FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JULY 1, 1975 TO DECEMBER 31, 1975

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PAUL RAND DIXON.
    Took oath of office March 21, 1961.
MAYO J. THOMPSON.[2]
    Took oath of office July 2, 1973.
M. ELIZABETH HANFORD.
    Took oath of office December 4, 1973.
STEPHEN NYE.
    Took oath of office May 29, 1974.
CHARLES A. TOBIN, *Secretary.*
    Appointed January 15, 1971.

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[1] Resigned December 31, 1975.
[2] Resigned September 1, 1975.

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

BEATRICE FOODS CO.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8864. Complaint, Oct. 1, 1971-Decision, July 1, 1975

Order requiring a multinational, multiproduct company, located in Chicago, Ill., among other things to divest itself of a competing manufacturer of paint rollers which it acquired in 1970, and to not make any acquisitions for 10 years, in the paint brush-and-roller industry, without prior Federal Trade Commission approval. Further, the order dismissed, for failure of proof, allegations in the complaint that the acquisition of Tip Top Brush Co., through which the respondent entered the industry, violated Sec. 7 of the Clayton Act.

Appearances

For the Commission: *Murray L. Lyon, William M. Sexton,* and *Randolph B. Sim.*

For the Respondent: *Edward L. Foote, John W. Stack,* and *Terry M. Grimm, Winston & Strawn,* Wash., D.C., *John P. Fox, Jr.,* General Counsel, Beatrice Foods Co.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Beatrice Foods Co., a corporation, has violated and is now violating the provisions of Section 7 of the Clayton Act, as amended (15 U.S.C. §18) through the acquisition of the stock and assets of various corporations, as hereinafter more particularly designated and described, and it appearing to the Commission that a proceeding by it with reference thereto would be in the public interest, hereby issues its complaint pursuant to the provisions of Section 11 of the aforesaid Clayton Act (15 U.S.C. §21) stating its charges as follows:

I. DEFINITIONS

1. For the purpose of this complaint, the following definitions shall apply:

(a) *Manually powered paint applicators:* Paint and varnish brushes; paint rollers including pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit; and miscellaneous paint applicators other than spray equipment and aerosol cans.

(b) *Manually powered paint application industry:* Persons, partnerships, joint ventures, and corporations engaging in the manufacture and sale of manually powered paint applicators, as defined in (a), immediately above.

(c) *Paint rollers:* As used separately, includes, in addition to the complete paint roller, pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit.

II. RESPONDENT

2. Respondent, Beatrice Foods Co., sometimes hereinafter referred to as "Beatrice," is, and has been, at all times relevant herein, a corporation organized, existing, and doing business under the laws of the State of Delaware, with its present executive office and principal place of business located at 120 S. LaSalle St., Chicago, Ill.

3. Beatrice is today a multinational, multiproduct company with its primary emphasis on foods and related services. Following extensive research by management and market specialists, Beatrice began diversifying six years ago into a limited number of non-food fields appraised as having exceptional potential for growth of sales and profits. These fields, grouped together as the Chemical & Manufactured Products Division, represented approximately 20 percent of Beatrice's dollar sales in fiscal year ended Feb. 28, 1970. Many of the products in the Chemical & Manufactured Products Division are similar in that these products are sold by Beatrice to common customers or are distributed to similar outlets, such as variety, hardware, grocery and mass merchandise stores. One field within this division is paint brushes and paint rollers. Many retailers and distributors of paint brushes and paint rollers are purchasers or potential purchasers of a variety of other products manufactured and distributed by Beatrice.

Beatrice, in the sale of its products, relies heavily on advertising, especially advertising designed to promote consumer brand identification. For fiscal year ended Feb. 29, 1968, Beatrice spent approximately $27 million for advertising of its products, utilizing all major media and means of reaching the consumer public. Respondent has continued to expand its advertising expenditure since that time.

In conjunction with its advertising, Beatrice has been successful in promoting its household products through new packages, display materials, coupons, and special promotions. Major promotional programs have centered on products within the Chemical & Manufactured Products Division, including Melnor sprinklers, Stiffel lamps, and Airstream trailers.

4. In the course and conduct of its business, Beatrice is, and has been, at all times relevant herein, engaged in selling its products to

purchasers located in various States of the United States, and caused such products, when sold, to be transported from its facilities in various States of the United States to such purchasers located in various States of the United States. In so doing, Beatrice is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, and has been continuously so engaged at all times relevant herein.

5. Beatrice's development has been characterized through the years by continuous growth. During the past decade, sales increased by $1.1 billion, or 256 percent. For fiscal year ended Feb. 28, 1970, net sales were approximately $1,576,000,000, and total assets approximated $504 million. Acquisitions accounted for a significant portion of this growth.

III. ACQUIRED COMPANIES

Tip Top Brush Co., Inc. and Affiliated Companies

6. Prior to and until July 31, 1969, Tip Top Brush Co., Inc. and its affiliated companies Banner Brush Co., Inc.; Best-Set Brush Co., Inc.; United Brush Manufacturing Co., Inc.; First Synthetic Fibre & Brush Co., Inc.; West Side Leasing Corp.; Excello Roller Co., Inc.; and Star Brush Manufacturing Co., Inc., sometimes hereinafter referred to collectively as "Tip Top," were corporations organized, existing, and doing business under the laws of the State of New Jersey, with their offices and principal places of business located at 151 W. Side Ave., Jersey City, N.J., except with respect to Star Brush Manufacturing Co., Inc., which was organized, existing, and doing business under the laws of the State of New York, with its office and principal place of business located at 690 Harrison Ave., Boston, Mass.

7. All of the issued and outstanding capital stock of each of the corporations listed in Paragraph 6, above, were owned by Miklos Felkay and Madelaine Felkay. These corporations were closely held and operated so as to mutually benefit each other.

8. Tip Top was engaged in the manufacture, sale, and distribution of manually powered paint applicators. For fiscal year ended Sept. 30, 1968, the year preceding its acquisition by Beatrice, it had net sales of approximately $5,425,000, and it had total assets approximating $2,641,000. By fiscal year ended Sept. 30, 1969, these sales had increased to approximately $7,126,000.

9. In the course and conduct of its business prior to July 31, 1969, as aforesaid, Tip Top sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in various States of the United States to such purchasers located in various other States of the United States. In

so doing, Tip Top was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

10. Pursuant to an agreement adopted June 25, 1969, Beatrice, on July 31, 1969, acquired all of the issued and outstanding capital stock of Tip Top in exchange for up to 85,000 shares of Beatrice's common stock.

Essex Graham Company

11. Prior to and until July 1, 1970, Essex Graham Company, sometimes hereinafter referred to as "Essex," was a corporation organized, existing, and doing business under the laws of the State of Illinois, with its office and principal place of business located at 1700 W. Pershing Rd., Chicago, Ill.

12. Essex was engaged in the manufacture, sale, and distribution of manually powered paint applicators. In 1969, the year preceding its acquisition by Beatrice, Essex had net sales of approximately $2,216,000 and its total assets approximated $2,322,000.

13. In the course and conduct of its business prior to July 1, 1970, as aforesaid, Essex sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in Illinois to such purchasers located in various other States of the United States. In so doing, Essex was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

14. Pursuant to an agreement and plan of reorganization adopted July 1, 1970, Beatrice, on July 1, 1970, acquired substantially all of the assets of Essex in exchange for shares of Beatrice's common stock.

IV. NATURE OF TRADE AND COMMERCE

15. Manually powered paint applicators are a separate and distinct product which is distinguished from all other paint applicators and all other products in a number of ways, including, but not restricted to, method of use, cost of production, marketing, and consumer acceptance.

16. In the United States prior to World War II, paint was principally applied by brush. During World War II the paint roller was developed, offering a new method by which to apply paint. Initially paint rollers were produced principally by firms not engaged in the manufacture of paint brushes. During the past decade, however, substantial market pressure has resulted in a significant number of companies originally engaged in the manufacture of either paint brushes or paint rollers entering into the manufacture and sale of both. Currently, of the top twelve concerns in the manually powered paint application industry, ten manufacture and sell both paint brushes and

paint rollers. Of the remaining companies within this industry, most if not all, manufacture and/or distribute both paint brushes and paint rollers.

17. Approximately three years ago miscellaneous flat paint applicators other than brushes and rollers were introduced. In 1969, such miscellaneous flat paint applicators constituted an insignificant portion of the total sales of manually powered paint applicators.

18. The manufacture and sale of manually powered paint applicators is a significant industry in the United States. In 1969, value of shipments was approximately $99.3 million, up from 1967 value of shipments of $88.6 million. There has been a significant increase in the level of concentration in the manually powered paint application industry. In 1967, the top four and top eight manufacturers had approximately 34.6 percent and 51.3 percent of domestic plant shipments, respectively. By 1969, these shares had increased to approximately 40.4 percent and 58.6 percent, respectively. By attributing to the acquiring company the 1969 plant shipments of those companies acquired in 1970, the market shares of the top four and top eight in 1969 increase to 46.7 percent and 66.1 percent, respectively.

19. The aforesaid increase in concentration has been paralleled by a number of independent manually powered paint applicator concerns leaving the industry, either by virtue of merger or by voluntarily ceasing operations. Additionally, there has not been a significant new entrant into this industry within the past two decades.

20. In 1969, Tip Top was the third largest manufacturer of manually powered paint applicators, accounting for approximately 6.9 percent of plant shipments in the United States. In that year, Essex had approximately 2.3 percent of domestic plant shipments. The combined production of these acquired concerns would have made Beatrice the third largest domestic manufacturer of manually powered paint applicators in 1969.

21. Paint rollers constitute a significant segment of manually powered paint applicator sales, representing approximately $26.5 million in 1967, and increasing to approximately $31.2 million in 1969. Concentration in this segment is high. In 1969, the top four and top eight manufacturers had in excess of 59.2 percent and 76.7 percent of domestic plant shipments of paint rollers, respectively.

22. In 1969, Tip Top accounted for approximately 3.8 percent of paint roller plant shipments in the United States. In that year, Essex represented approximately 7.2 percent of domestic plant shipments. On the basis of the combined production of these acquired concerns, as aforesaid, Beatrice would become the third largest domestic manufacturer of paint rollers in 1969.

23. The largest segment of manually powered paint applicator sales is in paint and varnish brushes, representing approximately $62.1 million in 1967, and increasing to approximately $68.1 million in 1969. Concentration in this segment is significant. In 1969, the top four and top eight manufacturers accounted for approximately 40.1 percent and 61.7 percent of domestic plant shipments, respectively. In that year, Tip Top was the second largest manufacturer of paint and varnish brushes, with 8.3 percent of domestic plant shipments.

24. Manually powered paint applicators of all types are distributed to hardware, variety, paint and wallpaper, and mass merchandise stores, among others. Recently, these products have been sold in grocery stores, with this latter market expected to be of major significance in the future.

V. EFFECTS OF THE ACQUISITIONS

25. The effect, cumulatively and individually, of the aforesaid acquisition by Beatrice of the stock and assets of Tip Top and Essex may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of manually powered paint applicators in the United States as a whole in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Actual competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of manually powered paint applicators may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on manually powered paint applicators;

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's manually powered paint applicators;

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

26. The effect, cumulatively and individually, of the aforesaid acquisition by Beatrice of the stock and assets of Tip Top and Essex may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of paint rollers in the United States as a whole in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Actual competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of paint rollers may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on paint rollers;

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's paint rollers;

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

27. The effect, cumulatively and individually, of the aforesaid acquisition by Beatrice of the stock and assets of Tip Top and Essex may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of paint and varnish brushes in the United States as a whole in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Potential competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of paint and varnish brushes may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on paint and varnish brushes;

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's paint and varnish brushes;

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

VI. NATURE OF THE VIOLATION

28. The acquisition by Beatrice of the stock and assets of the aforesaid corporations, individually, and/or together with the cumulative effect thereof, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. §18), as amended.

INITIAL DECISION BY WILLIAM K. JACKSON, ADMINISTRATIVE LAW JUDGE

OCTOBER 25, 1973

PRELIMINARY STATEMENT

The Federal Trade Commission, on Oct. 1, 1971, issued its complaint in this proceeding charging Beatrice Foods Co., a corporation, by its acquisitions of the stock and assets of Tip Top Brush Co., Inc. and Essex Graham Company, violated Section 7 of the Clayton Act, as amended (15 U.S.C. § 18). The complaint alleges that the effect, cumulatively and individually, of the acquisitions may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale in the United States as a whole of (1) manually powered paint applicators, (2) paint rollers, and (3) paint and varnish brushes, in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Actual competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of (1) manually powered paint applicators (paint rollers/paint and varnish brushes), may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on manually powered paint applicators (paint rollers/paint and varnish brushes);

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's manually powered paint applicators (paint rollers/paint and varnish brushes);

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

After being served with the complaint, respondent appeared by counsel, and on Nov. 11, 1971, filed its answer to the complaint denying, in substance, that the mergers were illegal. Thereafter, on Jan. 13, 1972 and Feb. 25, 1972, prehearing conferences were held pursuant to pretrial orders of the undersigned for the purposes of simplification of the issues, obtaining admissions of fact and authentication of documents, discovery of relevant material, exchanging lists of exhibits and names of witnesses, together with a summary of their proposed testimony, to be used at the trial, and the preparation of a concise statement of the contested issues of law and fact. In accordance with the undersigned's pretrial order, both parties prepared and submitted a pretrial memorandum.

Hearings for the presentation of testimony and other evidence by complaint counsel began in Washington, D.C., on Dec. 6, 1972, and concluded on Dec. 18, 1972, with the exception of one witness, Mr. Brown W. Cannon, senior vice president of respondent, whose testimony was deferred until Apr. 24, 1973, in order to accommodate respondent until the commencement of respondent's defense. Pursuant to a request by respondent for further discovery, a 2-month adjournment[1] was granted prior to the presentation of respondent's defense. During this period, respondent presented to the undersigned approximately nine subpoenas duces tecum, all of which were issued. Respondent's defense commenced on Apr. 25, 1973, and was completed on May 21, 1973. Thereafter, on July 9, 1973, complaint counsel commenced rebuttal hearings which were concluded on July 16, 1973. On July 27, 1973, respondent had surrebuttal hearings and the record was closed on July 27, 1973.

The record in this matter consists of 3,553 pages and there were 35 days of hearing. Complaint counsel, for their case-in-chief, noticed 26 witnesses and 19 testified. Complaint counsel originally noticed 101 exhibits, of which 83 were received, one was withdrawn and 17 were omitted. Complaint counsel offered 12 additional exhibits, of which 10 were received. On rebuttal, complaint counsel called 20 witnesses and offered five exhibits, of which four were received and one was rejected.

Respondent's first pretrial submissions were submitted on Nov. 15, 1972, but were rejected as inadequate. Respondent resubmitted its lists of witnesses and documents on Nov. 29, 1972. On Jan. 10, 1973, respondent filed a third submission entitled "Second Revision of List of Witnesses and Documents." On Jan. 31, 1973, respondent filed a final list of documents, and on Apr. 5, 1973, filed a final schedule of witnesses.

Respondent, for its defense, originally noticed 232 exhibits, of which 69 were either offered or identified and 51 were received, 13 rejected, and five withdrawn. Respondent also identified or offered 20 additional exhibits that were not noticed, of which 15 were received, three were rejected, and two were identified but not offered. Approximately 163 of respondent's noticed exhibits were not identified or offered at the hearing. Respondent originally noticed approximately 90 witnesses, which on Apr. 5, 1973, was reduced to approximately 58 named individuals, together with numerous unnamed officials of respondent, of which 34 were actually called to testify in its defense. On surrebuttal, respondent called one witness and offered one exhibit which was rejected.

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[1] Due to the illness of the undersigned during this adjournment, respondent's defense was further postponed.

Pursuant to order of the undersigned, complaint counsel filed their proposed findings, conclusions of law, and brief in support thereof on Oct. 16, 1973. On Oct. 31, 1973, respondent filed its proposed findings and conclusions and brief in support thereof. Thereafter, on Sept. 10, 1973, complaint counsel filed their reply brief.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied.

This proceeding is before the undersigned upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by counsel supporting the complaint and by counsel for respondent. The proposed findings of fact, conclusions and briefs in support thereof submitted by the parties have been carefully considered by the undersigned, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial matter.

For the convenience of the Commission and the parties, the findings of fact include references to the principal supporting items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the recommended findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX - Commission's Exhibits
RX - Respondent's Exhibits
CPF - Complaint Counsel's Proposed Findings and Conclusions
RPF - Respondent's Proposed Findings and Conclusions
CB - Complaint Counsel's Brief
RB - Respondent's Brief
CRB - Complaint Counsel's Reply Brief

The transcript of the testimony is referred to with either the last name of the witness and the page number or numbers upon which the testimony appears or with the abbreviation Tr. and the page.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings, conclusions and briefs submitted by the parties, as well as replies, the administrative law judge makes the following:

FINDINGS OF FACT

I. IDENTITY AND BUSINESS OF RESPONDENT AND ACQUIRED COMPANIES

A. *Beatrice Foods Company (respondent)*

Introduction

1. Respondent Beatrice is and has been, at all times relevant herein, a corporation organized, existing, and doing business under the laws of the State of Delaware, with its executive office and principal place of business located at 120 S. LaSalle St., Chicago, Ill. (complaint and answer, Par. 2).

2. Beatrice is today a multinational, multiproduct company, with traditional emphasis on foods and related services (complaint and answer, Par. 3). In this regard, respondent has for many years been a leading producer of consumer food products, generally preselling consumers through intensive advertising, packaging, and promotional efforts (findings 5-15). Included within these products are fluid milk and cream, of which Beatrice is the third largest processor in the United States (CX 50 a); butter, yogurt, and other dairy products; grocery and confectionery items; and consumer convenience and specialty foods (CX 9-15). Some of the better known trade names of respondent's consumer food products are the following: Meadow Gold, Dannon, Louis Sherry, LaChoy, Aunt Nellie's, Ma Brown, Clark, and Holloway (CX 50 b).

It also engages in the agri-products business and has chemical, manufacturing, and international divisions which by 1970 accounted for over 30 percent of its sales. Nonfood products now sold by Beatrice range from house trailers to skis (*Beatrice Foods Co.*, F.T.C. Docket 8814, Sept. 28, 1972)[81 F.T.C. 481].

Growth Through Acquisition

3. Beatrice has become, through acquisition, a manufacturer of a number of consumer nonfood products, including lawn sprinklers, closet accessories, draperies, picture frames, housewares, paint brushes and rollers, travel trailers, and plumbing specialties (CX 2 a-h; CX 13, p. 15). Many of these acquired nonfood manufacturers are leading factors in their respective industries (CX 11, p. 9; CX 19 c).

4. Beatrice has made remarkable progress since its inception; its development has been characterized through the years by substantial and continuous growth. Between 1960 and 1970, all divisions reported record results. Total sales increased by $1.1 billion, or 256 percent; net earnings increased by $43 million, or 413 percent; working capital increased to $218 million from $52 million; and earnings per share of common stock increased 139 percent to $2.03 from 85 cents. By fiscal

year ended Feb. 28, 1970, net sales reached approximately $1,576,000,000 and total assets approximated $504,000,000 (complaint and answer, Par. 5; CX 13, pp. 2-3).

5. Acquisitions accounted for a significant portion of Beatrice's growth (complaint and answer, Par. 5). Of the approximate $1.5 billion in sales for fiscal year 1970, slightly under $750 million can be directly attributed to the sales of those companies acquired by respondent during its previous five fiscal periods (CX 9, p. 17).

Marketing and Advertising

6. The success of the Beatrice companies, by its own admission, is largely the result of marketing skill and knowhow (CX 15 1). This is manifested in its advertising, upon which Beatrice relies heavily to promote consumer brand identification in the sale of its products (findings 7-14). Beatrice has won awards for its advertising and promotion skill (CX 11, p. 16; CX 10, p. 18).

7. Beatrice utilizes all major media and means of reaching the consumer public (CX 5-z8) and advertises and promotes its products from coast to coast. Prime time is used on all three national television networks along with spot TV, radio, national magazines and large space newspaper ads. It has sponsored such famous TV shows as "The Girl from Uncle," the "Today" and "Tonight" shows, "Huntley-Brinkley," "Walt Disney's Wonderful World of Color," and the "Dean Martin" and "Carol Burnett" shows (CX 10, p. 19; CX 11, p. 17; CX 11, p. 19).

8. Other means of advertising used by Beatrice include transport ads, contests, recipe folders, trade magazine ads and outdoor signs (CX 10, p. 19; CX 11, p. 17; CX 12, p. 17).

9. Beatrice uses major league athletes and celebrities to endorse its products. Promotions have been conducted in conjunction with the Clyde Beatty-Cole Brothers Circus and through distributions of more than 100 million coupons. Millions of consumers are reached through Beatrice store displays and window signs (CX 10, p. 19).

10. For fiscal year ended Feb. 29, 1968, Beatrice spent approximately $27,000,000 for advertising (CX 5 z). Advertising expenditures reached $38,000,000 in 1971 (CX 15 o).

11. Beatrice has been among the leaders in innovative packaging of many of its products (CX 10, p. 12).

12. Beatrice has a continuing program of improving profit potential through imaginative marketing (CX 10, p. 17; CX 15 l; CX 16 f).

13. The company has successfully marketed its household products through new packages, display materials, coupons, and special promotions (CX 10, p. 19; CX 18 c-d).

14. Major promotional programs have centered on products within the Chemical & Manufactured Products Division, including Melnor

sprinklers, Stiffel lamps and Airstream trailers (CX 12, p. 9; CX 11, p. 17; CX 10, p. 19).

15. Some of Beatrice's more famous advertised brands are:

Meadow Gold (Dairy products)
La Choy (Chinese foods)
Holloway Milk Duds (Candy)
Clark (Candy Bars)
Dannon (Yogurt)
Stiffel (Lamps)
Melnor (Lawn sprinklers)
Miracle White (Laundry cleaning agent)
Rosarita (Mexican foods)
Airstream (Trailers)
Charmglow (Outdoor gas lamps and barbeques)
Hart (Skis)
Morgan (Yachts)

(CX 10, pp. 1-27; CX 11, pp. 1-26; CX 12, pp. 1-26).

Marketing and Distribution

16. Beatrice is highly skilled and efficient in marketing and distribution. Realizing that distribution is expensive, it has established distribution centers which increase effectiveness in marketing its broad line of Beatrice grocery products (CX 17, p. 10; CX 15 l; CX 13, p. 11). Distribution centers have been established in and around Los Angeles, Calif., Atlanta, Portland, Oreg., Denver, Dallas, Memphis, Camden, N.J., Fortoria, Ohio, and Boston. These nationwide distribution facilities enable the provision of faster customer service and reduction of costs by consolidating a variety of products into one shipment thereby improving the ready availability of products in major market areas. Other consolidations enabled by Beatrice's distribution center system are for such functions as sales, billing and inventory control (CX 13, p. 11). In 1970, Beatrice owned a nationwide network of 25 warehouses (CX 13, p. 12), and it also had additional warehouse facilities located in other States (Felkay 3514).

Interstate Commerce

17. Beatrice is, and has been, at all times relevant herein, engaged in selling its products to purchasers located in various States of the United States, and caused such products, when sold, to be transported from its facilities in various States of the United States to such purchasers located in various States of the United States. In so doing, Beatrice is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, and has been continuously so engaged at all times relevant herein (complaint and answer, Par. 4; Stipulation CX 1 a).

B. *The First Acquired Company - Tip Top Brush Co., Inc. and Affiliated Companies*

Introduction

18. Prior to and until July 31, 1969, Tip Top Brush Co., Inc. and its affiliated companies, Banner Brush Co., Inc.; Best-Set Brush Co., Inc.; United Brush Manufacturing Co., Inc.; First Synthetic Fibre & Brush Co., Inc.; West Side Leasing Corp.; Excello Roller Co., Inc.; and Star Brush Manufacturing Co., Inc. (hereinafter referred to collectively as "Tip Top"), were corporations organized, existing, and doing business under the laws of the State of New Jersey, with their offices and principal places of business located at 151 W. Side Ave., Jersey City, N.J., except with respect to Star Brush Manufacturing Co., Inc., which was organized, existing, and doing business under the laws of the State of New York, with its office and principal place of business located at 690 Harrison Ave., Boston, Mass. (complaint and answer, Par. 6).

19. Prior to acquisition by Beatrice, all of the issued and outstanding capital stock of each of the corporations listed in paragraph 18 above, were owned by Miklos Felkay and Madelaine Felkay. Mr. Felkay had been in the brush business in Hungary. In 1948, his business was nationalized by the Communists and he and his family came to the United States (CX 22). Felkay entered the United States' paint brush business in 1948 and began making artist brushes and small consumer, throwaway brushes (CX 22, Felkay 1248). A 1950 balance sheet of Tip Top's shows total assets of $44,000 and a plant and equipment investment of $7,000 (RX 215). These corporations were closely held and operated so as to mutually benefit each other (complaint and answer, Par. 7).

20. On July 31, 1969, Beatrice acquired all of the issued and outstanding capital stock of Tip Top in exchange for up to 85,000 shares of Beatrice's common stock (complaint and answer, Par. 10).

21. At the time of its acquisition by Beatrice and continuously since, Tip Top has been engaged in the manufacture and sale of paint brushes, paint rollers, and paint roller accessories (CX 5 z10-11).

Phenomenal Growth of Tip Top

22. Since its inception, Tip Top has experienced what the company describes as "phenomenal growth" (CX 22). Tip Top began operations in 1949 in New York City, engaging at that time in the manufacture and sale of paint brushes. By 1955, the company had moved to a more spacious location of 20,000 square feet and had opened a west coast warehouse located in Los Angeles, Calif. By that year, Tip Top had 50 employees and its name had become well known throughout the nation. Continuing expansion necessitated the company's move to its current location in Jersey City, N.J., in July 1961, where it occupied a large factory totaling more than 110,000 square feet as of the time of the

acquisition and engaged in the manufacture of a complete line of paint brushes and paint rollers (CX 22).

Growth Through Acquisition

23. Prior to its acquisition by Beatrice, Tip Top had acquired several paint brush and roller manufacturers. In the late 1950's or early 1960's, Tip Top purchased the United Brush Manufacturing Company, a long established producer of paint brushes (Felkay 974). In 1967, Tip Top acquired Pitegoff Brothers, Inc., a manufacturer of paint brushes (CX 34-36, Felkay 1327). On July 1, 1969, Tip Top purchased substantially all of the assets of Star Brush Manufacturing Co., Inc., a well-known manufacturer of paint and varnish brushes and distributor of paint rollers (CX 37). During the period prior to its acquisition, Tip Top considered purchasing additional paint brush and roller companies (Felkay 983, 984-85).

For fiscal year ended Sept. 30, 1968, Tip Top had net sales of approximately $5,425,000 (CX 5 z-10). In that year, Tip Top was the fifth largest manufacturer of manually powered paint applicators in the United States (CX 108 b).

24. By 1969, due to its acquisitions and internal development, Tip Top had manufacturing facilities in Boston, Mass., and Jersey City, N.J., and warehouses in Los Angeles, Calif., and in Chicago, Ill. (CX 5 j; CX 22; CX 47 b, c.) Its initial employment of 10 had increased to in excess of 250 (Felkay 983). By the end of that year, Tip Top had become the third largest domestic manufacturer of manually powered paint applicators, with sales of approximately $7.4 million (CX 108 c).

25. In 1969, Tip Top had one of the most completely automated manufacturing facilities in the industry (CX 22).

26. In 1969, it was the expressed intention of Tip Top management to become the number one factor in its industry. It was estimated that this goal could be achieved by 1974-75 (Felkay 992-94, Schlytter 1000).

Products and Distribution

27. Tip Top is and has been in the business of making and selling brushes and rollers. In 1958, Tip Top's products were sold throughout the United States directly to drug chains, food chains, lumber yards, variety stores (Felkay 1250) and mass merchandisers (Felkay 1261). Prior to 1958, Tip Top was unable to place its brush line with jobbers since the jobber who sold to small dealers (Felkay 1251) carried only products of the then-established old line brush concerns, *i.e.*, Wooster, Baker, Rubberset and PPG (Felkay 1251). These products were professional paint brushes. Such brushes, in comparison with the Tip Top product, were thicker, heavier brushes with more and longer filaments and were made differently so as to carry more paint to a surface (Felkay 1254). In 1958, such brushes sold at retail from $5-$25,

whereas Tip Top's brushes sold from 99 cents to $2.49 (Felkay 1261). Since 1968, Tip Top has sold a full line of paint brushes (Felkay 1327-28).

Tip Top first saw rollers in the market in the mid-50's (Felkay 1258). Ace, EZ Paintr, Bestt and Thomas then sold rollers (Felkay 1258). In response to the advent of the roller, Tip Top introduced a lower priced 4 inch-brush (Felkay 1258). In comparison to earlier Tip Top brushes, this product was smaller and thinner, had a plastic (versus wood) handle and had lower quality filaments (Felkay 1259). The brush retailed for 99 cents (Felkay 1260).

In 1958, Tip Top began selling lower priced rollers (Felkay 1261). It purchased some of these products for resale from Ace Roller Co. (Felkay 1258, 1296). It also created in 1958 the Excello Roller Co. for its roller business (Felkay 976). Tip Top was an assembler of rollers. To 1969, the only part of the roller kit ever manufactured by Tip Top was the roller cover (Felkay 1296). Even as to these, the cores, fabrics and adhesives for covers were purchased elsewhere. These raw materials were not made by Tip Top (Felkay 1296, 1302). Tip Top never made any parts for roller frames (Felkay 1302).

In addition to making covers, Tip Top also purchased some complete covers elsewhere (Felkay 1325). Cheap, throwaway covers were purchased primarily for resale during 1965-70 from Jackson Roller (Felkay 1305), as well as Marshall Tubing Co. and Interstate Roller (Felkay 1304-06).

Tip Top's promotional roller kits (tray, cover and frame in one unit) retail from 59 cents to 99 cents (Felkay 1306).

The bulk of Tip Top's promotional roller kits are distributed on the east coast (Felkay 1315). Tip Top also sells some kits in the South (Atlanta to Florida) (Felkay 1318); as well as in the Western States (Felkay 1318) and in the Southwestern market (Texas and Louisiana) (Felkay 1323). In the Western States and in the Southwestern market, Tip Top's promotional kits are all jobbed (Felkay 1319, 1323).

28. Tip Top sells its products through salesmen and manufacturers' representatives. Prior to its acquisition by Beatrice, its principal outlets were hardware stores, lumber yards, food chains, paint stores, paint manufacturers, hardware wholesalers, drug stores and chains, discount stores, variety stores, variety wholesalers, general wholesalers, and rack jobbers (CX 5 s; Felkay 988, 1250; Edelson 2328). Recently, Tip Top has sold its merchandise to grocery supermarkets, such as Fred Meyers and Thrifty Acres (Zook 338, Edelson 2328).

Merchandising and Marketing

29. At the time of its acquisition, Tip Top was recognized as "the best merchandiser in the industry" (O'Conner 955). Prior to acquisition,

it had shown a record of continuous innovation in merchandising, as shown, by being:

(a) first to design a complete merchandising program for different types of outlets retailing brushes and rollers (CX 22);

(b) first to develop both the mass merchandiser and drug store as potential markets for paint applicators (Felkay 973-74);

(c) first to utilize mobile display showrooms (Felkay 976);

(d) first to offer premiums as an incentive to purchase paint applicator products (Felkay 987);

(e) first to display brushes and rollers in relation to the type of paint being used (Felkay 987); and

(f) first to offer color-coded brushes and rollers (CX 22).

Research and Development

30. By 1969, Tip Top possessed a reputation as a leader in research and development, and as a pioneer in the development of tapered nylon brushes designed particularly for the application of new, modern water- and rubber-based latex paints (CX 22).

Interstate Commerce

31. Prior to July 31, 1969, Tip Top sold its products to purchasers located throughout the United States and shipped its products to such purchasers from its facilities located in various States as described in findings 18 and 24. In so doing, Tip Top was engaged in "commerce," as defined in the Clayton Act, as amended (complaint and answer, Par. 9).

C. *The Second Acquired Company - Essex Graham Company*

Introduction

32. Prior to July 1, 1970, Essex Graham Company (hereinafter referred to as "Essex"), was a corporation organized, existing, and doing business under the laws of the State of Illinois, with its office and principal place of business located at 1700 W. Pershing Rd., Chicago, Ill. (complaint and answer, Par. 11).

33. On July 1, 1970, Beatrice acquired substantially all of the assets of Essex in exchange for shares of Beatrice common stock (complaint and answer, Par. 14).

Financial Growth

34. In 1969, the year preceding its acquisition by Beatrice, Essex had net sales of approximately $2,216,000 and its total assets approximated $2,322,000 (complaint and answer, Par. 12). In that year, it was the fifth largest manufacturer of paint rollers in the United States (CX 109 c).

35. In the 6-year period preceding its acquisition by Beatrice, Essex was an economically strong and viable concern. Based upon relatively stable sales during that period, operating income rose steadily each year, increasing from $80,483 in 1964 to $220,093 by 1969, while total

assets increased over 273 percent, rising from approximately $510,000 in 1964 to approximately $2,322,000 in 1969 (CX 39 a-c; CX 41 a-c; CX 42 f; CX 43 a-e).

Products and Distribution

36. Essex, at the date of its acquisition by Beatrice, was engaged solely in the manufacture, sale, and distribution of paint rollers and paint roller accessories (CX 5z11-12). Subsequent to the acquisition, it began to distribute paint brushes (CX 32 a, CX 32 l-p).

37. Prior to its acquisition by Beatrice, Essex sold its products through sales representatives and by competitive bids. These sales representatives do not sell exclusively to paint stores but sell to additional kinds of customers such as automotive stores (Greenberg 1459-60, Weiss 540, Zook 451A, Gartner 3207-08). At that time, the principal outlets for its products were paint stores and chains, hardware jobbers, paint and hardware distributors, variety stores and chains, mass merchandisers, department stores, the U.S. Government and other brush and roller manufacturers (CX 5 s-t; Felkay 1385-86; Freund 1415, 1429-30; Greenberg 1462). After its acquisition by Tip Top, Essex Graham supplied all of Tip Top's roller requirements (Strobel 3286). The bulk of these were in the lower priced category (Greenberg 1469).

38. Prior to July 1, 1970, Essex sold its products to purchasers located throughout the United States and shipped its products to such purchasers from its facilities in Illinois. In so doing, Essex was engaged in "commerce," as defined in the Clayton Act, as amended (complaint and answer, Par. 13).

II. NATURE OF THE TRADE AND COMMERCE

DEFINITIONS

Manually Powered Paint Applicators

39. Manually powered paint applicators consist of paint and varnish brushes, paint rollers, including covers, handles and attachments included in a paint roller kit, and miscellaneous flat applicators, primarily pads (Zook 229-30).

40. A paint brush is used for the manual application of paint to a surface. It consists of a handle, a ferrule and the filament (Zook 262, 266-67; Weiss 466-67; Lieberman 680).

41. A paint roller is used for the manual application of paint to a surface. It consists of a paint roller sleeve or cover that applies the paint, the frame which holds the cover, the tray into which the paint is poured, extension handles and miscellaneous accessories such as trim rollers and bucket grids. Other products included in the category are painter's mitts and pad applicators (Zook 233, 262; Weiss 466; Felkay

1302). A pad applicator is a device where roller fabric is cut to size and bonded to an oblong frame (Zook 267-68). It is included in the accounting of rollers because it is made of the same material (Zook 233, Lieberman 681).

Artist Brushes

42. The manufacture and sale of artist brushes differs in many ways from that of paint brushes:

(a) The industry recognizes that the manufacture and sale of artist brushes is a separate industry from that of paint brushes (Zook 230-32, Weiss 465-66).

(b) The manufacture of artist brushes requires a different type of knowledge, equipment, bristles, handles and ferrules than the manufacture of paint brushes (Zook 230-32, Weiss 465-66, Shulman 658).

(c) Different manufacturers produce artist brushes than produce paint brushes (Zook 230-32, Weiss 456-66, Edelson 2293-94).

(d) Artist brushes are distributed differently than paint brushes (Zook 230-32). Artist brushes, when sold in the same store, are displayed in a different part of the store than other paint brushes (Weiss 572).

(e) An artist brush is made of much more expensive filament material than are paint brushes (Zook 230-32, Weiss 465-66, Shulman 658).

(f) An artist brush is designed for a specialized use: to paint pictures or to do hobby work and are not interchangeable with or included among manually powered paint applicators (Zook 230, Shulman 658).

Paint Brushes and Rollers are Part of the Same Overall Market

43. Paint brushes and rollers are interchangeable in use to a very great degree (Weiss 471). Paint brushes and rollers are distributed by the same salesmen to the same buyers, shipped together, and stocked, merchandised and promoted together (Zook 258-59, 291-92; Weiss 462-63; Touchett 581-85, 595-604; Lieberman 672-73).

44. Both customers and salespersonnel exert pressure on manufacturers of manually powered paint applicators to sell both paint brushes and rollers (CX 52, CX 53, CX 54, CX 55, CX 56, CX 57, CX 58, Weiss 463, Touchett 585-96, Lieberman 672-73). These manufacturers believe that they would lose sales and that their businesses would be adversely affected if they did not sell both paint brushes and rollers (Touchett 585; Shulman 635; Felkay 977, 980-81; Gartner 2251; Lieberman 672-73). One industry leader felt it would be a definite threat to his company's position, while another felt that the existence of his business would be threatened if brushes could not be delivered along with paint rollers (Touchett 585, Shulman 635).

45. The overwhelming majority of significant manufacturers of

manually powered paint applicators in 1969 each manufactured both brushes and rollers in that year (Findings 46, 47, 48).

46. The eight largest and 13 of the top 15 manufacturers of manually powered paint applicators manufactured both brushes and rollers in 1969. These 13 firms accounted for approximately 75 percent of manually powered paint applicator shipments. The largest firm in the manually powered paint applicator industry which did not manufacture both brushes and rollers ranked 12th with a 2.6 percent market share (CX 108 c, CX 109 c, CX 110 c).

47. In 1969, the largest eight manufacturers of paint brushes also manufactured rollers. These top eight accounted for 58.6 percent of all shipments of paint brushes in that year (CX 109 c, 110 c). Only one of the top 15 did not manufacture paint rollers (CX 109 c, CX 110 c).

48. Every one of the 13 largest manufacturers of paint rollers in 1969 except Essex Graham also manufactured brushes in 1969 (CX 109 c, CX 110 c). These 12 firms accounted for 76.5 percent of shipments of paint rollers in that year (CX 109 c).

49. Both paint brushes and rollers are sold by manufacturers to the same types of retail outlets such as hardware stores, lumber yards, paint stores, department stores, mail order houses, mass merchandisers, and drug and grocery chains (CX 27 d; CX 115 z7, z8; Felkay 973-74, 988; Zook 258-59, 412-17; Lieberman 681; Bready 818-21; Zurawin 843-47; Brumm 1536, 1543; Gartner 2244; Edelson 2328).

Beginning in the latter 1950's and continuing until the late 1960's, competitors in the manually powered paint applicator industry began selling to mass merchandisers. As the number of mass merchandiser outlets increased, a growing number of manually powered paint applicator manufacturers began selling to this retail outlet. As witness Weiss succinctly stated, "* * * the manufacturing and distributing patterns are following the retail pattern" (Weiss 532). By the latter 1960's, "* * * *everybody was in the market* * * *." (Felkay 1263). As respondent's proposed findings indicate, "virtually *all* companies identified of record have gotten into this * * * business." (RPF, p. 47). Since this type of retail outlet was growing, it was to be expected that companies in the industry would begin making sales efforts to these outlets. But *all* companies in the industry, as indicated above, sought this growing business; companies did not specialize in sales to this one type of retail outlet. To characterize selling a new customer as "entry", in an antitrust sense, is illusory. The manufacturers did not "enter" anything; they simply added a new outlet. Nor did manufacturers forego selling other types of retail outlets to specialize in selling to mass merchandisers; the record shows clearly that manufacturers continued to sell to all types of outlets (Zook 258; Weiss 478; Felkay

1388-89; Cannon 1166; Shulman 636; Zurawin 845; Gartner 2237, 2244; Edelson 2328; CX 115 z7).

The reason that companies in the industry sell to all types of customers is because of the wide variety of brushes and rollers carried by these customers. As testified to by respondent's witness Felkay, paint and hardware stores do *not* carry only the more expensive brushes and rollers; rather they carry both the inexpensive and more costly products (Felkay 1387-88; See also Zook 451; Weiss 529; Cannon 1201). Mass merchandisers such as Sears carry "good, better, and best" paint applicator products (Brumm 1543, Cannon 1137). Mass merchandisers generally carry both more expensive and throwaway brushes (Cannon 1200, Felkay 1387). As a result, distribution channels are intermingled; jobbers and distributors sell to department stores, food stores and variety chains as well as to paint stores and paint contractors (Weiss 529, 534; Cannon 1202). These distributors carry lower priced manually powered paint applicator products (Edelson 2472, Tyler 2103, Felkay 1387), as well as more expensive brushes and rollers (Cannon 1170, 1172). Some paint and hardware stores are sold direct (Weiss 529, 533), as are some variety stores and large retail outlets (Cannon 1202). Both jobbers and mass merchandisers may carry a "professional line" of paint brushes (Weiss 529).

The same salesmen and manufacturer's representatives sell to all types of paint brush and roller outlets (Weiss 540, Zook 451A, Gartner 3207-08).

Pricing

50. Many retail outlets, such as Sears, mass merchandisers, hardware stores, paint stores and drug chains carry both lower priced and higher priced brushes and rollers (CX 27 e, f; Greenberg 1433; Brumm 1540-43; Cannon 1200-01; Zook 450; Felkay 1387).

51. Manufacturers of paint brushes and rollers do not consider the prices of aerosol cans and power spray equipment in setting paint brush and roller prices (Zook 304-05, Weiss 475, Touchett 596-97).

52. Retail outlets do not purchase aerosols to replace paint brushes and rollers, nor do they increase their purchases of aerosols or paint brushes and rollers to the detriment of the remaining category (Weiss 473).

53. The average retail price of both brushes and rollers sold by several major manufacturers and retailers is $5.00 and under (Zook 302; Weiss 473-74; Edwards 711; Silverman 764-65; George 940).

54. In 1969, many leading paint brush and roller manufacturers made and sold both high and low priced brushes and rollers (Brumm 1540; Zook 302; Weiss 473; Shulman 637; Tyler 2125, 2129-30).

Recognition of the Industry

55. The paint brush and roller industry is generally recognized as a separate industry. Beatrice Foods made a study entitled "The Study of the Paint Brush and Paint Roller Market for Beatrice Foods Company" (Schlytter 999). The Bureau of Census categorizes brushes and rollers in the same five-digit SIC category, 39912. This category includes no other products (CX 74).

Other Paint Applicators

56. Other paint applicators consist of power spray equipment and aerosol cans. It has been stipulated in this action that "brushes and aerosols are interchangeable for certain uses" (Tr. 1874). The manufacture, distribution, sale and use of these products differ in many ways from that of paint brushes and rollers.

Aerosols

57. An aerosol paint spray (hereinafter "aerosols") consists of a metal container holding from 8 to 32 ounces of paint and propellant (Felkay 1272, DeGregory 1664). Aerosols apply paint directly to the surface, using the pressure of the propellant to force the paint through an orifice, which atomizes it (Weiss 468).

58. Aerosols are normally manufactured and sold by firms different from those which manufacture and sell manually powered paint applicators (Kerr 1905-06, CX 108 a-b, 109 a-c, 110 a-c).

59. Manufacturers of aerosols often package and sell many aerosol items other than aerosol spray paint (Mulliken 2101, Kerr 1900). Such other aerosol items can be produced on the same equipment used to produce aerosol spray paint (Mulliken 2101, Weiss 468-69, Kerr 1898). The same containers are used to package each type of aerosol product (Mulliken 2100-01, Weiss 468-69, Kerr 1898).

60. Aerosols are manufactured using different technology and machinery from that used to produce manually powered paint applicators (Weiss 468-69, Felkay 1304, Mulliken 2097).

61. Aerosol manufacturers recognize aerosols as a separate industry. There is a specialized trade organization for aerosol producers, the Chemical Specialties Manufacturers Association (Weiss 484; Mulliken 2030, 2033-34) and a specialized trade publication, "Aerosol Age" (Weiss 485). A seller of aerosols considers them to be in a market "completely different from the paint brush and paint roller market." (Weiss 472-73).

62. Aerosols are used for specialized painting applications for which the use of a paint brush or roller would be impractical (Chasen 2368). Aerosols are used for painting small, intricate objects, such as wrought iron chairs or radiators (Weiss 470-71, Touchett 595-602, Bready 821, Kerr 1872, Felkay 1272, Chasen 2368). Aerosols are not used for larger flat surfaces as their cost for such applications would far exceed the

cost of applying paint by paint brush or roller (Weiss 470-71, Touchett 595-602).

Spray Equipment

63. Sprayers consist of mechanical equipment for applying paint under force (Zook 262). There are three basic types of such sprayers, conventional, airless and electrostatic (Adams 772, Chasen 2369).

64. A conventional spray system is powered by compressed air generated by an air compressor (Adams 793). Conventional sprayers consist of a spray gun, made up of a container to hold the paint and a nozzle through which the paint is forced, and a compressor (Chasen 2369-70).

65. Airless sprayers use hydraulic pressure to force the paint through a small orifice (Adams 773, 792-93; Chasen 2369-70). The principal components of an airless sprayer are a high pressure pump, an airless spray gun, and the high pressure hoses which convey the paint from the pump to the gun (Adams 773).

66. Electrostatic sprayers apply paint to an object by placing an opposite electrical charge on the item to be coated from the electrical charge of the paint. The paint when released by such sprayers is thereby attracted solely to the object to be painted (Chasen 2369-70).

67. A cross section of witnesses directly involved in the making and/or selling of spray equipment testified on the prices of spray equipment. Their testimony shows that the range of prices of spray equipment is considerably higher than the range of prices for manually powered paint applicators (Findings 53, 68).

68. The least expensive complete spray unit sold by Sears had a list price of $37.95 (Panoessa 2001). A painting contractor testified that the least expensive spray equipment used in his business cost $50 and that some equipment used cost as much as $1500 (Chasen 2376-77). Wooster manufactures spray equipment ranging in price from $895 to $1095 (Zook 262). The entire range of Bink's spray equipment was $75 to $1500 (Adams 778-79). Respondent's witness Salovich testified as to two models of spray applicators sold by Spraytech with suggested retail prices of $50 and $119 (Salovich 1946-53).

69. The manufacture of sprayers is totally different from the manufacture of paint brushes and rollers (Zook 262-68, Weiss 466-67, Touchett 630, Shulman 645-47, Lieberman 675-81). Sprayers are primarily a precision machined metal product. Their manufacture uses processes common to a standard machine and metal working shop (Adams 777).

70. The raw materials used to manufacture sprayers are entirely different from those used to manufacture paint brushes and rollers. The manufacture of sprayers requires special forgings, stampings and

steel bar stock while the manufacture of brushes and rollers requires filament, handles, glue, ferrules, fabric, and cardboard tubes (Adams 777, Weiss 466-67, Zook 266-68).

71. With few exceptions, sprayers are manufactured and sold by firms different from those which manufacture and sell manually powered paint applicators (Adams 810; Zook 293-95; Lieberman 673-74; Bready 823; CX 80 d; CX 81 d; CX 86 d; CX 87 g; CX 88 f; CX 90 a; CX 91 d, k; CX 93 g; CX 96 d; CX 97 d; CX 98 d).

72. The government and paint brush and roller manufacturers recognize spray applicators as a separate industry. One paint brush and roller manufacturer stated: "* * * the spray business is a completely different type of business. It requires a much more degree of technical skill, a greater degree of having facilities, a bigger * * * investment, * * *. It takes a completely different selling organization. I don't know of any of our reps * * * that in themselves handle a paint spray line or paint gun line, because they call on different buyers. It is a different animal in business." (Touchett 630-31).

73. A manufacturer of sprayers did not consider any paint brush or roller firm to be a primary competitor (Adams 771-72).

74. Special training is required to achieve good results with a spray gun (CX 77, Adams 816-17). They are difficult to use. There are a multitude of things that can go wrong (Zook 265).

75. Sellers of sprayers must provide repair services and spare parts. Such services are not provided by paint brush and roller manufacturers (Zook 265-66; CX 112; Bready 822). Manufacturers of sprayers do not consider the costs of paint brushes and rollers in setting sprayer prices (Zook 305, Adams 790).

76. Sprayers are used to apply paint on small specialty jobs such as iron work and irregularly surfaced items (Zook 300-01), and by painting contractors for large, outdoor jobs (Chasen 2371, 2378). A painting contractor would not use a sprayer to paint an average sized room or one wall, since it would be more expensive than using a brush or roller (Adams 780-82, Chasen 2377). The large commercial sprayer manufactured by Wooster would be used for large commercial jobs such as factory ceilings and huge projects (Zook 300-01).

Paint Brush and Roller Submarkets

77. The raw materials used to manufacture paint brushes are completely different from the raw materials used to manufacture paint rollers (findings 40, 41).

78. The machinery used to manufacture paint brushes is completely different from the machinery used to manufacture paint rollers (Brumm 1522; Linzer 3355, 3361; Shulman 646; Lieberman 675; Cantonis 2146).

79. The technology required to manufacture paint brushes is completely different from the technology required to manufacture paint rollers (Benson 3427-28, 3432; Freund 1428-29).

80. Paint brushes and rollers have specialized characteristics and uses. Paint brushes are preferred to rollers for smaller flat surfaces and trim work while paint rollers are preferred to brushes for medium and larger flat surfaces (Bready 821, Weiss 471). Brushes are normally used for applying paint to furniture (Weiss 471, Touchett 613), and are preferred for outdoor walls of houses (Touchett 614).

81. Paint brush manufacturers are represented by their own trade association. Continual efforts to include roller manufacturers within the American Brush Manufacturer's Association have met with defeat (Weiss 482-84).

Conclusionary Findings Re Nature of the Trade and Commerce

82. The manufacture and sale of artist brushes, power spray equipment and aerosol cans are not included in the manually powered paint applicator line of commerce (findings 42, 56-79).

83. The relevant line of commerce in this proceeding consists of the manufacture and sale of manually powered paint applicators (findings 39-76).

84. A relevant submarket in this proceeding consists of the manufacture and sale of paint brushes (findings 77-81). An additional relevant submarket in this proceeding consists of the manufacture and sale of paint rollers and accessories (findings 77-81).

Size and Concentration of the Manually Powered Paint Applicator Industry

85. In 1967, total shipments of manually powered paint applicators were $88.6 million (CX 74, p. 39D-15).[2] Such shipments amounted to $96.4 million in 1968 and $98.2 million in 1969 (CX 75, p. 35).

86. The four largest manufacturers of manually powered paint applicators accounted for 36.6 percent of shipments in 1967, 38.1 percent in 1968 and 41.3 percent in 1969. The eight largest manufacturers of manually powered paint applicators accounted for 52.8 percent of shipments in 1967, 55.6 percent in 1968 and 62.5 percent in 1969 (CX 108 a-c).

87. Since 1967, concentration in the manufacture and sale of manually powered paint applicators has been increasing. Between 1967

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[2] Respondent states that the use of "value of shipments" for SIC product category 39912, "paint and varnish brushes and paint rollers" (CX 74, p. 39D-15), is invalid (RPF 16-31). The Census data was used solely to corroborate other market share data (see findings 39-92), and the undersigned finds that the figures for the firms listed on CXs 108, 109, 110 represent the major known competitors in the industry. (See footnote to Finding 87, *infra*.) The Commission has repeatedly held that Census data may be used for the purpose of corroboration where there is independent evidence and identification of the major competitors in the market (*Papercraft Corp.*, Docket No. 8779, 3 CCH Trade Reg. Rep. ¶ 19,725, pp. 21,779-80 (F.T.C. 1971) [78 F.T.C. 1352]; *Avnet, Inc.*, Docket No. 8775, 3 CCH Trade Reg. Rep. ¶ 20,252, at p. 22,275 (1973) [82 F.T.C. 391].

and 1969, the four firm concentration ratio increased 4.7 percent, and the eight firm ratio increased 9.7 percent. Calculated on a pro forma basis for 1969 to account for acquisitions made subsequent to 1969, the four firm concentration ratio increased to 47.4 percent, or a gain of 10.8 percent. Calculated on a similar pro forma basis, the 1969 pro forma eight firm ratio was 68.5 percent, or a gain of 15.7 percent over 1967.[3] (CX 108 a-d).

In 1967, total shipments of paint brushes were $62.2 million (CX 74, p. 39D-15). Such shipments amounted to $68.9 million in 1967 and $73.5 million in 1969 (CX 110 a, c).

88. The four largest manufacturers of paint brushes accounted for 35.5 percent of shipments in 1967, 36.0 percent in 1968, and 39.0 percent in 1969 (CX 110 a-c). The eight largest manufacturers of paint brushes accounted for 55.0 percent of shipments in 1967, 55.9 percent in 1968, and 58.6 percent in 1969 (CX 110 a-c).

89. Since 1967, concentration in the manufacture and sale of paint brushes has been increasing. Between 1967 and 1969, the four firm concentration ratio increased from 35.5 percent to 39.0 percent, or a gain of 3.5 percent. The eight firm concentration ratio increased 3.6 percent over 1967 (CX 110 a-c).

90. In 1967, total shipments of paint rollers were $26.5 million (CX 74, p. 39D-15). Such shipments amounted to $30.2 million in 1968 and $32.1 million in 1969 (CX 109 b-c).

91. The four largest manufacturers of paint rollers accounted for 59.0 percent of shipments in 1967. Attributing the 1969 shipments of Essex Graham to Beatrice, the four largest manufacturers in 1969 accounted for 61.6 percent of shipments. The eight largest firms in 1967 accounted for 80.1 percent. Attributing the 1969 shipments of Essex Graham to Beatrice, the eight largest in 1969 accounted for 80.8 percent (CX 109 a-c).

Concentration in the manufacture and sale of paint rollers is high and rising. On the above basis of attributing Essex Graham 1969 shipments to Beatrice, the four firm concentration ratio rose 2.6 percent over the 1967 figure, and the eight firm concentration ratio rose 0.7 percent over the 1967 figure (CX 109 a-c).

Prior to 1969, the vast majority of leading producers of manually powered paint applicators were small firms whose products consisted primarily of manually powered paint applicators (CX 108 a-c; CX 109 a-c; CX 110 a-c; Zook 229; Weiss 460; Shulman 634; Touchett 581-82; Lieberman 671; Silverman 715; Blum 898; Gallegher 900-01; Cantonis 2140; Edelson 2428; Leichter 3321; Rose 3406; Waksman 3462; findings 21, 36).

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[3] Respondent's attempt to impugn complaint counsel's concentration figures was notably unsuccessful. From 10 subpoenas duces tecum granted to respondent for the purpose of obtaining manufactured sales of manually powered paint applicators, respondent, with all its industry knowledge, could find no manufacturer remotely approaching complaint counsel's top eight competitors in its market and submarkets. Manufactured sales of the two largest firms introduced by respondent ranked 15th and 17th among manufacturers of manually powered paint applicators in 1969 and 14th and 15th among manufacturers of paint brushes in that year. No roller manufacturers of any substance were produced for the record (CX 108 c; CX 109 c; CX 110 c; RX 238, *in camera;* RX 239, *in camera;* RX 242, *in camera;* RX 243, *in camera*).

92. The record shows 21 acquisitions of firms producing manually powered paint applicators, 11 of which occurred between 1969 and December 1972, and 14 of which have occurred since 1967.

93. The following acquisitions took place between 1969 and December 1972:

Acquiring Company	Acquired Company	*Source*
Beatrice	Tip Top	Finding 20
Beatrice	Essex Graham	Finding 33
Pacific Lumber	Ideal Brush	Weiss 493
EZ Paintr	American Brush Corp.	Touchett 584
EZ Paintr	Masterset	Touchett 608
Masterset	King Paint Roller	Touchett 607 Benson 3426, 3444
Baker Brush	Maendler Co.	Shulman 635
Demert & Dougherty	Benzinger Bros.	Paley 2575
Lieberman	Bestt Roller	Lieberman 672-73
Consolidated Foods	Praeger Brush	O'Connor 949-50
Tip Top	Star Brush	CX 37

94. The following other acquisitions have taken place in this industry, with dates where known:

Acquiring Company	Acquired Company	*Source*
Tip Top (1967)	Pitegoff	CX 34-36, Felkay 1327
Thomas Industries (1968)	Brush Division Devoe & Reynolds	Lieberman 686 McIntosh 3391
Wooster (Prior to 1958)	Acme Brush	Zook 291-92
Tobias Paint (1967)	Colonial Brush	Kalman 2262
Tip Top (about 1960)	United Brush	Felkay 974
Rubberset	Osborne Brush	Lieberman 685
Empire Brush	American Brush Corp.	O'Connor 952
Baker Brush	American Roller Stippler	Shulman 635
Thomas Industries	Thomas Roller Co.	Lieberman 686
American Brush Co., Inc.	Gurtz-Lombard	Lieberman 686

Conclusions

The Relevant Line of Commerce

The Manually Powered Paint Applicator Industry

The manually powered paint applicator industry is an appropriate line of commerce to analyze the anticompetitive effects of this acquisition. In *Brown Shoe*, the Supreme Court gave guidelines for determining the appropriate product market and submarkets as follows:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. * * * [W]ithin this broad market, well-defined submarkets may exist which * * * constitute product markets for antitrust purposes.
>
> * * * The boundaries of such a submarket may be determined by examining * * * industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in *any* line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).

It is not necessary for each of the seven criteria set forth in *Brown Shoe* to be present in every merger case in order to establish a market. A relevant market has been found to exist where three or less of the *Brown Shoe* criteria were present. *United States* v. *E. I. du Pont de Nemours & Company*, 353 U.S. 586, 593-95 (1957); *General Foods Corporation* v. *FTC*, 386 F.2d 936, 941 (1967); *Reynolds Metals Co.* v. *FTC*, 309 F.2d 223 (D.C. Cir. 1962).

The above analysis when applied to the facts at hand shows that manually powered paint applicators is the relevant line of commerce. Manually powered paint applicators have the following common elements which distinguish them from all other products:

a. Manually powered paint applicator products are used for the same purposes and are interchangeable in use to a very great extent (finding 43). However, there is minimal interchangeability between manually powered paint applicators and other paint applicators because of differences in purpose, uses, skills required for application and convenience (findings 62, 74, 76, 80).

b. Manually powered paint applicators have uses for which there are no practical substitutes. The great majority of companies in this record which manufacture manually powered paint applicators make both paint brushes and paint rollers and no other type of applicator (CXs 80, 81, 86, 87, 88, 90, 96, 97, CX 108 c, CX 5z10-12).

c. No cross-elasticity of demand exists between manually powered paint applicator products and other paint applicator products. Manufacturers of manually powered paint applicators do not take into account prices of aerosols and spray equipment when pricing their products (finding 51). Retailers purchase manually powered applicators independent of their purchases of other paint applicator products (finding 52).

d. Respondent and the government recognize that the manufacture and sale of manually powered paint applicators constitutes a separate market (finding 55). The aerosol and spray industries are also recognized as economic entities separate from the manually powered paint application industry (findings 61, 75).

e. Manually powered paint applicators are distinguished in price and cost of application from other methods of applying paint. The average brush and roller generally retails for under $5. Spray equipment is priced as high as $1500 (findings 53, 68). For any substantial surface, aerosols are by far a more costly means of application than manually powered paint applicators (finding 62).[4]

f. The mere fact that brushes and aerosols (spray equipment) may be interchangeable for certain uses (finding 56) does not vitiate the fact that for other reasons brushes possess sufficient differences because of their peculiar uses, characteristics and prices to support the finding that they constitute a distinct product line (see *American Brake Shoe Co.*, 73 F.T.C. 658, 669, 671).

g. Manufacture of manually powered paint applicators requires specialized know-how experience, and a trained labor force (findings 61, 69, 78). The facilities and raw materials for manufacturing manually powered paint applicators are completely different from those needed to manufacture other types of paint applicators (findings 40, 41, 60, 69, 70).

h. Manually powered paint applicators are grouped together for distribution, promotion and sales (finding 43).

By the above test, the relevant market for consideration in this matter is clearly the manually powered paint applicator industry.

Submarkets

Paint Brushes and Paint Rollers are Relevant and Appropriate Submarkets in this Proceeding

Applying the *Brown Shoe* criteria, the paint brush submarket can be distinguished from the paint roller (and paint roller accessories) submarket as follows:

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[4] The courts have repeatedly emphasized that price differentials are important in separating markets for antitrust purposes. Judge (now Chief Justice) Burger stated in *Reynolds Metal Company* v. *FTC*, 309 F.2d 223, 229 (D.C. Cir. 1962):

> * * * We think price differentials have an important if not decisive bearing in the quest to delimit a submarket. * * * Such a difference in price as appears on this record must effectively preclude comparison, and inclusion in the same market, of products as between which the difference exists, at least for purposes of inquiry under Sec. 7 of the Clayton Act.

Two years after *Brown Shoe*, the Supreme Court stated:

> * * * to ignore price in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business. (*United States* v. *Aluminum Co. of America*, 377 U.S. 271, 276 (1964))

a. Paint brush manufacturers are represented by a separate trade association, and repeated attempts of roller manufacturers to join that association have met with failure (finding 81).

b. Paint brushes and rollers have peculiar characteristics and uses. Brushes are usually used for certain applications, and rollers for others. In certain situations, only one of the products may be used (finding 80).

c. Paint brushes and paint rollers have separate and distinct production facilities. Production machinery is entirely different, as is the technology (findings 78, 79). Completely different raw materials and component parts make up brushes and rollers (finding 77).

The above facts illustrate that paint brushes and paint rollers are appropriate submarkets. While an overall line of commerce including these products does exist, each can be distinguished from the other. Therefore, for purposes of analysis in this matter, paint brushes and rollers constitute separate submarkets.

III. The Geographic Market

95. The geographic market with respect to each of the relevant lines of commerce shown in Part II, *supra*, is the United States as a whole. Many firms, including each of the major factors in the relevant lines of commerce, compete and distribute their products on a nationwide basis (CX 5 t-u; Zook 309, 445; Weiss 486; Touchett 602; Lieberman 672; Silverman 718; Zurawin 843; Blum 899; Gallegher 903; Felkay 1250, 1318, 1323; Greenberg 1431, 1462-63; Edelson 2290). One manufacturer who did not sell nationally plans to do so in the immediate future (Cantonis 2177). In 1968 and 1969, there were no imports of paint brushes into the United States (Felkay 1365).

IV. The Tip Top Acquisition

A. *Beatrice as a Potential Entrant*

Beatrice's Expansion into the Home and Garden Accessory Field

96. Beatrice has followed a policy over the years of growth by acquisition (findings 3, 4 and 5). During the period 1965-70, the company's sales almost doubled. Almost one-half total corporate sales in 1970 were accounted for by firms acquired by Beatrice during that period (CX 9, p. 17).

97. Respondent has no overall plan as to the kinds of concerns it will acquire (Karnes 1211). The basic guides followed by respondent in considering and making acquisitions are (1) is the subject company a going, viable, profitable concern situated in a growing industry, (2) will the company's management continue in the business, and (3) will the company contribute to, and not dilute, respondent's earnings per share

ratio (Karnes 1210). Respondent's business is operated on an individual profit center basis with decentralized management (Karnes 1212). Its companies must stand on their own feet (Karnes 1212).

98. In the years immediately preceding the Tip Top acquisition, Beatrice diversified into a number of nonfood fields appraised as having exceptional potential for growth of sales and profits (CX 11, p. 9; CX 13, p. 15). Included within such nonfood fields was the home and garden accessory field (CX 21, p. 9; CX 13, p. 15).

99. In 1964, Beatrice began demonstrating an interest in "leisure-time companies, home-and-garden companies-things for home and garden" (Karnes 1213). Following extensive research by management and market specialists (CX 12, p. 9), Beatrice began diversifying in 1965 into the home and garden accessories field by acquiring the Stiffel Company, a manufacturer of lampshades and decorator lamps (CX 2 f; Cannon 1144; CX 10, p. 6). Stiffel doubled its production capacity during the year following its acquisition (CX 10, p. 6).

100. Beatrice's continued interest in the home and garden accessory field led to a study of "the do-it-yourself market for the home consumer * * *" (Karnes 1213). This study was made in 1967 because of Beatrice's interest in Melnor Industries (Karnes 1213). This area was considered one of "very rapid growth and potential great profit" by Beatrice (Cannon 1163).

101. Beatrice made its second acquisition in the home and garden accessory field through its 1967 acquisition of Melnor Industries (CX 2 e), a manufacturer of water sprinkling equipment, garden supplies and lawn and garden care tools (Cannon 1136; CX 10, p. 8). Melnor distributes its products through department stores, drug stores, mass merchandisers, specialty stores, grocery stores, hardware stores, and variety stores (Cannon 1136-37).

102. During fiscal 1968, Beatrice continued its acquisitions in the home and garden accessory field by acquiring six additional companies. Companies acquired were World Dryer Corporation, Charmglow Products, Inc., Max Kahn Curtain Corporation, Indiana Moulding & Frame Co., Vogel-Petersen Co., and the Farboil Company (CX 11, p. 9; CX 2 c, d, f, h). As of the end of fiscal 1968, those companies manufactured the following home and garden accessory products:

World Dryer - small household electric appliances (CX 2 h).

Charmglow - electric and nonelectric lighting equipment (CX 2 c), gas fired barbeques (Cannon 1144), gas patio lamps (Cannon 1144).

Kahn Curtain - curtains and drapes (CX 2 d; CX 11, p. 9).

Indiana Moulding - wood moulding, mirrors, picture frames (CX 2 d; CX 11, p. 9).

Vogel-Petersen - wardrobe racks (CX 11, p. 9).

Farboil - speciality coatings and paints (CX 11, p. 9).

103. During 1969, Beatrice acquired Tip Top and five companies in

the home and garden accessory field. These were Beneke Corporation, Hekman Cabinets, Inc. and Hekman Furniture Co., Vatco Companies, A. H. Schwab Company, and Walton Laboratories (CX 2 a, f, g, h). These companies manufacture the following home and garden accessory products:

Beneke Corporation - wood and plastic products (CX 2 b).
Hekman - wood household furniture (CX 2 c).
Vatco - house furnishings, including carpets, rugs, mats (CX 2 f).
Schwab - infants' and children's wood furniture (CX 2 g).
Walton - small household electric appliances (CX 2 h).

104. In 1969, Beatrice established Beatrice Manufacturing Company, which manufactures electric barbeque grills (CX 2 c). Beatrice Manufacturing Company distributes its products to speciality patio and swimming pool supply stores, outdoor living stores and departments, and anyone that sells barbeques (Cannon 1144, 1146).

105. After it had acquired Essex Graham in 1970, Beatrice acquired two additional companies in the home and garden accessory field in 1971. These were Chicago Specialty Manufacturing and Homemaker Industries (CX 2 c, d). Chicago Specialty distributed plumbing specialites (CX 2 c) and Homemaker Industries made bedspreads, sheeting and other allied products (CX 2 d).

106. Prior to the Tip Top acquisition, Beatrice conducted a study of the "paint brush and paint roller market" (Schlytter 999; Karnes 1219; Cannon 1178-79, 1181). Beatrice acquired Tip Top because it passed respondent's guides for acquisitions (Karnes 1163). Beatrice viewed the "paint brush and paint roller market" as a growth market (Cannon 1173, Karnes 1218), and it was interested in this market because of its growth and profit potential (Cannon 1163, 1178; Karnes 1219). Beatrice also viewed Tip Top as being in the "do-it-yourself consumer home improvement market" (Cannon 1163, 1213) which was "in the same general field selling to the same general customers" as Melnor (Karnes 1213, 1220).

107. Beatrice considered entry *de novo* into the paint brush and roller industry by building a plant, etc. (Karnes 1235, 1240). The company decided not to enter *de novo* because of the costs and because it would have taken a long period of time to become profitable (Karnes 1240).

108. Immediately prior to the Tip Top acquisition, there were numerous small brush and roller manufacturers available for acquisition as shown by their having been acquired in the period since 1969. Firms available for acquisition by Beatrice in 1969 included Ideal Brush (Weiss 439), American Brush Corp. (Touchett 584), King Paint Rollers (Touchett 608), Maendler Co. (Shulman 635), Benzinger Bros. (Paley

2575), Bestt Roller (Lieberman 672, 673, 686), and Adams Products (RX 239).

109. Beatrice possessed the ability to expand a toehold acquisition (findings 4, 5-14, 113).

110. One of the principal needs of a toehold manufacturer of paint brushes and rollers is financing (Weiss 574-79, Walsh 2400-01). Beatrice had financial assets in excess of $500 million (finding 4) and made substantial capital investments in its subsidiaries (finding 113).

111. When Tip Top decided to sell its business to another company, an acquisition specialist was hired to find a buyer (O'Connor 953-54). This acquisition specialist was also a former executive in the manually powered paint applicator industry (O'Connor 952-53). The specialist made formal presentations to only five companies, three of which were Beatrice, Consolidated Foods, and Borden (O'Connor 956). These were considered "similar" companies by the specialist in that they were large food companies which also carried nonfood items (O'Connor 956-58). The specialist's judgment was borne out by Beatrice and Consolidated Food's subsequent entry (finding 93).

112. On two other occasions when paint brush and roller companies decided to sell their businesses, the merger specialist made a presentation to a very limited number of possible acquirers, including Beatrice and Consolidated Foods (O'Connor 962, 964, 965).

113. Beatrice has made frequent and substantial capital improvements to the companies it has acquired in the home and garden accessory field so that it may continuously expand its product lines, services, distribution and sales in that field (CX 15 m; CX 17, p. 11; CX 10, p. 7; CX 11, pp. 1, 9; CX 12, pp. 4, 9; CX 13, p. 15; CX 14, p. 11).

114. Many products of Beatrice's home and garden accessory group are sold by Beatrice to common customers and distributed to similar outlets such as variety, hardware, grocery and mass merchandise stores, as follows:

Customer	*Beatrice Companies*
Montgomery Wards	Spiegel, Beneke, Chicago Specialty
Crane Supply Co.	Beneke, Chicago Specialty
Gibson Products, Inc.	Vatco Manufacturing, Beneke, Tip Top
Cotter & Company	Beneke, Melnor
J. M. Fields, Inc.	Beneke, Max H. Kahn
Walgreen Drug	Beneke, Essex Graham
Blue Chip Stamp Co.	Beneke, Melnor
Ace Hardware	Melnor, Chicago Specialty
Sears Roebuck	Chicago Specialty, Homemaker, Spiegel
S. S. Kresge	Chicago Specialty, Max H. Kahn,

	Spiegel, Melnor, Tip Top
Coast to Coast (City Products)	Melnor, Tip Top, Essex Graham, Chicago Specialty
Arlans	Vatco, Max H. Kahn
Faber Distributing	Vatco, Melnor
McCrory-McLellan	Vatco, Tip Top
Community Discount	Vatco, Tip Top
Leeds Fox	Vatco, Melnor
Gaylords	Vatco, Max H. Kahn
Zayres	Homemaker, Max H. Kahn
Jewel-Jewel Turnstyle	Homemaker, Spiegel
J. J. Newberry	Max H. Kahn, Spiegel
J. C. Penney	Max H. Kahn, Melnor, Spiegel
F. W. Woolworth	Max H. Kahn, Tip Top
W. T. Grant	Spiegel, Essex Graham
G. C. Murphy	Spiegel, Tip Top

Source: CX 3 a-g, CX 5 t-u; see also Felkay 988; Cannon 1136-38, 1142-46, 1149.

115. Common customers of Tip Top, Essex Graham and other companies in the home and garden accessory group are as follows:

Company	*Customer in Common*
Beneke Corp.	Gibson Products, Inc. (Gibson Stores) Walgreen Drugs
Chicago Specialty Manufacturing Co.	S. S. Kresge Co. Coast-to-Coast (Division of City Products)
Vatco Manufacturing Co., Inc.	Gibson Products Co. (Gibson Stores) Community Discount
Max H. Kahn Curtain Corp.	S. S. Kresge Co. F. W. Woolworth Co.
Spiegel Industries Corp.	W. T. Grant Co. S. S. Kresge Co. G. C. Murphy
Melnor Industries	Coast-to-Coast (Division of City Products) S. S. Kresge Co.

Source: CX 3 a-g, CX 5 t-u

116. Beatrice has a nationwide warehousing and transportation system (Cannon 1140-41; CX 13, p. 12; finding 16). However, Tip Top does not use Beatrice warehouses (Felkay 3519). On one isolated occasion, Tip Top used the Soo Terminal in Chicago (Gartner 3158, Strobel 3289-90) and was billed for use of the space (Felkay 3506). Beatrice's non-food products if shipped on Beatrice trucks are charged the same rate as if they used outside commercial carriers (Cannon 1141). The use of Beatrice trucks to deliver roller fabric from a Milwaukee supplier was an isolated instance (Gartner 3158). In any

event, Tip Top as a Beatrice subsidiary may not use Beatrice trucks because of ICC regulations (Cannon 1148-49).

117. Grocery supermarkets and chains are becoming outlets for home and garden accessories, including paint brushes and rollers. Industry leaders believe food stores will become an increasingly more significant outlet for manually powered paint applicators in the near future (Weiss 478, Zook 258, Shulman 638-39, Edelson 2328, Gartner 2212).

118. Food brokers are an important method of distribution to food stores. A food broker is a manufacturer's representative selling food and nonfood products primarily to grocery stores (Zurawin 845-50). Beatrice has the largest team of food brokers of any company in the nation (CX 17, p. 10).

119. One paint brush and roller manufacturer testified that approximately half of his sales representatives were food brokers (Zurawin 847). A few other witnesses stated that they too were exploring this sales method (Baker 638, Weiss 478). There is no evidence that Tip Top uses food brokers, although Tip Top has sold to food stores for many years (Felkay 1250).

120. After Beatrice's acquisition of Essex Graham, it engaged in an isolated joint promotional effort with Chicago Specialty Manufacturing Company, another Beatrice subsidiary. However, the joint venture was unsuccessful and discontinued (Cannon 1160-61, CX 32 a-v). The record contains no evidence of any joint promotions by Tip Top with other Beatrice subsidiaries.

121. Corporate discounts are against respondent's company policy (Karnes 1224, Cannon 1155). A corporate discount is injurious to Beatrice's theories of permitting each company to price its own products and it deteriorates the profitability of these companies (Cannon 1156-58). Essex Graham never gave a discount to City Products (Cannon 1159). City Products in a negotiation with Beneke management was given a discount by Beneke "based on a local competitive situation at the time." (Cannon 1159). Felkay of Tip Top had no authority to offer discounts for other Beatrice companies (Cannon 1159). No corporate discount was ever offered to City Products by Beatrice (Karnes 1224).

122. During the period 1968-70, many major paint manufacturing companies commenced distribution and sale of paint brushes and rollers together with other paint products (Felkay 1266). These paint companies market their brushes and rollers together with paint through the same channels served by paint brush and paint roller manufacturers (Bechtel 2280-81). The major paint manufacturing companies have extensive marketing networks (Bechtel 2281). Large

paint manufacturing companies sometimes label their applicators with the company name and sometimes they private label them (Bechtel 2281, Earle 2485, Felkay 1276). Paint manufacturers' salesmen handle all of the paint and related products that a company offers for sale (Bechtel 2282). Paint companies compete against paint brush and roller companies for sale of these items (Bechtel 2282, 2284; Felkay 1283-84; Weiss 567; MacIver 2553). Large consumer paint companies have historically jointly promoted the use of paint sundries and brushes and rollers together (Wilson 1818). Large paint companies have provided Tip Top with its strongest competition in recent years (Felkay 1294, Cannon 1201-02). Other competitors have felt the competition from paint companies (Weiss 567).

123. Brooklyn Paint Co. has promoted brushes and rollers with its paint (Wilson 1818). Glidden-Durkee Division of SCM Corp. sells paint and a complete line of sundry closely related products such as paint applicators, brushes, rollers, aerosol products (Bechtel 2280). Glidden's applicators are sold through its own outlets as well as independent dealers. It has leased departments within mass merchandising stores (Bechtel 2281). Some applicators are labeled with the Glidden identification (Bechtel 2281). Sherwin-Williams sells paint, paint applicators and allied products (Earle 2482). These products are sold through Sherwin-Williams' branch stores and directly to dealers (Earle 2484). Sherwin-Williams' sales to the outside are by its Rubberset Company (Earle 2485). Colonial Brush Manufacturing Co. is owned by Tobias Paint Co. (Kalman 2262). Elder & Jencks Brush Co. is owned by Muralo Paint Co. (Tr. 2778). Paint manufacturing companies operating retail paint stores exert a strong influence in the markets for the products sold by Tip Top and its competitors (Bechtel 2280-81, Felkay 1284-85).

124. Media advertising is insignificant in and to the paint applicator industry (Zook 450, Weiss 527). Applicator customers do not buy based on such advertising (Bready 828). One industry competitor had no understanding of the term consumer advertising (Zurawin 877). One competitor testified that a large portion of its advertising expenses was of the display-type or promotions (Zook 450). Another competitor testified that he began an advertising campaign in the late 1940's and discontinued it because it was not worthwhile (Shulman 639-40). Competitors of Tip Top testified that private labeling is used extensively in paint brush and roller selling (Zook 450, Weiss 535-36). Wooster's business is between one-quarter and one-third in private label and this percentage has increased significantly over the years (Zook 449). Private label branding has paralleled the growth of sales to mass merchandisers who request private label items (Zook 450). An

industry with heavy private labeling is not generally engaged in advertising.

Conclusions

The complaint alleges the elimination of potential competition between Beatrice and Tip Top in the manufacture and sale of (a) manually powered paint applicators, (b) paint rollers, and (c) paint and varnish brushes. The leading cases dealing with potential competition in mergers found invalidity in situations where the merging firm was virtually the only likely or potential entrant. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *FTC* v. *Procter & Gamble* (*"P&G-Clorox"*), 386 U.S. 568 (1967). These decisions and subsequent authorities have developed the applicable principles, so that for a merger to be barred because of its effect in eliminating potential competition between the merging companies, the following four factors must be established: (1) the particular market must be shown to be substantially concentrated; (2) the merging firm within the market must be shown to be a leading or major factor in that market; (3) the merging firm outside the market must be shown to be a likely entrant by internal growth or by a relatively small acquisition as an alternative to the proposed merger; and (4) the latter must be shown to be the most likely entrant, or one of few such likely entrants. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), 389 U.S. 308 (1967); *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967); *Bendix Corp.*, 3 CCH Trade Reg. Rep. ¶ 19,288, F.T.C. Opinion, June 18, 1970 [77 F.T.C. 731], remanded on other grounds, 450 F.2d 534 (6th Cir. 1971); Department of Justice Merger Guidelines, Sec. 18.

To expand on the factors principally relevant here, the firm within the market must be a leading or major factor, so that the merger cannot be justified as entry by a valid "foothold" or "toehold" acquisition. See *Bendix-Fram, supra*. A company outside the market will be viewed as a likely or potential entrant if it is shown to have distinctive capabilities, resources, incentives, and interests to enter the particular market. Thus, in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. at 651, 660, the Supreme Court called for an assessment of a company's "nearness" to the market, its "eagerness" to enter that market, its "resourcefulness," and so on. In *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 175 (1964), the Court in remanding directed attention to such factors as the outside company's resources and know-how, its capacity to enter, its long-sustained interest in entering and its competitive and economic reasons to do so. Furthermore, it is essential to show that the merging firm's resources and incentives are distinctive and unusual, to establish that it is one of few likely entrants. If there were many firms similarly situated, the elimination of only one (who entered by merger) would not significantly reduce the number of potential entrants or the likelihood of such entry. *United States* v. *El Paso Natural Gas Co., United States* v. *Penn-Olin Chemical Co., FTC* v. *Procter & Gamble Co., Bendix Corp., supra*. See also *United States* v. *Ford Motor Co.*, 286 F. Supp. 407 (E.D. Mich. 1968); *United States* v. *Crocker-Anglo National Bank*, 277 F. Supp. 133 (N.D. Cal. 1967).

The Commission has set out the governing law quite clearly in *P&G-Clorox* and *Bendix-Fram. Procter & Gamble Co.*, 63 F.T.C. 1465 (1963), *aff'd* 386 U.S. 568 (1967); *Bendix Corp., supra*. In *P&G-Clorox*, the Commission found that Procter & Gamble was a potential competitor in liquid bleach, in fact, "virtually the only such prospect" because it was "a progressive and experienced manufacturer of many products in the same product line as liquid bleach", it actually considered independent entry and "by reason of its proximity, size, and probable line of growth", it was perceived as a likely entrant and it already exerted influence on the market (63 F.T.C. 1577-78). As the Supreme Court noted, liquid bleach was "a natural avenue of diversification since it is complementary to Procter's products, is sold to the same customers through the same channels, and is advertised and merchandised in the same manner." It also noted that "Procter's management was experienced in producing and marketing goods similar to liquid bleach," "Procter had considered the possibility of independently entering" and there was substantial evidence to support the Commission finding that it was "the most likely entrant" (386 U.S. 580-81).

In *Bendix-Fram*, the Commission found that Bendix was a likely entrant by acquisition (*not* by internal growth) into the relevant market on the basis of "objective evidence" of its major involvement in the automotive parts business, its manufacturing and sale of automotive filters, and its actual examination of the market with a view toward entering. It found that "only one conclusion is possible: the whole logic of Bendix's corporate development, its size, resources, and direct proximity to the passenger car filter aftermarket, and the unambiguous direction of its business growth, all pointed to expansion into the passenger car filter aftermarket." *Bendix, supra*, 3 Trade Reg. Rep. p. 21,444.

Recently, in *United States* v. *Falstaff Brewing Corporation*, 5 Trade Reg. Rep. ¶ 74,377, 93,739, Feb. 28, 1973, Justice Marshall in his concurring opinion stated:

> Thus, mere entry by acquisition would not prima facie establish a firm's status as an actual potential entrant. For example, a firm, although able to enter the market by acquisition, might, because of inability to shoulder the *de novo* startup costs, be unable to enter *de novo*. But where a powerful firm is engaging in a related line of commerce at the fringe of the relevant market, where it has a strong incentive to enter the market *de*

novo, and where it has the financial capabilities to do so, we have not hesitated to ascribe to it the role of an actual potential entrant. 5 Trade Reg. Rep. p. 93,752.

Judge Marshall also noted that "the proper test is whether Falstaff would have entered the market *de novo* if the preferable alternative of entry by acquisition had been denied it." 5 Trade Reg. Rep. p. 93,756.

Both complaint counsel and respondent in their proposed findings and briefs fail to address themselves to the question of whether or not Beatrice was a likely entrant into the manually powered paint applicator, roller, or paint and varnish brush markets. Instead, the main thrust of complaint counsel's argument is that Beatrice's expansion was into the "home and garden accessory field," an undefined and much broader line of commerce than that referred to in the complaint herein and for which complaint counsel submitted no market data.

However, using the tests laid down by the courts, there has been no showing that Beatrice possessed distinctive capabilities, resources, incentives and interests to enter the manually powered paint applicator market, roller or paint and varnish brush submarkets. At best, complaint counsel have demonstrated that Beatrice was interested generally in any firm in the "home and garden accessory field," sometimes referred to as the "do-it-yourself home improvement market." In this connection, Beatrice acquired Melnor garden sprinklers, Charmglow gas fire barbeques, Kahn curtains and drapes, Indiana Moulding wood molding, mirrors and picture frames, Vogel-Petersen wardrobe racks, and World Dryer small household electric appliances, etc. There is no showing that the resources and know-how to manufacture these items could be used in any way in the manufacture and sale of paint brushes and rollers, etc. Complaint counsel have suggested that many of these products are sold to the same mass merchandisers, drug chains, food stores, etc., but this in and of itself certainly is not sufficient to satisfy the criteria set forth above. Moreover, there has been no showing that Tip Top was the dominant or leading firm in the manually powered paint applicator industry since, at best, it ranked third in 1969 with 7.6 percent of the market (CX 108 c).

As found above, many major paint companies, given their financial capabilities and resources and their nearness to the market, were the most likely entrants by virtue of the fact that they distribute brushes and rollers together with the paint they manufacture (findings 122, 123). Although the record shows that the manually powered paint applicator market is substantially concentrated, it certainly is not as highly concentrated as that for Clorox.

Due to the many factual distinctions between the instant case and those cited above, the undersigned finds that Beatrice was not a potential entrant *de novo* into the manually powered paint applicator market, if the preferred alternative of entry by acquisition had been denied it. Furthermore, the undersigned finds that Beatrice was not a likely entrant by acquisition into the relevant market on the basis of objective evidence, since it was merely interested in the general overall "home and garden accessory field" which, due to its broad and undefined nature, cannot be said to constitute "the same or a related line of commerce."

Complaint counsel also seek to strike down the acquisition of Tip Top by Beatrice on the grounds that it constitutes entrenchment of a leading firm. *FTC* v. *Procter & Gamble, supra,* and *General Foods* v. *FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. denied* 391 U.S. 919 (1968). In the above-cited cases, the acquired company was the manufacturer of the leading product in its field; large advertising expenditures were necessary in the industry and the industry was highly concentrated. In the instant case, national advertising expenditures for manually powered paint applicators are practially nonexistent, the degree of concentration in the industry nowhere approaches that found in the *Procter & Gamble* and *General Foods* cases, and Tip Top with only 7.6 percent of the market and ranking number 3 could hardly be equated to Clorox and SOS. Moreover, the evidence adduced fails to show that any economies of distribution and sale were taken advantage of by Tip Top after its acquisition by Beatrice. As a matter of fact, only isolated instances of joint warehousing and transportation were revealed. On the basis of the foregoing, the undersigned finds that it has not been established that entrenchment of Tip Top will occur to the detriment of its competitors solely from its acquisition by Beatrice. The acquisition subsequently by Beatrice of Essex Graham will be dealt with hereinafter.

V. THE ESSEX GRAHAM ACQUISITION

Essex Graham was Eliminated as a Direct Competitor of Beatrice (Tip Top)

125. Tip Top perceived Essex Graham as its competitor before the acquisition. Elimination of Essex as a competitor to Tip Top was one of the reasons cited by the vice president of Excello Roller Division of Tip Top in a memo he wrote for Mr. Felkay which recommended the acquisition (Gartner 3128, 3132).

126. Other reasons cited in this memo were as follows:

(a) it would expedite the acquisition of additional capacity;

(b) certain cost advantages would be brought about by the integration of the roller manufacturing facilities of Essex Graham and Tip Top; and

(c) elimination of duplicate sales efforts (Gartner 3131-33).

127. The reasons Tip Top believed the acquisition of Essex Graham should be made were discussed with at least three high ranking Beatrice officials, including Beatrice's acquisition specialist and group manager, concerning Tip Top's operations (Gartner 3133).

128. Since the acquisition of Essex Graham, Tip Top has ceased manufacturing rollers (Greenberg 3343; Strobel 3300-01). Essex Graham now provides all of Tip Top's roller requirements (Strobel 3286).

129. Tip Top purchases rollers from Essex Graham with the trade names "Tip-Top," "Best Set," "G. C. Murphy," "Star," "Pitegoff." It currently purchases no rollers from Essex Graham under the Excello label (Strobel 3305-06).

130. In 1969, Tip Top manufactured approximately 7.6 percent of the manually powered paint applicators shipped in the United States, and ranked third in such shipments (CX 108 c).

131. In 1969, Essex manufactured approximately 2.3 percent of the manually powered paint applicators shipped in the United States, and ranked 13th in such shipments (CX 108 c).

132. On the basis of the combined shipments of manually powered paint applicators of Tip Top and Essex in 1969, Beatrice manufactured and sold 9.9 percent of the manually powered paint applicators shipped in the United States (CX 108 c, d).

133. In 1969, Tip Top manufactured approximately 3.7 percent of the paint rollers shipped in the United States, and ranked eighth in such shipments (CX 109 c).

134. In 1969, Essex manufactured approximately 7.0 percent of the paint rollers shipped in the United States, and ranked fifth in such shipments (CX 109 c).

135. On the basis of combined roller shipments of Tip Top and Essex in 1969, Beatrice manufactured 10.7 percent of paint rollers shipped in the United States, and ranked third in such shipments (CX 109 c).

136. On the basis of the foregoing, it is found that actual competition was eliminated between Beatrice and Essex, in both the manually powered paint applicator market and roller submarket, by the acquisition of Essex Graham (findings 21, 28, 36, 37, 125-135).

Respondent's argument that Tip Top and Essex Graham sold in separate markets and did not compete is not supported by the record. Tip Top sold, at the time of the acquisition, to all types of brush and roller customers (Felkay 1389; CX 115 z7; Cannon 1166; CX 5, pp. T-U). Essex Graham sold lower priced as well as higher priced rollers (Greenberg 1469) to a variety of customers (CX 5, p. U), including mass merchandisers (Karnes 1234) and drug chains (see also findings 21, 28, 36, 37, 49, 126).

A former Tip Top executive testified that the two companies competed prior to the acquisition (Gartner 3128, 3132), and respondent's documents so indicate (CX 5, pp. T-U; see also Karnes 1233-34). If the two companies did sell to "different markets," the best indication of that would have been a sales breakdown into the alleged "markets" by volume. Significantly, no such sales breakdown was ever introduced into evidence by respondent. Actually, Felkay's testimony concerning Tip Top's competition with the "professional line" of Pitegoff graphically refutes any such contention:

> Q. Would you identify the Pittegoff Company?
> A. It is a brush manufacturer.
> Q. What products did that company manufacture from 1965, for example?
> A. *Professional paint brushes.*
> Q. What connection, if any, did you have with that company at any time, if any?
> A. Prior to 1966 or '67, *they were competitors.*
> Q. What connection, if any, did you have with them thereafter?
> A. We acquired this company. (Felkay 1327) (emphasis supplied)

Barriers to Entry Have Been Heightened

Prospective entrants into the manually powered paint applicator industry will find it more difficult to obtain customers for their products. Customers in this industry will now give preference to Essex Graham because of Beatrice's size and stature (findings 2, 3, 4, 5, 10) and because Essex is now combined with Tip Top, a manufacturer of brushes. These customers prefer to deal with large established companies (Weiss 575), and with those who can supply both brushes and rollers. Essex, which was formerly an independent company and which previously did not manufacture brushes, now possesses these advantages over prospective entrants into roller manufacturing (findings 32-38).

The above facts confirm that entry of new competitive entities has been and may continue to be made more difficult, and that preexisting barriers have been made even higher in the manually powered paint application industry and submarkets by the acquisition of Essex by Beatrice (see also findings 146-158, *infra*).

Conclusions

The record confirms that Tip Top (as a Beatrice subsidiary) and Essex Graham were competitors in the manufacture and sale of manually powered paint applicator products. Tip Top considered Essex Graham a competitor prior to the acquisition, citing that the acquisition would "eliminate a competitor" as a reason for recommending the acquisition to Beatrice officials (findings 125, 126).

Tip Top and Essex Graham manufactured the same products, sold to the same types of outlets, and met head on at certain accounts (findings 21, 28, 36, 37, 136). The companies had similar marketing programs. Combining teamwork in marketing to eliminate duplicate sales effort was another reason that Tip Top recommended the acquisition (finding 126).

Tip Top and Essex manufactured products that required similar facilities. When Tip Top required expanded production capacity in rollers, it could turn to Essex Graham in that Essex had equipment that performed the same manufacturing operations as Tip Top's equipment (finding 126).

Subsequent to the acquisition, Tip Top ceased to exist as a roller manufacturer, instead purchasing its roller requirements from Essex Graham. The "Excello" label no longer is used for roller sales by Tip Top (findings 128, 129).

The attitude of the Supreme Court, in cases such as this, has been made explicit in its holdings on horizontal mergers.

In *Brown Shoe Co.* v. *United States, supra;*[5] *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.,*[6] 259 F.2d 524 (2d Cir. 1958); *United States* v. *Von's Grocery Co.,*[7] 384 U.S. 270 (1966); *United States* v. *Pabst Brewing Co.,*[8] 384 U.S. 546 (1966); *United States* v. *Atlantic Richfield Co.,*[9] 297 F. Supp. 1061 (S.D.N.Y. 1969) (preliminary injunction granted); mergers which eliminated actual competition and involved similar or lesser market shares in analogous lines of commerce were prohibited.

In *Brown Shoe*, the Court stated as follows:

> If a merger achieving a 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved. *Brown Shoe, supra*, at 343, 344.

Similarly, the Court in *Alcoa* stated:

> * * * If concentration is already great, the importance of preventing even slight increases in concentration * * * is correspondingly great. *United States* v. *Aluminum Company of America, supra*, at 279.

The analysis applied by the Commission *In the Matter of Litton Industries, Inc.* is determinative in the acquisition of Essex Graham,

> This is a classic horizontal merger between two direct competitors. In a highly concentrated industry, the effect of such a merger is direct and immediate. No extensive economic analysis is required in such cases. Docket 8778, slip opinion, p. 36, dated Mar. 13, 1973.

Since these same factors apply to the manually powered paint applicator industry and its submarkets, this merger should also be condemned.

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[5] Brown Shoe: 7.2 percent of shoe stores or 2.3 percent of all retail shoe outlets.

[6] American Crystal Sugar: 13 percent.

[7] Von's Grocery: 7.5 percent.

[8] Pabst: 4.49 percent.

[9] Atlantic Richfield: 7.4 percent.

Essex Graham was Eliminated as a Potential Competitor in the Manufacture of Paint Brushes

137. Paint rollers and paint brushes are used for the same purpose and distributed by the same salesmen to the same buyers (Zook 291-92).

138. Paint roller customers prefer to buy paint brushes from the same supplier from whom they purchase rollers (Weiss 462-63).

139. From the early 1960's to the present, there has been a trend for paint roller manufacturers to expand into paint brush manufacture (Zook 268-69, 291-92; Weiss 463-64).

140. The leading paint roller manufacturer in 1969 entered into paint brush manufacture by acquisition in 1969 (Touchett 585, CX 109 c). Similar roller firms recently have entered into brush manufacturing (Cantonis 2144, Zook 268-69).

141. In 1969, Essex Graham was the largest manufacturer of paint rollers who did not manufacture brushes (CX 109 c). In that year, it was the only manufacturer of paint rollers among the 13 largest manufacturers of rollers which did not manufacture brushes (finding 47).

142. From 1963 onward, Essex Graham considered acquiring a paint brush company (Freund 1416). Essex had considered acquiring at least four paint brush manufacturers, three of which could be considered toehold acquisitions (Freund 1417, CX 108, CX 109, CX 110). In addition, the company hired an acquisition specialist for the purpose of acquiring a brush company (O'Connor 960). The company gave slight consideration to *de novo* entry into brushes during the period 1965 to 1970, but was forestalled because of lack of technology intracompany (Freund 1428-29).

143. On the basis of the foregoing, it is found that potential competition between Beatrice (Tip Top) and Essex Graham was eliminated in the paint brush submarket by the acquisition of Essex Graham (findings 137-142).

The Trend of Concentration in a Highly Concentrated Industry Has Been Accelerated

144. In 1969, the four and eight firm concentration ratios in the manually powered paint application industry and roller submarket were high and rising (finding 86).

145. The acquisition of Essex by Beatrice accelerated this trend of rising concentration and reduced the possibility of decreasing the high concentration in the already highly concentrated paint brush submarket by eliminating Essex as a possible future entrant (findings 137-143).

The Supreme Court has often cited high concentration and a trend to rising concentration as factors which cause mergers to be condemned under the Clayton Act. *Brown Shoe Co.* v. *United States, supra; United States* v. *Von's Grocery Co., supra; United States* v. *Continental Can Co.,* 378 U.S. 441 (1964); *United States* v. *Aluminum Co. of America, supra; United States* v. *Pabst Brewing Co., supra.*

Conclusions

Essex Graham was the most likely entrant into the highly concentrated paint brush manufacturing industry (finding 88). Essex had considered entry into this market for seven years prior to its acquisition (finding 142). Customers and salesmen pressured roller manufacturers to sell paint brushes and paint brush manufacturers to sell paint rollers (finding 44). *All* of Essex Graham's leading 12 competitors had entered into paint brush manufacturing by the end of 1969 (finding 48).

No firm stood closer to the edge of the paint brush market than Essex Graham. The company was going into brush manufacturing. The only question was how. When it was acquired by Beatrice, it was removed as the most likely entrant into the highly concentrated paint brush submarket and as the most significant roller manufacturer that might still have entered that industry *de novo* or by toehold acquisition. No paint roller manufacturer who entered into paint brush manufacturing after Essex Graham is indicated in this record to have had as much as a 0.3 percent share of the paint roller market in 1969 (CX 109 c). Entry of such a competitively insignificant firm into brush manufacturing would be of dubious competitive significance as regards effectively competing with significant paint brush manufacturers.

Essex Graham had the capability and incentive to enter the paint brush market, either by internal expansion or by toehold acquisition. It was the only substantial company in the paint roller industry not manufacturing paint brushes. Concentration in the paint brush industry was high and increasing (findings 48, 88, 137-145).

Barriers to entry into paint brush manufacture did exist (findings 146-158, *infra;* CX 109 c). Such barriers could have been surmounted by Essex Graham. The company already was a major factor in rollers and could have acquired a toehold brush company or the technological know-how necessary for entry *de novo* from another firm in the brush industry.

On the basis of the above facts, the removal of Essex Graham as a potential entrant violates Section 7 of the Clayton Act. See generally *United States* v. *El Paso Natural Gas, supra; United States* v. *Penn-Olin Chemical Co., supra; FTC* v. *Procter & Gamble Co., supra; Ekco Products Co.* v. *FTC,* 347 F.2d 745 (7th Cir. 1965); *Kennecott Copper Corp.* v. *FTC,* 467 F.2d 67 (10th Cir. 1972); *The Bendix Corp.,* Trade

Reg. Rep. ¶ 19,288 at 21,439 (F.T.C. 1970) [77 F.T.C. 731], remanded on other grounds, 450 F.2d 534 (6th Cir. 1971).

VI. Barriers to Entry into the Manually Powered Paint Applicator Industry

146. The capital investment to begin initial manufacture of paint brushes and paint rollers is not great. Felkay testified that he entered the brush business in 1948 making small artist brushes and small consumer throwaway brushes with a capital investment of $4,400 (Felkay 1248, CX 22). A 1950 balance sheet for Tip Top shows total assets of $44,000 and plant and equipment investment of $7,000 (RX 215). In general, initial capital requirements for entry into the paint brush and paint roller industry are not high (Felkay 1376, 1381; Weiss 519). Felkay testified that production of approximately $1 million worth of brushes a year can be accomplished with an investment in equipment of less than $2,000 and a total working capital investment of $10,000 to $12,000 (Felkay 1381-96). Felkay also testified that he could produce $4,000 to $5,000 worth of brushes per day with a relatively modest amount of equipment and with about 12 to 15 employees (Felkay 1376, 1381, 1391-93). Felkay further testified that a total investment of $10,000 to $12,000 would be sufficient to sustain operations (Felkay 1396). However, another witness testified on rebuttal that approximately twice as many people would be needed to obtain the production to which Felkay testified (Edelson 3052). Another one of complaint counsel's witnesses estimated that $25,000 worth of equipment would be sufficient to begin the manufacture of rollers (Weiss 519). Greenberg of Essex Graham testified, based on actual experience, that the equipment necessary for a roller plant would cost approximately $7,000 (Greenberg 1468).

147. Another one of complaint counsel's witnesses testified that a paint brush plant with annual sales of $2.5 million would require $250,000 worth of machinery and $5,000 for initial supplies (Lieberman 677-81). Another witness for complaint counsel testified that the construction of a new plant which would produce sales of $3.5 million (primarily in brushes and also some in rollers) would cost one-half million dollars for machinery alone (Shulman 645, 647). In addition, a substantial amount of cash is required if a manufacturer is to make a successful entry into a new region (Weiss 575). Both of these witnesses, however, were testifying about duplicating existing plants or construction on a level much greater than that needed to make a meaningful entry (Lieberman 680, Shulman 645, 647).

148. One of complaint counsel's witnesses who was already a large manufacturer of brushes testified that he commenced the manufacture

of rollers with two part-time employees (Linzer 3358), that the production of rollers consisted of 2,000 to 3,000 square feet, located in the basement of his plant (Linzer 3360), that he utilized only two pieces of equipment in the manufacture of rollers, a winder and a trimmer and comber (Linzer 3360-61), and that with this plant equipment and personnel, he produced approximately $25,000 worth of rollers the first year (Linzer 3367). Another witness testified that he was a manufacturer of brushes and was able to enter the manufacture of rollers on a modest scale (Waksman 3463).

149. A new entrant into the manually powered paint applicator industry, to be a significant competitive factor, must enter into both the manufacture of brushes and rollers. There is considerable pressure by customers on manufacturers to sell both paint brushes and rollers, and manufacturers feel they will lose sales and market position unless they sell both products (finding 44). Significant manufacturers of manually powered paint applicators in 1969 each produced both paint brushes and paint rollers in that year. The largest firm in the manually powered paint applicator industry which did not manufacture both brushes and rollers ranked 12th with a 2.6 percent of market share in 1969 (finding 46).

150. There have been no *de novo* entrants into the manufacture of paint brushes in the last 10 years (Lieberman 686). There have been no significant entrants *de novo* in the manufacture of paint rollers since 1965 (finding 151, *infra*).

151. Of seven companies characterized as new entrants into the roller business since 1965 by respondent's witness Pereles, who was neither a manufacturer nor seller of rollers, one denied ever having made rollers, one was a remnant of a previous manufacturer, one entered by acquiring assets and accounts of a company previously in business, and at least two others were producing on an insignificant scale in 1972. Combined sales of the latter two firms were less than $150,000 in 1972 (Pereles 1577; Wolf 3269; Leichter 3321, 3325, 3375; Edelson 3076; Waksman 3463; Linzer 3366). Neither would have equaled the 13th largest manufacturer of rollers in 1969, which had 0.3 percent of industry shipments (CX 109 c).

152. The chairman of the board of Beatrice, Karnes, indicated the difficulty of entering into the manufacture of paint brushes *de novo* as follows:

> * * * this [entry *de novo*] would have been very costly to us and would have been a long period of time getting it into a profitable position * * * (Karnes 1240).

Instead, Beatrice chose to enter by acquisition of Tip Top (CX 54).

153. Similarly, a roller manufacturer decided against manufacture

of brushes because of the need to commit large resources and "the question of feasibility and profitability * * *." (Gartner 2254).

154. Independent companies such as Ideal, Praeger, Tip Top and Essex Graham have been replaced by congolmerates such as Consolidated Foods, Pacific Lumber and Beatrice (finding 93). These conglomerates possess advantages over new entrants in having a "deep pocket," expensive promotion programs, large-company merchandising and marketing know-how, and distribution systems (findings 1-16).

155. Such companies have a competitive advantage in obtaining new customers. Paint brush and roller outlets are reluctant to deal with small firms or those firms which "lack a track record." (Weiss 575). It is Ideal's opinion that large customers prefer to buy from a brush or roller company with a large, financially strong parent (Weiss 575).

156. There is very little used machinery available for brush manufacturing, there is no machinery available for lease, and financing terms for brushmaking machinery are not available (Lieberman 691-92). Shortage of qualified personnel necessary to successfully manufacture paint *brushes* has discouraged entry *de novo* (Freund 1429). Also, equipment necessary for the manufacture of paint rollers is not readily available (Benson 3427, 3452).

157. There is a shortage of personnel required to manufacture paint brushes and rollers at the management, foremen and skilled labor levels. Plant managers and foremen are not available (Schulman 2947, 2950, 2951). Because skilled laborers cannot be obtained from other industries (Schulman 2967-68), manufacturers pirate them from other companies in the industry (Schulman 2962).

158. Upon the basis of the foregoing, the undersigned finds that substantial barriers to new entry exist in the manually powered paint applicator market, that entry of new competitive entities have been and may continue to be made more difficult, and that preexisting barriers have been made even higher in the manually powered paint applicator industry and submarkets by the acquisition of Essex by Beatrice.

Mergers having the effect of raising barriers to entry similar to those which occurred in this case were held to violate Section 7 in *FTC* v. *Procter & Gamble Co., supra; General Foods Corp.* v. *FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. denied* 391 U.S. 919; and *United States* v. *Wilson Sporting Goods Co.,* 288 F. Supp. 543 (N.D. Ill. 1968) (preliminary injunction granted).

The fact that the capital investment to begin initial manufacture of paint brushes and paint rollers may not be great, in and of itself, is not particularly significant. It is only one of many factors to be considered in appraising barriers to entry. But even if it were the sole factor in determining ease of entry, the Commission has repeatedly held that the difficulty of entry factor is not indispensible to a finding of illegality under Section 7. See *American Brake Shoe Co., supra,* 684; *Ekco Products Company,* 65 F.T.C. 1163, 1209.

VII. The Matter of EZ Paintr Corp.

Respondent argues that the consent settlement *In the Matter of EZ Paintr Corp.* (F.T.C. Docket C-2106) [79 F.T.C. 805] establishes the legality of the mergers by Beatrice which are the subject matter of this proceeding. In support of this, respondent cites the initial decision *In the Matter of Sterling Drug, Inc.,* Docket 8797 [80 F.T.C. 477], wherein reference was made to Sterling's reliance on the decision of the Commission in the divestiture phase approving the acquisition by Miles Laboratories of SOS after a full adjudication on the merits before the Commission and review by the courts (*In the Matter of General Foods Corp.,* Docket 8600, 69 F.T.C. 380 (Mar. 11, 1966), *aff'd* 386 F.2d 936 (3d Cir. 1967), *cert. denied* 391 U.S. 919 (1968)).

It is well settled that a decision approving an acquisition in a divestiture context amounts to a holding that the acquisition clearly does not violate Section 7 of the Clayton Act. See *United States* v. *Kennecott Copper Corp.,* 249 F. Supp. 154, 163 (S.D.N.Y. 1965). Indeed, it has been held that a divestiture would be rejected if it had any significant anticompetitive effects, even if not amounting to a violation of Section 7. *United States* v. *Aluminum Company of America* (*Alcoa-Rome*), *et al.,* 1967 CCH Trade Cases ¶ 71,973 (N.D.N.Y. 1966).

In contrast to the procedures in a divestiture order, a consent order entered into by the Commission is not an adjudication on the merits of a matter and is not binding. The Commission in such a proceeding does not determine the legality or illegality of the conduct involved, consent orders contain no complete findings of fact, and many of the factors considered are known only to the Commission and are not a part of the public record. The courts and the Commission have consistently held that a consent decree is not a binding judicial precedent because of these factors, as well as the fact that they are based entirely upon the bargaining of the parties (*United States* v. *DuPont Co.,* 366 U.S. 316, 330, n. 12 (1961); *Oxwall Tool Co.,* Docket 7491, 64 F.T.C. 240, 243 (1959)). Moreover, a determination that consent orders are controlling precedents would severely limit the use of the consent settlement process.

In the absence of sufficient factual information and in view of the legal precedents cited above, any comparison or analysis of the *EZ Paintr* consent settlement to the instant case would be inappropriate.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of and over respondent and the subject matter of this proceeding.

2. At all times relevant to this proceeding, respondent Beatrice, Tip Top and Essex Graham were corporations engaged in "commerce" as defined by Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

3. The entire United States is the appropriate geographic market, or "section of the country," within which to consider the alleged competitive effects of the mergers of Beatrice and Tip Top and Beatrice and Essex Graham under Section 7 of the Clayton Act, as amended.

4. The manufacture and sale of manually powered paint applicators, paint and varnish brushes and paint rollers are appropriate product markets and submarkets, or lines of commerce, within which to consider the alleged competitive effects of the mergers of Beatrice and Tip Top and Beatrice and Essex Graham under Section 7 of the Clayton Act, as amended.

5. Counsel supporting the complaint have failed to sustain the burden of establishing, by substantial, reliable and probative evidence, that the effect of the acquisition by respondent Beatrice of Tip Top has been, or may be, substantially to lessen competition or to tend to create a monopoly in any line of commerce alleged in violation of Section 7 of the Clayton Act, as amended.

6. The acquisition by Beatrice of Essex Graham eliminated a direct competitor of Beatrice in the manually powered paint applicator market and paint roller submarket, and a potential competitor of Beatrice in the paint brush submarket.

(a) Beatrice, through its Tip Top subsidiary, and Essex Graham manufactured the same products which were distributed to the same outlets at the time Essex was acquired. Beatrice and Essex were direct competitors.

(b) The acquisition of Essex eliminated Essex as the most likely potential entrant into the paint brush submarket.

(c) The acquisition of Essex increased concentration and entry barriers into these lines of commerce.

7. The effect of the acquisition by respondent Beatrice of Essex Graham has been, or may be, substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended.

The Remedy

It is well settled that the choice of the remedial order is committed to the discretion of the Commission. *FTC* v. *Mandel Bros.*, 359 U.S. 385, 392-93 (1959); *Niresk Industries, Inc.* v. *FTC*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied* 364 U.S. 883 (1960); *L. G. Balfour Company* v. *FTC*, 442 F.2d 1 (7th Cir. 1971). The Commission has the power to order divestiture to restore competition to the state of health it might be expected to enjoy but for the acquisition. *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 606 n. 4 (1966); see *Pan American World Airways Inc.* v. *United States*, 371 U.S. 296, 312-13 nn. 17 and 18 (1963); *Ekco Products Company*, 65 F.T.C. 1204, 1214-17 (1964). The remedial phase of antitrust cases is crucial and the primary focus of inquiry as to remedy is whether the relief adequately redresses the economic injury arising out of the violation. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326, 327. Moreover, "once the government has successfully borne the considerable burden of establishing a violation of law all doubts as to the remedy are to be resolved in its favor." *United States* v. *du Pont, supra*, at 334. Generally, the most appropriate remedy to redress a Section 7 violation is divestiture. *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967). Based upon the findings and conclusions of law set forth above, divestiture is the appropriate remedy in this proceeding.

ORDER

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent Beatrice, through its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall as soon as possible and in any event within one (1) year from the date this order becomes final, divest absolutely and in good faith all assets, rights, property and privileges, tangible and intangible, including all plants, equipment, machinery, raw material reserves, inventory, customer lists, trade names, trademarks, good will and other property of whatever description acquired by Beatrice as a result of its acquisition of Essex Graham Company (hereinafter referred to as Essex), including all additions and improvements thereto, which are necessary to restore Essex as a separate independent and viable going concern in the lines of commerce in which it was engaged prior to said acquisition.

II

It is further ordered, That, pursuant to the requirement of Paragraph I above, none of the stock, assets, rights or privileges, tangible or intangible, acquired or added by Beatrice shall be divested directly or indirectly to anyone who is, at the time of the divestiture, an officer, director, employee, or agent of, or under the control, direction or influence of Beatrice or any of Beatrice's subsidiaries or affiliated corporations or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of Beatrice.

III

It is further ordered, That, pending divestiture, respondent Beatrice shall not make or permit any deterioration in the value of any of the plants, machinery, parts, equipment, or other property or assets of the corporations to be divested which may impair their present capacity or market value unless such capacity or value be restored prior to divestiture.

IV

It is further ordered, That respondent Beatrice shall cease and desist for ten (10) years from the date this order becomes final from acquiring directly or indirectly, through subsidiaries or otherwise, without prior approval of the Federal Trade Commission, any part of the assets, stock, share capital, or other actual or potential equity interest or right of participation in the earnings of any domestic concern, corporate or noncorporate, which is engaged in the manufacture or sale of manually powered paint applicators or engaged in the manufacture or sale of raw materials to companies engaging in the manufacture or sale of manually powered paint applicators, or from entering into any arrangements or understandings with such a concern through which respondent Beatrice becomes possessed of that concern's market share.

For the purposes of this order, manually powered paint applicators are defined as: paint and varnish brushes; paint rollers, including pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit; and miscellaneous paint applicators other than spray equipment and aerosol cans.

V

It is further ordered, That respondent Beatrice shall within sixty (60) days after date of service of this order, and every sixty (60) days thereafter until respondent Beatrice has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent Beatrice intends to comply or has complied with this order. All compliance reports shall include, among other things that are from time to time required, a summary of contracts or negotiations with anyone for the specified stock, assets and plant, the identity of all such persons, and copies of all written communications to and from such persons.

VI

It is further ordered, That respondent Beatrice notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any change in the corporation which may affect compliance obligations arising out of the order.

Opinion of the Commission

JULY 1, 1975

By Lewis A. Engman, *Commissioner:*

This matter is before the Commission on cross-appeals by both the respondent and counsel supporting the complaint from the Initial Decision of the administrative law judge.

The complaint in this matter alleges that Beatrice Foods Company ("Beatrice") violated Section 7 of the Clayton Act in two respects; first, when it acquired the stock and assets of Tip Top Brush Company and its affiliated companies[1] (hereinafter referred to collectively as "Tip Top") in July 1969 and, second, when it acquired the Essex Graham Company ("Essex Graham") in July 1970. The complaint alleges that these acquisitions may result in a substantial lessening of competition in the manufacture and sale (1) paint and varnish brushes, (2) paint rollers, and (3) a market encompassing both paint and varnish brushes and paint rollers. (The latter market is given the infelicitous name "manually powered paint applicator" in the complaint. We refer to it here as simply the "brush-and-roller market." The two alleged submarkets will be referred to as the "paint brush" and "paint roller" markets or submarkets.)

At the time of the first acquisition-the acquisition of Tip Top-the parties agree that Beatrice was not then engaged in the manufacture or sale of any of the product lines involved in this case, so there is no question of a competitor being eliminated as a result of that merger. Rather, complaint counsel argue that Beatrice was a potential entrant into the brush-and-roller market and that by acquiring Tip Top a

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[1] Banner Brush Co., Inc.; Best-Set Brush Co., Inc.; United Brush Manufacturing Co., Inc.; First Synthetic Fiber & Brush Co. Inc.; West Side Leasing Corp.; Excello Roller Co. Inc., and Star Brush Manufacturing Co., Inc. Banner Brush, Best-Set, and United Brush were not operating corporations but their names were used for private label business.

"leading manufacturer" of paint brushes and rollers, it chose a method of entering the market that removed the likely pro-competitive effects that would have ensued had it entered by way of a "toehold" acquisition and subsequently sought to expand the operations of such a smaller company. Complaint counsel further allege that the acquisition has "entrenched" Tip Top as a market leader to the detriment of competition.

As to the subsequent acquisition of Essex Graham-a manufacturer of paint rollers, but not of paint brushes-complaint counsel argue that this transaction was a horizontal merger between two substantial competitors in the brush-and-roller market and the paint roller submarket. In addition to eliminating a significant competitor in those markets, it is alleged that the acquisition also eliminated Essex as a potential entrant into the paint brush submarket.

The administrative law judge, after extensive hearings, found that the acquisition of Essex Graham transgressed Section 7 of the Clayton Act as alleged in the complaint. However, he dismissed the complaint as to the Tip Top acquisition. Divestiture of Essex Graham only was therefore ordered.

Complaint counsel appeal from the law judge's dismissal of the challenge to the Tip Top acquisition. Respondent appeals from his decision insofar as the Essex Graham acquisition was found unlawful. Since respondent's challenge to the appropriateness of the product lines adopted in the initial decision is relevant to both appeals, we will take that question up first.

I. The Relevant Product Markets

The administrative law judge found that "paint brushes" (which includes varnish brushes) constitute a line of commerce for purposes of Section 7, and that "paint rollers" (which includes accessory products such as paint roller covers, handles, trays, trimmers, and flat pad applicators) constitute an appropriate line of commerce.

The law judge found that paint brushes and rollers taken together also constitute a line of commerce for purposes of this case.

Respondent contends that there are a number of errors in the definitions of lines of commerce. It argues that the traditional brush or roller manufacturer sells products in two distinct lines of commerce-a higher priced "professional" brush or roller and a cheaper "throwaway" version for the "do-it-yourself" buyer.[2] Respondent also argues that

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[2] Respondent's briefs do not suggest what criteria should be used to distinguish these two lines of commerce. In its statement of the issues it says "a professional brush may sell for $30 or more and a throwaway brush may sell for 99 or less" (appeal brief pp. 2,4). This hardly answers the question in which of the two lines belong products that *retail*

(*Continued*)

aerosol and power spray equipment should be included in any paint applicator market.

It may well be that paint brushes and rollers could be divided into product submarkets according to quality-derived price distinctions. However, the question presented by respondent is whether brushes and rollers *must be* segregated into entirely *separate product* markets according to price/quality distinctions. We find that any such division into separate product markets is unwarranted. Unless articles within a product classification are sold in clearly separated price groupings that have little price sensitivity between them, there will always be the problem of just where market divisional lines should be drawn along the price/quality spectrum. As the Court observed in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 326 (1962). "It would be unrealistic to accept Brown's contention that, for example, men's shoes selling below $8.99 are in a different product market from those selling above $9.00."

At the time the hearings were held, the bulk of rollers and paint brushes were sold at retail prices below $5.00 (Tr. 474, 637, 656, 711, 764). As indicated in the preceding footnote, retailers offer a range of painting utensils of differing quality and price with considerable overlap between paint applicators listed by manufacturers as "professional" in quality and those promoted to the "homeowner." (See also Tr. 302, 473-74, 637, 764-65, 1387, CX 27H-Z, CX 32Q, CX 33B.) As in *Brown Shoe*, we think it would be unrealistic to divide the brushes and rollers into separate product markets at some arbitrary point such as $2.49. The fact that Tip Top specialized in selling and promoting rollers that were lower in quality and price than most of the rollers sold by Essex Graham is a factor that should be considered in weighing the effects of the merger between those companies, not in defining market boundaries, *Brown Shoe*, *supra*, 326.[3]

We also find that the law judge was correct in determining that sales of aerosol paint cans and power spray equipment need not be included

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between 99 cents and $30. At another point respondent suggests that "throwaway" brushes and rollers are those that sell for "no more than $2.49" (*id.* at 34). Yet its own exhibits show that both higher- and lower-priced brushes and rollers are promoted to homeowners and their prices substantially overlap with brushes advertised as "professional" paint brushes. For instance, Respondent's Exhibit 8-I, a page from a Sears catalogue, shows "Homeowner Brushes * * * Nickel plated ferrule * * * Plastic handles" ranging from $4.55 for 4-inch nylon-bristle brushes to $1.70 for 2-inch nylon-bristle brushes. On the same page are listed "Professional Brushes * * * Hardwood handles * * * Copper-plated ferrules" that range from $5.67 for 4-inch nylon-bristle brushes to $2.55 for 2-inch nylon brushes. "Professional" sash and trim brushes are priced from $1.49 to $2.10. Sears also offers low, medium, and high quality paint rollers (Tr. 1543).

[3] Furthermore, if a manufacturer of more expensive brushes or rollers can easily shift his production facilities to make a cheaper version in response to increased demand for such products, then the market may be defined broadly to include "all brushes" and "all rollers" and market shares based on firms' total output. *Brown Shoe*, *supra*, at 325 n. 42; *Sterling Drug Co.*, 80 F.T.C. 477, 585, *et seq.* (1972). The record indicates that such "cross-elasticity of supply" exists throughout the price/quality continuum with respect to the manufacture of rollers (Tr. 646, 1303-04, 1526-28). Thus, after its acquisition by Tip Top, much of Essex Graham's production of paint rollers was converted to supply lower priced rollers whereas previously that company made higher quality rollers for the most part. Although more hand labor and better material are used in manufacturing finer brushes than cheaper ones, it appears that similar production interchangeability exists. (Tr. 266-67, 466, 451A, 2472, RX179).

along with brush and roller sales in measuring market concentration. Clearly his conclusion on this point is correct insofar as the "submarkets" in this case are concerned. Paint brushes have their own peculiar characteristics and uses that distinguish them from all other paint applicator devices such that buyers will prefer them for certain uses. Paint rollers likewise have their own peculiar advantages for certain paint jobs because of the ease and speed with which they can apply paint.

A closer question is whether sales of brushes and rollers *combined* constitute a separate product market. Although sales of some paint brushes are complementary to paint roller sales such that the buyer will often buy both products rather than one for the other, respondent does not dispute that rollers and brushes also compete in sales for certain end uses. Respondent agrees, for instance, that rollers compete with 4-inch brushes for large flat area paint jobs and that with the introduction of the roller in the market in the 1950's brush manufacturers were compelled to develop lower priced 4-inch brushes to compete with rollers. However, since aerosol paint cans and power spray equipment also "apply" paint and sales of these products collectively are acknowledged to be substantial by complaint counsel, respondent contends that their sales should also be included in measuring any of the markets involved.

In determining the outermost boundaries of a product market, analysis should be guided by examination of the "reasonable interchangeability of use" or the cross-elasticity of demand between the product and substitutes for it. *Brown Shoe* v. *United States*, *supra*, 370 U.S. at 325; *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). A market definition that combines paint rollers with paint brushes is a proper market in our opinion as it defines products that are to a large degree interchangeable for an important use, namely the application of paint to large flat areas such as walls, ceilings, exteriors of buildings, etc. As previously noted, it is with regard to this type of application that paint rollers have made inroads on sales of brushes and forced the appearance of competitively priced brushes.

Aerosol paint cans, on the other hand, are convenience items used mainly around the home where only a small amount of paint is required. The record establishes that aerosols are most commonly used to paint small pieces of furniture, decorative ironwork, craft projects, automobile touch-ups, and so forth (Tr. 300, 596, 821, 826). The cost factor, among other things, makes them too expensive for extensive paint application on most architectural surfaces where rollers and brushes are more suitable (Tr. 471, 2368). Once the paint is used up, the aerosol can is not re-usable. Also the range of colors and types of paint offered in aerosol cans is limited (Tr. 704). In contrast, rollers and brushes can be used many times, are clearly more suitable for large paint jobs, and can be used with a wider variety of paints.

It was also proper for the law judge to exclude sales of power spray equipment. Although professional painters do sometimes use power spray equipment to paint architectural structures, such use is usually limited to industrial buildings such as warehouses and factories, not houses or apartments where fall-out from the overspray would create a problem (Tr. 300-01, 596, 780-82, 814, 833-34, 2377-78). Furthermore, these devices are not competitively priced with rollers and brushes and require skills and maintenance (not to mention purchase price) that do not ordinarily appeal to consumers. For that reason many paint stores, hardware stores, and other retail outlets do not carry power spray equipment, although all retail outlets that sell interior and exterior house paint consider it necessary to carry a full line of both brushes and rollers (Tr. 479-699). The bulk of power spray equipment is sold and used for industrial purposes or specialty jobs where brushes and rollers would not be suitable (Tr. 300, 451-A, 779, 1990-91).

Arguably, in measuring the size of the brush-and-roller market, the "brush" segment could be limited to sales of large brushes-*e.g.* 4-inch brushes-that are most commonly used for large paint jobs and are most competitive with paint rollers. However, such "fine tuning" of brush sales to "end use" seems entirely unnecessary here. In the first place, many paint purchasers do in fact buy smaller paint brushes along with paint rollers to do edging and trimming work on interior walls and ceilings. Interchangeable and competitively priced with such brushes are trimming roller devices that are also designed to perform that function (Tr. 821, 833). Secondly, the inclusion of "all brush sales" in the combined market-as distinguished from some portion of total brush sales or sales of particular size brushes-would make little difference in the final picture of market concentration. Major paint brush manufacturers sell a full line of brush sizes to redistributors or directly to retailers. There is no reason to believe that one brush manufacturer sells, for example, more 4-inch brushes proportional to his line than any other full line manufacturer. Furthermore production interchangeability exists among brush sizes. We fail to see how the picture of market concentration would be changed were the brush segment of this market limited to sales of only 4-inch brushes, as respondent seems to suggest.[4] Indeed, since concentration ratios are considerably lower in sales of paint brushes than in sales of rollers (CX 109, 110), any bias in concentration figures resulting from using "all brush sales" in the product mix favors respondent.

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[4] Cf. *Brown Shoe Co.* v. *United States*, *supra*, 370 U.S. at 327:

"Brown's sharpest criticism is directed at the District Court's finding that children's shoes constituted a single line of commerce. Brown argues, for example, that 'a little boy does not wear a little girl's black patent leather pump' and that '[a] male baby cannot wear a growing boy's shoes.' * * * Assuming, arguendo, that little boy's shoes for example, do have sufficient peculiar characteristics to constitute one of the markets to be used in analyzing the effects of this

(Continued)

That paint rollers and paint brushes combined can properly constitute a line of commerce which is measured by the total sales of both products, and excluding more distant substitute products such as aerosols and power spray equipment, is supported by *United States* v. *Continental Can Company*, 378 U.S. 441 (1964). In that case, involving a merger between a glass container manufacturer and a metal can manufacturer, the Court determined that since there was considerable interchangeability for some end uses between glass containers and metal cans that "quantitywise [were] very substantial," the district court should have recognized the existence of a "glass and metal container" market. The Court held that complete overlap in end use need not be present and stated: "[N]or are we concerned by the suggestion that if the product market is to be defined in these terms it must include plastic, paper, foil and any other materials competing for the same business. That there may be a broader product market made up of metal, glass and other competing containers does not necessarily negative the existence of submarkets of * * * cans and glass together, for 'within this broad market, well-defined submarkets may exist which in themselves, constitute product markets for antitrust purposes' [citing *Brown Shoe*]." *id.* 457-58. See also *United States* v. *Connecticut National Bank*, 418 U.S. 656, 663 n. 3 (1974). Similarly, the fact that aerosols and other spray equipment are interchangeable with brushes or rollers for some limited end uses does not negative the existence of a separate brush-and-roller market.

In conclusion, we affirm and adopt the law judge's conclusions that "paint brushes" and "paint rollers" each constitute a line of commerce and that paint brushes and rollers combined properly constitutes an overall line of commerce for purposes of this case.

II. Section of the Country

The administrative law judge found the relevant geographic market to be the United States as a whole. Although disputed by respondent, this finding is amply supported by the record. Many manufacturers of paint brushes and rollers testified in this case. Nearly all stated that

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merger, we do not think that in this case the District Court was required to employ finer 'age/sex' distinctions than those recognized by its classifications of 'men's,' 'women's,' and 'children's' shoes. Further division does not aid us in analyzing the effects of this merger. * * * Appellant can point to no advantage it would enjoy were finer divisions than those chosen by the District Court employed. Brown manufactures significant, comparable quantities of virtually every type of nonrubber men's, women's and children's shoes, and Kinney sells such quantities of virtually every type of men's, women's and children's shoes. Thus, whether considered separately or together, the picture of this merger is the same."

they ship their products for sale throughout the United States. Respondent cites instances where some manufacturers testified that freight costs are a significant factor and give local manufacturers, *i.e.* firms with factories in a given area, a competitive advantage. However, none with the exception of a witness from Beatrice claimed that freight was so prohibitive as to foreclose firms from selling in any particular section of the country. Even here the item in question was a "promotional roller kit"-a cheap and relatively bulky item for which freight is obviously a more significant factor than it is for other paint applicator products. The majority of products involved in this proceeding are distributed nationally and the major firms compete with others throughout the United States, a fact that compels finding that the nation as a whole constitutes the relevant market.

III. The Acquisitions

Respondent Beatrice is a large, diversified corporation which had its origin in the dairy business. It also engages in the manufacture and sale of nonfood products and has chemical, manufacturing, and international divisions which by 1970 accounted for over 30 percent of its sales. Nonfood products now sold by Beatrice range from house trailers to skis. For the fiscal year ending Feb. 28, 1970, Beatrice's overall net sales reached approximately $1,575,000,000 and total assets approximated $504 million.

Tip Top Brush Co. Inc. and its affiliated companies (see n. 1, *supra*) were corporations collectively engaged in making and selling paint brushes and rollers. Tip Top's principal office was located in Jersey City, N.J. Prior to acquisition by Beatrice, the outstanding stock of the corporations was owned by Miklos Felkay and his wife, Madelaine Felkay, who had entered the paint brush business in this country in 1948.

During the ensuing years, Tip Top expanded rapidly. By 1955 the company had opened a warehouse in Los Angeles, Calif. and its name had become known in the trade throughout the country. By the end of 1969, it had expanded to become the third largest manufacturer in the combined paint brush-and-roller market, having approximately 7.6 percent of sales in that market. It had manufacturing facilities in Boston and Jersey City, and warehouses in Chicago and Los Angeles. Total sales in 1969 approximated $7.4 million.

Paint rollers first entered the market in the mid-1950's. In response to the roller, Tip Top introduced a lower priced 4-inch brush that retailed for 99 cents. In 1958, Tip Top commenced selling rollers and created the Excello Roller Company as an assembler of rollers. Tip Top sold its brushes and rollers through hardware stores, food chains, paint stores, drug stores and variety stores.

By the time of its acquisition it had been recognized as being an innovative merchandiser. According to Mr. Felkay, it was the first to develop the mass merchandiser and drug store as potential markets and one of the first to display brushes and rollers in relation to the type of paint being used (Tr. 976, 973-74).

In 1968, the Felkays decided to put their company up for sale and initiated contacts with several companies, including Beatrice, seeking a purchaser. On July 31, 1969, Beatrice acquired Tip Top through an exchange of stock.

On July 1, 1970-11 months after its acquisition of Tip Top-Beatrice acquired the Essex Graham Company, a Chicago-based manufacturer of paint rollers.

The record shows that in the six year period preceding the acquisition, Essex Graham was an economically strong and viable competitor in the industry. Its assets increased from approximately $510,000 in 1964 to approximately $2,322,000 in 1969. Sales amounted to $2,216,000 in 1969 and in that year it was the fifth largest manufacturer of paint rollers in the United States. After the acquisition, Essex Graham began to distribute paint brushes.

IV. Complaint Counsel's Appeal from the Dismissal of the Complaint as to the Tip Top Acquisition.

A. Beatrice as a potential entrant

As previously noted, in the years preceding the Tip Top acquisition, Beatrice had diversified into a number of nonfood fields. These were fields appraised by Beatrice as having exceptional sales growth potential. Included was the home and garden accessory field. In 1965 Beatrice diversified into home and garden accessories by acquiring the Stiffel Company, a manufacturer of lamp shades and decorator lamps. In 1967, Beatrice made a study of the "do-it-yourself" market for the home consumer that led to a second acquisition-Melnor Industries, a manufacturer of water sprinkling equipment and garden and lawn supplies. During 1968, Beatrice continued its acquisition in the home and garden field by acquiring the following manufacturers: World Dryer Corporation (small household electric appliances); Charmglow Products, Inc. (lighting equipment, patio lamps, and gas barbeques): Max Kahn Curtain Corporation (curtains and draperies); Vogel-Petersen Co. (wardrobe racks); and the Farboil Company (specialty coatings and paints).

After having been approached by a representative of Tip Top who was seeking a purchaser for that company, Beatrice conducted a study of the paint brush-and-roller market. Beatrice concluded that this was a growth market and, according to testimony of its officials, acquired Tip Top because that firm met the prerequisites that Beatrice requires of prospective acquirees: (1) that it is a profitable company doing business in a growth market; (2) that its management agrees to continue with the firm after the merger; (3) that the acquisition will contribute to the per-share earnings of Beatrice (Karnes, Tr. 1210-19)[5].

The administrative law judge concluded that an insufficient showing had been made that Beatrice was a likely potential entrant into the brush-and-roller market. He also found that even if Beatrice were considered a potential entrant, elimination of it as a future entrant would not substantially lessen competition. His reasoning consisted of the following points and observations:

1. Complaint counsel had failed to address themselves to question whether Beatrice was a likely entrant into the paint brush-and-roller market. Rather, the thrust of their case was that Beatrice was potential entrant into the "home and garden accessory field" a much broader market and one not alleged as a line of commerce in this proceeding.
2. There was no showing that Beatrice possessed distinctive capabilities and incentives to enter the brush-and-roller market.
3. There was no showing that Tip Top was the dominant or leading firm in that market, since it had only 7.6 percent of the market in 1969.
4. Many major paint companies, given their financial capabilities and closeness to the market were more likely entrants.

As the Commission has recognized before, injury to competition by the elimination of a potential competitor can come about by one or both of two ways. First, the elimination by acquisition of a substantial firm perceived to be waiting at the edge of a market and ready to enter if profit opportunities beckon may remove an important restraining influence on prices of leading firms in a concentrated market. *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973). Secondly, elimination of likely entry into the market could remove one of the few remaining opportunities for deconcentration in a market characterized by concentration and high entry barriers. In other words, had the acquisition not occurred the potential entrant might have entered the market *de novo* or expanded a toehold acquisition, thereby creating greater capacity and competition.

Complaint counsel do not claim that Beatrice was perceived as a potential entrant by firms in any of the markets involved here and therefore do not claim that its alleged presence at the edge of the market had a disciplining effect on prices. Rather, they argue that injury has come about in the second manner–that Beatrice was in fact a future entrant into the relatively concentrated brush-and-roller market and that by choosing to enter by way of acquisition of a leading company (Tip Top), Beatrice eliminated any possibility of its entering in a more competitive manner.[6] Complaint counsel do not contend that Beatrice would have entered this market *de novo* but argue that both "objective evidence" and "subjective evidence" demonstrate that Beatrice was a likely entrant by way of a "toehold acquisition." *Cf. The Bendix Corp.*, 77 F.T.C. 731 (1970) *reversed and remanded on other grounds*, 450 F.2d 534 (6th Cir. 1971).

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[5] As to the latter prerequisite, see *Beatrice Foods Co.*, 81 F.T.C. 481, 519 n. 2:

> It has frequently been noted that one of the incentives for acquisitions by diversified companies is to increase earnings per share on common stock. This occurs when the company which is being acquired has a lower price-to-earnings ratio than the acquiring company. Simply through acquisition of such a corporation the first company can immediately increase its earnings per share and usually the value of its stock on the market. See, *e.g.*, Scherer, *Industrial Market Structure and Economic Performance* 114 (1970); Staff Report to the F.T.C., *Economic Report on Corporate Mergers* 122-138 (1969).

Complaint counsel's objective evidence is based on the fact that Beatrice was already engaged in the production and sale of certain home and garden accessory products, such as Stiffel lamps, Melnor garden tools and sprinklers and gas-fired barbeques and that following the acquisition it acquired the Chicago Specialty Company which distributed plumbing specialties to hardware stores. However, the home and garden accessory field is so large and amorphous that we must agree with the law judge's rejection of this line of argument. There has been no showing that know-how in the manufacturing of any of the above items made by Beatrice divisions would create an incentive for Beatrice to diversify into paint brushes or rollers. And even if Beatrice's interest in the home and garden accessory field were deemed somehow to place it as a potential entrant into the paint brush-and-roller category, there is no reason why it should be considered a more likely entrant than the numerous other firms similarly engaged in marketing such consumer products–many of whom, like Beatrice, are large multi-product corporations. As the Commission stated in regard to a similar argument presented in *Sterling Drug, Inc.*, 80 F.T.C. 477, 604 (1972):

> A stroll through any supermarket or drug store will show that there are scores, if not

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[6] That a violation of Section 7 can come about in the second manner discussed above-elimination of an "actual" potential entrant as distinguished from the elimination of a "perceived" potential entrant having a present influence on prices in the market-is not disputed by respondent. The Supreme Court has not had occasion to reach the question whether elimination of a non-perceived but likely potential entrant can violate Section 7 and has expressly reserved decision on that point. *Falstaff Brewing Corp., supra* 410 U.S. at 537, *United States* v. *Marine Bancorporation, Inc.*, 42 U.S. L.W. 5210, 5217 (1974). However, the Commission and several lower courts have recognized that elimination of likely future competitor can violate Section 7. *Ekco Products* v. *Federal Trade Commission*, 347 F.2d 745, 752-53 (7th Cir. 1965); *General Mills, Inc.* Dkt. 8836, Trade Reg. Rep. ¶20, 457 (1973); *Beatrice Foods Co., supra*, 81 F.T.C. at 817 (1973); *The Bendix Corp.*, 77 F.T.C. 731, 817 (1970) *reversed and remanded on other grounds*, 450 F.2d 534 (6th Cir. 1971); *United States* v. *Phillips Petroleum Company*, 367 F. Supp. 1226, 1234 (C.D. Cal. 1973), *aff'd without opinion*, 94 S. Ct. 3199 (1974); *United States* v. *Standard Oil Co.*, 253 F. Supp. 196, 227 (D.N.J. 1966). In view of our ultimate dismissal of the allegations of injury to potential competition we see no reason to reconsider the arguments that have been given in support of that interpretation. Compare Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," 78 Harv. L. Rev. 1313, 1379-80 (1965) with Rahl, "Applicability of the Clayton Act to Potential Competition," 12 A.B.A. Antitrust Section 143 (1958).

hundreds, of diverse "household products" in which Sterling-or any other established supplier of consumer items-might with equal logic be deemed a "potential entrant." Such a test, however, would nullify any meaningful distinction between likely potential competitors and all other firms. Elimination of one among such a multitude of firms could not be said to eliminate substantial potential competition.

Complaint counsel claim, however, that the law judge completely ignored evidence evincing Beatrice's strong subjective desire to enter the brush-and-roller market. We have examined the evidence cited and find it unpersuasive. The evidence of corporate intent that complaint counsel rely upon most heavily is the fact that prior to its decision to acquire Tip Top, a study was commissioned by Beatrice management entitled "Study of the Paint Brush and Paint Roller Market" wherein it was concluded that sales of paint brushes and rollers to homeowners was a growing market as it was part of the increasing do-it-yourself, home improvement trend (Tr. 1216-1219). However, this study was not made until after Tip Top approached Beatrice with a merger proposal and it was made in connection with Beatrice's appraisal of Tip Top as an acquisition candidate. It was standard procedure for Beatrice to appraise not only the past performance record of a prospective merger candidate but also of course its potential for future growth, which entails a prediction of whether the market it does business in is a growth market. The study referred to was listed as a prospective exhibit but was not offered in evidence by complaint counsel. We can only assume in its absence that the conclusions stated in it were not inconsistent with the testimony at the hearing by Beatrice executives that the company had no overall plan to enter the market aside from the Tip Top acquisition.

Complaint counsel also point to evidence that subsequent to the Tip Top acquisition, Beatrice considered acquiring brush parts suppliers and other firms in the brush or roller business-one of them, of course, being Essex Graham which in fact was acquired one year later. However, these considerations, including the Essex Graham acquisition, were for the purpose of broadening Tip Top's production and strengthening its position in the market. Post-merger expansion through acquisition of suppliers or competitors may independently raise problems under Section 7, but standing alone do not demonstrate that prior to the acquisition the acquiring company was a potential entrant into that line of commerce.

We are not holding that simply because corporate executives testify that they had no plans to enter a particular market that their testimony must be accepted at face value. Expressions by corporate management that their company did not intend to enter a market except by a particular acquisition are by their nature self-serving and may express only transitory views of the corporation. "While * * * subjective evidence is probative on the issue of potential entry, it is inherently unreliable and must be used with great care * * * [S]ubjective evidence should be preferred only when the objective evidence is weak or contradictory." *United States* v. *Falstaff Brewing Corp., supra,* 410 U.S. 548 (Marshall, J., concurring); Here, however, there is no persuasive evidence, objective *or* subjective, that rebuts the testimony of Beatrice's executive officers that the company had no plans to enter the market but for this acquisition. By relying on the fact that Beatrice studied the growth potential of the market in which Tip Top did business, complaint counsel are in effect arguing that the willingness of Beatrice to acquire Tip Top demonstrates *ipso facto* that Beatrice was a likely entrant into the market. But as was noted in *Ekco Products* v. *Federal Trade Commission,* 347 F.2d 745, 752 (7th Cir. 1965), that rule would make virtually every merger unlawful.[7] The test is whether "the acquiring corporation * * * would have entered the field by internal expansion but for the merger" *id.* at 752-753. Or, looking at the matter from a different perspective, whether the respondent would probably re-enter the market by internal expansion or equivalent means if divestiture were ordered. *General Mills, Inc.,* Dkt. 8836, Trade Reg. Rep. ¶ 20, 457 (1973) [83 F.T.C. 696].

Having concluded that the record fails to support any finding that Beatrice was a probable entrant into any of the relevant product markets involved in this case aside from its acquisition of Tip Top, we find no necessity to pass on the additional arguments relied upon by the law judge in dismissing the charge that potential competition was eliminated as a result of the Tip Top acquisition.

B. "Entrenchment" Arguments

Complaint counsel contend that quite apart from whether Beatrice was a potential entrant into the relevant market, the acquisition entrenched Tip Top in the market in a manner that will hinder competition. Complaint counsel argue *inter alia:*

> 1. [After the subsequent acquisition of Essex Graham] Tip Top was able to greatly expedite its expansion of capacity in rollers, vertically integrate its roller production to include certain roller manufacturing operations of Essex Graham previously not performed by Tip Top and reduce overall costs of both companies.
>
> 2. Tip Top has obtained the warehousing and trucking facilities of the entire Beatrice organization * * * Having a warehouse system located throughout the country enables mass merchandisers and other accounts to be serviced more efficiently than has been the practice in this industry.
>
> 3. Beatrice can provide extensive financial resources to expand product lines, service and sales.
>
> 4. Beatrice studied Tip Top production and distribution processes and made suggestions for improvement.

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[7] See also *United States* v. *Falstaff Brewing Corp., supra,* 410 U.S. 561: "[M]ere entry by acquisition would not prima facie establish a firm's status as an actual potential entrant" (Marshall, J., concurring).

5. Beatrice greatly expanded Tip Top's rebate program to jobbers and distributors. Maximum rebates increased from 5 percent prior to the acquisition to 10 percent following the acquisition. Various conditions and requirements placed on dealers to be eligible for the rebate program have been eliminated since the acquisition of Tip Top.

Although there is scant record support for most of the assertions that operating costs have been reduced as a result of the merger, even assuming all these changes were effected, improved efficiencies and price reductions are certainly no reason to condemn a merger not otherwise shown to be anticompetitive. Although it has been said that merger cannot be "defended" on the ground that a more efficient industrial entity has resulted, such statements have always appeared in the context of a merger having overriding anticompetitive consequences such as elimination of a competitor and vertical foreclosure of markets, *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 344; or the raising of substantial entry barriers having little relationship to real efficiencies, *Federal Trade Commission* v. *Procter & Gamble Co.,* 386 U.S. 568, 580 (1967).

More relevant to the issue of anticompetitive effects of the merger is complaint counsel's argument that the acquisition may create psychological barriers to new competition, that "no one can expect new entrants into an industry dominated by a Beatrice * * *." However this argument depends, as complaint counsel seem to agree, on Beatrice occupying a dominant position in the industry. But in the year of acquisition, Tip Top, although it ranked third in the industry, had but 7.6 percent of sales.[8] In contrast, in the cases relied upon by complaint counsel, the acquired firms did have a dominant position and their acquisition by an even larger corporation that manufactured related product lines threatened permanently to entrench the already dominant firm. In *Procter & Gamble supra,* the acquired firm, Clorox, represented nearly 50 percent of sales of liquid bleach nationally and had even higher shares of regional markets. In *General Foods* v. *Federal Trade Commission,* 386 F.2d 936 (3d Cir. 1967), the acquired company, S.O.S., had 51 percent of total sales.[9] In both cases, the remaining firms were small single-product firms that could not qualify for the substantial advertising volume discounts that were then available to large multi-product advertisers such as Procter & Gamble and General Foods.[10] The record clearly shows, despite complaint counsel's arguments to the contrary, that media advertising is not an important factor in paint applicator markets.

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[8] In previous cases involving the "toehold" doctrine, the Commission has considered firms having market shares below 10 percent as toehold companies, acquisition of which would have been procompetitive. *The Bendix Corp.,* 77 F.T.C. 731, 821 (1970) (fourth-ranked Wix Corporation, with 9.5 percent of the market); *Stanley Works,* 78 F.T.C. 1023, 1072 (1971), 469 F.2d 498, 501 (2d Cir. (1972) (third-ranked Ajax, with about 8 percent of the market). Although these cases can perhaps be distinguished from the instant one in that different industries and other factors were involved, in this case complaint counsel argue that had Beatrice acquired Masterset Brush Company, which had 3.6 percent of the market, competition would have *benefited* as Beatrice would have used its deep pocket resources to expand Masterset thereby challenging the position of market leaders. In contrast, complaint counsel assert that Beatrice's deep pocket rendered the Tip Top acquisition anticompetitive and unlawful. It is difficult, however, to see how a difference in only 4 percentage points in market shares (Masterset's 3.6 percent compared to Tip Top's 7.6 percent) can make the difference between a *procompetitive* merger and one that it is claimed will substantially lessen competition.

[9] In *United States* v. *Wilson Sporting Goods Co.,* 288 F. Supp. 543 (N.D. Ill. 1968), another case cited by complaint counsel, the acquired firm was number one in its market with a 32 percent market share.

In support of their position that Beatrice's bigness and diversity will enable it to gain business at the expense of smaller brush-and-roller competitors, complaint counsel point to evidence that, subsequent to the acquisition, Tip Top's management in an effort to get a large chain store company to switch to Tip Top as its supplier of brushes and rollers represented that purchases of Tip Top products would help earn the company rebates on other Beatrice home and garden accessory products carried by the company's stores. However, unchallenged evidence was introduced by Beatrice that such a corporate-wide discount was against Beatrice's policy-that each division operates as individual profit centers with independent pricing policies-and that Beatrice made supervisory changes within Tip Top to prevent a recurrence of such representations (Tr. 1224). No such corporate-wide discount in fact existed or was ever granted to the buyer (Tr. 1155-59). We cannot find on the basis of this isolated incident that Beatrice will be inclined to use truly predatory methods to gain new customers for Tip Top.

It is true that as a result of the acquisition, Tip Top gained access to Beatrice's "deep pocket" for capital expansion loans. No significant competitive advantage would appear to result, however, since this industry is not capital intensive. With firms like PPG Industries, Consolidated Foods, and Sherwin Williams manufacturing brushes and rollers we find it difficult to accept the argument that Beatrice's deep pocket will enable Tip Top to dominate or restructure this industry.

V. Respondent's Appeal from the Finding that the Essex Graham Acquisition Violated Section 7.

On July 1, 1970, approximately one year after the Tip Top acquisition, Beatrice acquired substantially all the assets of the Essex Graham Company. Essex Graham at the date of acquisition was engaged solely in the manufacture and sale of paint rollers and roller accessories, shipping its products to purchasers located throughout the United States from production facilities in Illinois.

The administrative law judge found that the acquisition substantially lessened actual competition in both the combined brush-and-roller market and the roller submarket and that Essex Graham was eliminated as the most likely entrant into the paint brush submarket.

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[10] Since those cases were decided, the networks have abandoned volume discounts. *Sterling Drug, Inc.* 80 F.T.C. 477, 605 (1972). See also Peterman, "The Clorox Case and the Television Rate Structure," 12 J. Law & Economics 321 (1968).

The law judge accepted complaint counsel's market figures and found that in 1969, Tip Top manufactured 7.6 percent of the combined brush-and-roller market, ranking third in such shipments. In the same year Essex's shipments of rollers represented 2.3 percent of that market, giving it a rank of 13th. In the same year, Tip Top ranked number eight in the paint roller submarket, manufacturing approximately 3.7 percent of all paint rollers. Essex Graham ranked fifth, with 7.0 percent of paint rollers shipped in the United States.

The law judge found that concentration in the relevant markets was high and rising and that the acquisition of Essex Graham by Beatrice accelerated the trend. On the basis of these and other factors cited in the Initial Decision he concluded that Section 7 had been violated and ordered divestiture of the acquired assets and all additions and improvements thereto and further ordered respondent to cease and desist from any further acquisitions of firms doing business in the market for a period of ten years without the approval of the Commission.

Our examination of the market structure and trends in the market persuades us to affirm the law judge's decision. Prior to the acquisition there had been a clear increase in concentration between 1967 and 1969:[11]

4-FIRM RATIOS (*BRUSHES-AND-ROLLERS*)	*YEAR*
36.6%	1967
38.1%	1968
41.3%	1969

8-FIRM RATIOS (*BRUSHES-AND-ROLLERS*)	*YEAR*
52.8%	1967
55.6%	1968
62.5%	1969

As previously indicated, Tip Top ranked third in shipments in this market in 1969. Adding Essex Graham's 1969 shipments to Tip Top's, four-firm concentration increased from 41.3 percent to 43.6 percent as a result of this merger.[12] Eight-firm concentration increased from 62.5 percent to 64.8 percent as a result.

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[11] In the following tabulations, we have omitted any *pro forma* increase in concentration brought about by horizontal acquisitions in 1969 and 1970 by the EZ Paintr Corporation which are discussed *infra*.

[12] The top four companies and Essex had the following sales and market shares in 1969 (CX 108c):

	Shipments ($000)	%
The Wooster Brush Co.	14,961	15.2

(Continued)

A similar increase in concentration in the paint roller submarket resulted from the merger. The top four companies in this market collectively made 58.1 percent of total shipments of paint rollers in 1969, Essex Graham ranked number five and Tip Top ranked number eight in the market. After the merger, Tip Top's position moved to number three in the market with a 10.7 percent combined share.

These two markets are "concentrated" under definitions accepted by the Commission and courts in prior merger cases. *Stanley Works*, 78 F.T.C. 1023 (1971), *aff'd* 469 F.2d 498 (2d Cir. 1972). The fact that concentration was increasing at a rapid rate at the time of the merger is added reason to order divestiture. Where there has been a "history of tendency toward concentration in the industry," mergers leading toward further concentration "are to be curbed in their incipiency," *Brown Shoe Co.* v. *United States, supra*, 370 U.S. at 345, and where "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great," *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 365 n. 42 (1963). See also *United States* v. *Von's Grocery*, 384 U.S. 270 (1966); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966); and *United States* v. *Continental Can Co.*, 378 U.S. 441. The trend toward greater concentration in the markets involved here was accompanied by a number of horizontal acquisitions.

The clear rise in concentration, substantially augmented by this merger, outweighs in our view any consideration of the fact that prior to the acquisition most of Essex Graham paint rollers may have been generally of higher quality and sold at a higher price than of Tip Top's rollers. Furthermore, the record shows that Essex Graham did sell lower-priced rollers and roller kits as well, and distributed roller products to the same type of outlets that Tip Top sold to, including mass merchandisers and drug chains (Tr. 1387, 1389, 1166, 1234, 1405, 1442, 3128, 3132, CX 115 Z7, CX 7-D, CX 5T-U). Also, Tip Top manufactured and sold quality paint brushes as well as "throwaways" (Tr. 1328, CX 115 F, RX 179A). The president of Tip Top considered manufacturers of professional applicators as competitors of Tip Top (Tr. 1263, 1327). Elimination of Essex as "a competitor" was one of the reasons cited by a vice president of Tip Top in recommending its acquisition (Tr. 3128-33).

EZ Paintr Corp.	10,902	11.1
Tip Top Brush Co., Inc.	7,437	7.6
The Sherwin-Williams Co.	7,299	7.4
* * * * *		
Essex Graham	2,245	2.3
Universe	98.2 million	

Unless the market share data placed in the record by complaint counsel is flawed and substantially overstates the degree of concentration in these markets, the only reasonable conclusion to be drawn from the record is that this merger lessened competition in the manner proscribed by Section 7.[13]

We now turn to respondent's challenge to these data.

Complaint counsel's universe figures for total shipments by manufacturers in the markets involved in this case were obtained directly from published Census reports–the 1967 Census of Manufactures and the Annual Surveys of Manufactures for 1968 and 1969. The Standard Industrial Code (SIC) 39912 and its subcategories cover shipments of paint brushes and paint rollers and do not include any products that are extraneous to this proceeding. Market shares were obtained by dividing shipments of individual companies by the universe figures obtained from the Census reports. Shipments of individual firms were obtained as follows: Companies known to be in the market were interviewed by a Commission economist and were asked to list the 12 leading companies in the brush-and-roller industry. To each firm so identified by an interviewee, the economist directed a letter requesting shipment figures of products in the relevant markets for the years 1967 through 1969. Furthermore these addressees were also requested to list the companies which they considered to be the 12 leading firms in the market. Any company not surveyed originally but listed in more than one response was then also sent such an inquiry. Twenty-eight firms were eventually surveyed in this manner. Respondent was given the opportunity to cross-examine each firm whose shipment data was placed in the record as well as an opportunity to check the accuracy of the shipment figures against original records.

The administrative law judge granted respondent ten discovery subpoenas to search for any substantial firms which may have been omitted from the above survey. The two largest firms that respondent was able to locate that had not been included in complaint counsel's survey ranked 15th and 17th in the market for 1969.

Respondent argues that the universe figures taken from Census Reports are incomplete for the reason that the Census data was obtained only from firms where paint brushes or rollers constituted the *primary* product at a given plant and not any of its secondary products. This contention is refuted by the record. The heading of the Census Table showing industry shipments states that it "Includes quantities and value of the products reported not only by establishments classified in this industry but also by establishments classified in other industries, and shipping these products as 'secondary' products." (CX 74, p. 39D-15). A Bureau of Census official testified that when annual surveys are sent to a company it is instructed to report every product it makes based upon an SIC category (Tr. 1065). Thus, even a company in a completely unrelated industry who made a small volume of paint brushes was surveyed as to its production of paint brushes and paint rollers (Tr. 1043-50).

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[13] The law judge also found that competition was substantially lessened in the paint brush submarket by the elimination of Essex Graham as the most likely future entrant into that line of commerce. In view of the clearer violations occurring in the overall market and the paint roller submarket, we find it unnecessary to decide whether elimination of Essex Graham as a potential entrant into the paint brush market was so significant as to amount to a separate violation of Section 7.

Respondent asserts that Tip Top should be viewed as an "assembler" of paint rollers, that it did not "manufacture" *all* the component parts that go into a roller unit. We find this argument confusing, as respondent admits that "The notion that an assembler in this particular industry is on the same footing as a manufacturer is a concept accepted by the Bureau of Census."[14] In view of its acknowledgment that the Census universe includes shipments of such assemblers we fail to see what respondent hopes to get from this argument. If the point that is intended is that there may be other roller "assemblers" *larger* than Tip Top or Essex Graham in the market that were not surveyed by complaint counsel and hence their individual shipment figures would not have been obtained, then we fail to see how respondent was prevented from obtaining their shipment figures. As noted previously, the law judge allowed respondent opportunity to subpoena any firms thought to be important factors in the industry and missed by complaint counsel in their survey. He indicated that if a showing was made, further subpoenas would be available. The initial grant of ten discovery subpoenas to respondent for such purpose was clearly adequate. Cf. *Papercraft Corp.* v. *Federal Trade Commission*, 472 F.2d 927 (7th Cir. 1973).

Finally, respondent complains that the law judge refused its request to subpoena approximately one hundred subpoenas to companies, many of whom are paint companies, who purchase paint applicator products from manufacturers and then repackage them for resale. The law judge was clearly correct, however, in refusing this request. The lines of commerce involved in this proceeding, as clearly indicated in the complaint, is the *manufacture* of paint applicator products. The fact that a redistributor may sell under his own label does not place him in the same position as a manufacturer. The private label distributor must still pay someone to produce his product. Companies that redistribute brushes and rollers purchased from manufacturers are at an obvious cost disadvantage with respect to manufacturers who compete in selling to the trade (Tr. 2282-84). To include in the universe sales of such redistributors would result in "double-counting" and would serve only to confuse and distort any analysis of the probable effects of the challenged acquisition.

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[14] Respondent goes on to point out, correctly, that the instructions on the Census reporting form "specifically requires the inclusion in the manufacturing category of these products which have been assembled from purchased components (CX 102, p. 3 - 1967 "Instructions for the Annual Survey of Manufactures")." Resp. Appeal Brief pp. 13-14.

VI. The Commission's Proceedings in EZ Paintr Corp., Dkt. C-2106 Do Not Compel Dismissal of the Complaint

At the time a "proposed complaint"[15] was served on respondent Beatrice, the Commission also served a proposed complaint on the EZ Paintr Corporation, a manufacturer of paint rollers, which challenged that company's acquisition in 1969 of the American Brush Corporation of Chicago, Ill. ("ABC")[16] and its acquisition in 1970 of Masterset Brushes, Inc. ("Masterset") and King Paint Roller, Inc. ("King"). The latter two companies, Masterset and King, were purchased together and had been closely held corporations owned and operated by the same persons. The EZ Paintr complaint alleged, *inter alia*, that prior to the acquisitions, EZ Paintr was the nation's largest manufacturer of paint rollers, accounting for 29.7 percent of domestic plant shipments in 1968 and that ABC and King respectively shipped 0.5 percent and 1.2 percent of paint rollers in that year. The complaint alleged a violation of Section 7 in the paint roller line of commerce and also the overall paint applicator market (brushes and rollers) and the paint brush segment.[17]

The Commission and EZ Paintr subsequently entered into a consent order agreement. The major terms of the consent order required EZ Paintr to divest all the paint roller facilities it acquired; partial divestiture was required of the paint brush business acquired from ABC and no divestiture was required of the paint brush business acquired from Masterset. Sales of the acquired properties required to be divested under the terms of the order were subsequently effectuated with Commission approval.

In the meantime, on Oct. 1, 1971, the Commission issued its formal complaint against Beatrice commencing adjudicative proceedings, no settlement having been reached under consent order procedures.[18]

Respondent argues that the Commission "approved" the concentration level in the industry when it allowed EZ Paintr to keep the paint brush manufacturing capability of ABC and the Masterset Brush Company. It argues that these properties in EZ Paintr hands increased concentration more than the consolidation of Essex Graham into the Tip-Top Beatrice organization.

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[15] Under the Commission's procedure then in effect, "proposed complaints" were served on respondents prior to issuance of a formal complaint, with notice that they had an opportunity to settle the matter under the Commission's non-adjudicative consent order procedures then in effect.

[16] This company should be distinguished from the American Brush Company of Boston, Mass., which is several times larger and is not affiliated with this company.

[17] Although EZ Paintr did not manufacture paint *brushes* prior to 1969, ABC and Masterset did. Hence the complaint alleged a violation in the paint brush line of commerce as well.

[18] The record before us does not disclose whether Beatrice made any offer of settlement. As we understand its argument, however, it is not complaining of disparate treatment during the consent order stages of the two proceedings but that any adjudication of illegality of the Essex Graham acquisition would be inconsistent with the Commission's action taken in the *EZ Paintr* matter.

It is true that the ABC and Masterset acquisitions, at least when viewed in the context of an overall brush-and-roller market, would appear to have been of greater magnitude than the Tip-Top (Beatrice)-Essex Graham merger. Combined sales were about $14 million.[19] By comparison Tip-Top applicator sales in 1969 were $7,437,000 and Essex Graham's were $2,245,000, or a combined total of somewhat less than $10 million.

Nevertheless these facts are not controlling here. Although the Commission made a determination that the settlement in *EZ Paintr* was in the public interest, that was not tantamount to a ruling that any portions of the EZ Paintr acquisitions not ordered to be divested were lawfully acquired or that acquisitions of no greater magnitude in the industry are immune from attack. The standards for determining that a proposed consent settlement is in the public interest embrace a number of considerations, including resource allocation factors, which may convince the Commission in a particular case that entry of a non-contested order containing less than a full divestiture would be preferable to seeking full divestiture after the hazards and delay of adjudication. The circumstances surrounding negotiated divestitures are so different that they usually cannot be cited in a litigation context. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 330 n. 12 (1961).

An examination of additional facts surrounding the *EZ Paintr* matter show that it is distinguishable in any event.[20] By 1971 ABC had been losing market position and sales and was in financial difficulties

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[19] In 1968, the year prior to EZ Paintr's acquisition of ABC, EZ Paintr had total applicator sales (all were paint rollers, as it sold no paint brushes) of $8,835,000 and ABC paint brush sales amounted to $1,500,000. In 1969, the year prior to its acquisition, Masterset's sales (paint brushes, as it did not make rollers) amounted to $3,570,000 and EZ Paintr's applicator sales were $9,244,000.

[20] Respondent contends that it was denied sufficient access to documents in the *EZ Paintr* files of the Commission to enable it adequately to confront the Commission with the precedents of the decisions it made in that proceeding.

The ALJ on Aug. 2, 1972 denied respondent's pre-hearing discovery motion for an order requiring production of all non-public documents in the *EZ Paintr* files. Assuming *arguendo* that, because of the facial similarity between the two proceedings, access to material information in the files beyond that available from the public docket in C-2106 was required, cf. *Sterling Drug Inc.* v. *Federal Trade Commission*, 450 F.2d 698, 711-712 (D.C. Cir. 1971), we are satisfied that respondent obtained it. Pursuant to a Freedom of Information Act request Beatrice filed with the Commission on Sept. 8, 1972, the Commission granted it access to all records pertaining to the *EZ Paintr* matter except certain confidential financial data, customer lists, and portions of intra-agency memoranda expressing individual opinions and recommendations. (No Commission memorandum or opinion, as distinguished from memoranda containing staff or individual Commissioner views, existed.) Respondent subsequently placed a number of those documents into the record of this case.

Although respondent argues that it should have had complete access to intra-agency memoranda discussing the *EZ Paintr* settlement and divestitures, we fail to see the precedential value of such discussions since none constituted or contained statements adopted by the Commission.

(Continued)

when the consent settlement was reached. Its brush manufacturing plant had been relocated in another city as a result of an urban renewal project, causing it to lose most of its experienced personnel. It was estimated by one official that production had dropped 65 percent as a result (RX 109). The public docket file indicates that EZ Paintr itself had substantial financial difficulties during 1970 and 1971 (C-2106-1-2-1, p. 77). These factors may have persuaded the Commission that full divestiture was impractical or not in the public interest. Cf. *Litton Industries*, Dkt. 8778 (slip opinion, Mar. 4, 1975) [85 F.T.C. 333]. In contrast, Essex Graham and Beatrice were growing, profitable companies.

Also it should be noted that, although EZ Paintr was permitted to retain much of the paint brush manufacturing capacity it had acquired, the consent order required full divestiture of the businesses in the line of commerce in which EZ Paintr was previously engaged, the manufacture of paint rollers. Tip Top and Graham were also substantial factors in that market. Clearly, insofar as preserving intra-product competition in paint rollers, consistent treatment would call for an order of divestiture of Essex Graham, not dismissal of the complaint as respondent urges.[21]

VII. Respondent's Challenge to Evidentiary Rulings

Respondent claims that the ALJ erroneously prevented it from introducing competent evidence. Respondent's principal objection is that the ALJ erred in sustaining objections to questions posed by respondent's counsel to his witnesses on the ground that they were leading questions. We find no prejudice to have occurred since counsel was permitted to make offers of proof as to the expected testimony and we have accepted and considered as record evidence the offers of proof. For instance, the ALJ sustained objections to respondent counsel's asking three of his witnesses whether in their experience they regarded aerosol paint cans as competitive with brushes or rollers.[22] The offers of proof indicated that the testimony would simply have

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We conclude that Beatrice has been given sufficient access to the relevant information in the *EZ Paintr* files enabling it "to argue the precedential value of that case," *Sterling Drug, Inc. v. Federal Trade Commission*, *supra* at 711.

[21] Respondent also points to the fact that subsequent to the entry of the consent order in *EZ Paintr*, the Commission allowed EZ Paintr to divest the roller companies it had acquired (Frank Gill Company [the paint roller division of ABC] and King Paint Roller Company) to members of the applicator industry. Again, however, these transactions are distinguishable. The company, that acquired Frank Gill (Bentzinger Bros., Inc.) had only $80,000 in paint roller sales. This figure combined with Gill's roller sales in 1971 (Gill's sales had declined considerably between 1969 and 1971) gave Bentzinger only a *de minimis* share-less than 1 percent-of the paint roller market based on 1969 industry data.

The divestiture of the King Paint Roller Company is also distinguishable. The acquiring company, Red Devil Inc., did not manufacture paint applicator products for sale in this country (Tr. 2508). None of these divestiture sales approved by the Commission are comparable to the Beatrice acquisition of Essex Graham.

[22] The ALJ sustained the objections to this question on the ground it was leading (Tr. 1674, 1874, 2128). Complaint

(*Continued*)

been that aerosols and small brushes are interchangeable for *some* uses–a fact which was conceded by complaint counsel anyway and which, as we indicated *supra* p. 8 [p. 59], does not negate the market definitions adopted in this case. We have examined the other evidentiary rulings cited by respondent and find no prejudicial error.[23]

We wish to note our disagreement, however, with the ALJ's apparent belief that leading questions are improper even when used to introduce a subject matter or to refresh a witness' memory which, unaided, has been exhausted.[24] The general rule is to the contrary. *Roberson* v. *United States*, 249 F.2d 737 (5th Cir. 1957); *Green* v. *United States*, 348 F.2d 340 (D.C. Cir. 1965). Indeed we see little point in worrying about leading questions which seek to elicit information within the business expertise of witnesses that have been qualified to give opinion evidence. The "evil . . . of supplying a false memory for the witness" *United States* v. *Durham*, 319 F.2d 590, 592 (4th Cir. 1963), is unlikely to occur in such circumstances.

The examiner also disallowed a respondent's witness the opportunity to see if he could refresh his memory of names of customers from a written list. Apparently the ALJ so ruled because the list did not originate in his company and he had not seen it before. Again, however the rule is generally that any document, regardless of its origin, can be used to refresh a witness' memory. McCormick, Evidence §9 (1971). Nevertheless no prejudice occurred since an offer of proof was made and we have considered it as part of the record evidence (Tr. 2242).

Much of this record is filled with debate, acrimonious at times, over technical objections as to forms of questions. Counsel on both sides frequently indulged in raising such objections, apparently believing that they would gain some advantage in doing so. The objections did not, however, improve the quality of the evidence and served only to delay the proceeding. We reiterate what a distinguished panel of appeal judges observed many years ago in *Samuel H. Moss* v. *Federal Trade*

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counsel, however, was permitted to ask the identical question of one of his own witnesses over respondent's objection it called for a legal conclusion, (Tr. 472). Presumably, had respondent counsel raised an objection that the question was leading, the ALJ would have sustained it. In any event, we reject respondent's argument that these or any of the other instances cited in their brief amounted to prejudicial treatment favoring complaint counsel.

[23] Respondent contends that on several occasions the ALJ refused to allow offers of proof when objections were sustained. This is not accurate. Of the instances cited, there was only one (Tr. 1861-1865), where respondent was unable to make an offer of proof. No prejudice resulted since the question dealt only with a tangential issue.

Finally, we have examined respondent's arguments with respect to alleged disparate treatment between witnesses Zook and Felkay and find no error on the part of the ALJ.

[24] A sample of questions that were ruled to be improper leading questions are:

"What, if any, discount have you ever given them?" (Tr. 1446)

"In your research, are there any other products that you use besides those to which you have testified?" (Tr. 1861)

"Would you have telephone contact with your customers?" (Tr. 1816)

"In your business activity did you have an opportunity to observe the promotions of your competitors, if any?" (Tr. 1818)

"In your job as sales manager, do you call on some customers?" (Tr. 2143)

"Do you know the Ideal Brush Company?" (Tr. 2150-51)

Commission, 148 F.2d 378, 380 (2d Cir. 1945) (per curium by Clark, A. Hand and L. Hand, JJ):

> * * * Why either he [hearing examiner] or the [Federal Trade] Commission's attorney should have thought it desirable to be so formal about the admission of evidence, we cannot understand. Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence.

Although we are satisfied that no prejudice to the parties resulted from any of the ALJ's rulings, the record in this case would have been considerably shorter had the above advice been heeded.

An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon briefs and oral argument in support of cross appeals filed by respondent and complaint counsel from the initial decision in this matter; and the Commission for the reasons stated in the accompanying opinion having concluded that the appeals should be denied;

It is ordered, That the initial decision, as supplemented and modified by the Commission's opinion in this matter, and the order contained in said initial decision, be, and hereby are adopted as the decision and order of the Commission;

It is further ordered, That the parties' motions for correction of the transcript of oral argument before the Commission be, and hereby are, granted.

IN THE MATTER OF

HERBERT R. GIBSON, SR., ET AL.

Docket 9016. Order, July 1, 1975

Denial of motion by nine of the respondents herein for dismissal of the complaint.

Appearances

For the Commission: *Andre Trawick, Jr., Paul W. Turley* and *Richard H. Gateley.*

For the respondents: *Bardwell D. Odum, Robert E. Rader* and *Passman, Jones, Andrews, Coplin, Holley & Co.*, Dallas, Tex. *Presley E. Werlein, Jr.*, Houston, Tex.

ORDER DENYING MOTION TO DISMISS COMPLAINT FOR LACK OF PUBLIC INTEREST

Respondents Herbert R. Gibson, Sr., Herbert R. Gibson, Jr., Gerald Gibson, Belva Gibson, Gibsons, Inc., Gibson's Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Gibson Products Company, Inc., have moved that the complaint in this matter be dismissed as to them for lack of public interest. The administrative law judge having determined that this matter is outside the scope of his authority, certified it to the Commission pursuant to Section 3.22(a) of the rules of practice.

Respondents contend that this administrative proceeding is unnecessary inasmuch as the issues raised herein will be adjudicated in a private treble damages action, now pending in a Texas District Court, entitled *Howard-Gibco, et al.* v. *H. R. Gibson, Sr., et al.*, No. 75-0085. The Commission finds this insufficient reason to warrant dismissal since the public interest in halting respondents' allegedly illegal acts and practices will not necessarily coincide with the interests of private parties who are seeking monetary damages. *See* Order Denying Respondents' Motions for Discontinuance or Suspension of Proceedings, *In Re: Boise Cascade Corp., et al.*, Docket No. 8958 (Aug. 26, 1974) [84 F.T.C.308]. Accordingly,

It is ordered, That the aforesaid motion to dismiss the complaint in this matter be, and it hereby is, denied.

Commissioner Thompson abstaining.

IN THE MATTER OF

CROWN TRADING COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2678. Complaint, July 1, 1975-Decision, July 1, 1975

Consent order requiring a Miami, Fla., retailer of television sets, furniture and appliances, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Truett M. Honeycutt.*

For the respondents: *Arthur J. August*, Miami, Fla.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Crown Trading Company, Inc., a corporation, trading and doing business as Crown Stores, and Eusebio Benitez and Juan Benitez, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Crown Trading Company, Inc., trading and doing business as Crown Stores, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 1051 S.W. Eighth St., Miami, Fla.

Respondents Eusebio Benitez and Juan Benitez are officers of said corporation. They formulate, direct and control the policies, acts and practices of the corporate respondent, including those hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale and retail sale of television sets, furniture and appliances to the public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with credit sales, as "credit sale" is defined in Regulation Z, have caused and are causing customers purchasing television sets, furniture and appliances to execute certain blank retail installment contracts. In a substantial number of instances, such customers are never given a copy of the completed contract. Respondents do not provide these customers with any other credit cost disclosures.

By and through their use of this blank retail installment contract, respondents:

1. Fail to disclose the "annual percentage rate," computed in

accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b) (2) of Regulation Z.

2. Fail to disclose the number, amount, and due date or period of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

3. Fail to disclose the sum of the payments scheduled to repay the indebtedness, using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

4. Fail in any credit sale to disclose the price at which respondents, in the regular course of business, offer to sell for cash the property or services which are the subject of the credit sale, using the term "cash price," as required by Section 226.8(c)(1) of Regulation Z.

5. Fail to disclose the amount of any downpayment in money made in connection with any credit sale, using the term "cash downpayment," as required by Section 226.8(c)(2) of Regulation Z.

6. Fail to disclose the amount of any downpayment in property made in connection with any credit sale, using the term "trade in," as required by Section 226.8(c)(2) of Regulation Z.

7. Fail to disclose the sum of the "cash downpayment" and the "trade in" made in connection with any credit sale, using the term "total downpayment," as required by Section 226.8(c)(2) of Regulation Z.

8. Fail in any credit sale to disclose the difference between the "cash price" and the "total downpayment," using the term "unpaid balance of cash price," as required by Section 226.8(c)(3) of Regulation Z.

9. Fail to disclose all other charges which are included in the amount financed, but which are not part of the finance charge, as required by Section 226.8(c)(4) of Regulation Z.

10. Fail in any credit sale to disclose the sum of the "unpaid balance of cash price" and all other charges individually itemized, which are included in the amount financed but which are not part of the finance charge, using the term "unpaid balance," as required by Section 226.8(c)(5) of Regulation Z.

11. Fail to disclose the amount of credit extended, using the term "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

12. Fail to disclose the sum of all charges made to the customer which are required by Section 226.4 of Regulation Z to be included in the finance charge, using the term "finance charge," as required by Section 226.8(c)(8)(i) of Regulation Z.

13. Fail in any credit sale to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, using the term

"deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

14. Fail to make consumer credit cost disclosures heretofore set forth in this Paragraph before consummation of the transaction, and to furnish the customer with a duplicate of the contract or a statement by which the disclosures required by Section 226.8 of Regulation Z are made, as required by Section 226.8(a) of Regulation Z.

PAR. 5. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business as aforesaid, have charged and are now charging, a substantial number of consumers for credit life, accident, health and/or disability insurance written in connection with consumer credit sales transactions.

Typical and illustrative but not all inclusive, of the circumstances in which such insurance charges are incurred by consumers are the following, which generally occur in the sequence set forth:

1. Respondents automatically include charges for credit life, accident, health, and/or disability insurance on the credit sale disclosure statement and, unless the customer specifically objects to the inclusion of the charges for such insurance, the coverage becomes part of the credit transaction.

2. On that portion of the credit sale disclosure statement or statements which contains the statement, "I desire to obtain the creditor insurance checked above* * *" or words of similar import, followed by a line for the customer's signature, respondents, without the permission or authority of the consumer, check the box provided for the customer's election of credit life and then date and place an "x" on the line for the borrower's signature.

3. The credit sale disclosure, filled out as indicated above is presented to the customer for two signatures, and the consumer is told by respondents' employees to sign next to the "x's" respondents' employees have made. The consumer is not told of the purpose of each signature. These signatures are intended to indicate the consumer's request for the insurance coverage, and to acknowledge the consumer's receipt of the completed loan disclosure statement.

PAR. 6. By and through the acts and practices described in Paragraph Five, and others of similar import, meaning and consequence, but not specifically set forth herein, respondents, in a substantial number of instances, obtain consumers' signatures through practices which operate, directly or indirectly, to defeat the elective language of the insurance authorization disclosures by obscuring from consumers knowledge about the option, by misrepresenting to consumers that their signatures are necessary solely for the purpose of consummating the credit transaction, and by discouraging the declination of the coverage when it is questioned. These practices have the effect of preventing substantial numbers of consumers from exercising their own independent, voluntary choice whether to obtain credit life, accident, health and/or disability insurance.

Therefore, respondents, in a substantial number of instances, induce their customers to incur charges for credit life, accident, health and/or disability insurance without said customers making a knowing, affirmative election to have such insurance and, thereby, respondents have failed to obtain from each of their customers a "specifically dated and separately signed affirmative written indication of [their] desire" to obtain such insurance, as required by Section 226.4(a)(5) of Regulation Z, in spite of the existence of language to the contrary in the credit cost disclosure statement.

PAR. 7. By and through the acts and practices described in Paragraphs Five and Six hereof, respondents have failed to include the charges for credit life, accident, health and/or disability insurance in the Finance Charge when a specific dated and separately signed affirmative written indication of the consumer's desire for such insurance has not been obtained, as required by Section 226.4(a)(5) of Regulation Z, and thereby respondents:

1. Failed to disclose accurately the "finance charge," as required by Section 226.8(c)(8)(i) of Regulation Z; and
2. Failed to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, in accordance with Section 226.5, as required by Section 226.8(b)(2) of Regulation Z.

PAR. 8. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108(c) thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Crown Trading Company, Inc., is a corporation, trading and doing business as Crown Stores, organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 1051 S.W. Eighth St., Miami, Fla.

Respondents Eusebio Benitez and Juan Benitez are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Crown Trading Company, Inc., a corporation trading and doing business as Crown Stores, or under any other name or names, its successors and assigns, and its officers, and Eusebio Benitez and Juan Benitez, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the "annual percentage rate," computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Failing to disclose the number, amount, and due dates or periods of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

3. Failing to disclose the sum of the payments scheduled to repay the indebtedness, using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

4. Failing in any credit sale to disclose the price at which respondents, in the regular course of business, offer to sell for cash the property or services which are the subject of the credit sale, using the term "cash price," as required by Section 226.8(c)(1) of Regulation Z.

5. Failing to disclose the amount of any downpayment in money made in connection with any credit sale, using the term "cash downpayment," as required by Section 226.8(c)(2) of Regulation Z.

6. Failing to disclose the amount of any downpayment in property made in connection with any credit sale, using the term "trade in," as required by Section 226.8(c)(2) of Regulation Z.

7. Failing to disclose the sum of the "cash downpayment" and the "trade in" made in connection with any credit sale, using the term "total downpayment," as required by Section 226.8(c)(2) of Regulation Z.

8. Failing in any credit sale to disclose the difference between the "cash price" and the "total downpayment," using the term "unpaid balance of cash price," as required by Section 226.8(c)(3) of Regulation Z.

9. Failing to disclose all other charges which are included in the amount financed, but which are not part of the finance charge, as required by Section 226.8(c)(4) of Regulation Z.

10. Failing in any credit sale to disclose the sum of the "unpaid balance of cash price" and all other charges individually itemized, which are included in the amount financed but which are not part of the finance charge, using the term "unpaid balance," as required by Section 226.8(c)(5) of Regulation Z.

11. Failing to disclose the amount of credit extended, using the term "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

12. Failing to disclose the sum of all charges made to the customer which are required by Section 226.4 of Regulation Z to be included in the finance charge, using the term "finance charge," as required by Section 226.8(c)(8)(i) of Regulation Z.

13. Failing in any credit sale to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, using the term "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

14. Failing to make consumer credit cost disclosures heretofore set forth in this order before consummation of the transaction, and to furnish the customer with a duplicate of the contract or a statement by which the disclosures required by Regulation Z are made, as required by Section 226.8(a) of Regulation Z.

15. Supplying, orally or in writing, any information to a customer so as to mislead or confuse the customer, or contradict or obscure, or detract attention from the information required by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

16. Misrepresenting, orally or otherwise, directly or by implication, that credit life, accident, health and/or disability insurance are required as a condition of obtaining credit from respondents.

17. Discouraging, orally or otherwise, directly or by implication, the declination of credit life, accident, health and/or disability insurance.

18. Failing, when charges for credit life insurance and/or accident and health insurance are not included in the finance charge to:

a. Obtain from each customer purchasing such insurance a specifically dated and separately signed affirmative written indication of the consumer's desire for such insurance after making written disclosure to the consumer of the costs of such insurance, as required by Section 226.4(a)(5) of Regulation Z.

b. Tell the consumer that:

i. credit life insurance and/or credit accident and health insurance are optional; and

ii. the consumer's choice regarding the insurance coverage will not be considered in respondents' approval of the consumer's credit.

19. Failing to tell every customer the purpose(s) of each signature requested by respondents on any document directly related to the consummation of the credit transaction.

20. Making any marks or otherwise instructing a consumer where to sign or date the personal insurance authorization required by Section 226.4(a)(5), in advance of the consumer's free and independent choice of such insurance.

21. Failing in any consumer credit transaction or advertisement to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form, and amount required by Sections 226.6, 226.7, 226.8, and 226.10 of Regulation Z.

It is further ordered, That whenever the sales presentation is principally made in a language other than English, *e.g.*, Spanish, that the customer be given a statement containing the disclosures required by Section 226.8 of Regulation Z, in the form and manner prescribed therein but in the same language as that principally used in the sales presentation made to such customer.

It is further ordered, That respondents prominently display the following notice both in Spanish and in English in two or more locations in that portion of respondents' business premises most frequented by prospective customers, and in each location where customers normally sign consumer credit documents or other binding instruments. Such notice shall be considered prominently displayed only if so positioned as to be easily observed and read by the intended individuals:

NOTICE TO CREDIT CUSTOMERS

If The Dealer Is Financing Or Arranging The Financing Of Your Purchase, You Are Entitled To Consumer Credit Cost Disclosures As Required By The Federal Truth In Lending Act. These Must Be Provided To You In Writing Before You Are Asked To Sign Any Document Or Other Papers Which Would Bind You To Such A Purchase.

It is further ordered, That the respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged, as well as a description of their duties and responsibilities.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor business, corporate or otherwise, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MARSHALL CAVENDISH CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2679. Complaint, July 14, 1975-Decision, July 14, 1975

Consent order requiring a New York City seller and distributor of encyclopedia and other educational material, among other things to cease distributing any product through the use of a continuity program that provides for the delivery on approval any product at intervals with the balance being sent in one or more multi-unit shipments.

Appearances

For the Commission: *Edward D. Steinman.*

For the respondent: *Peter D. Standish, Weil, Gotshal & Manges,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Marshall Cavendish Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Marshall Cavendish Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 110 E. 59th St., New York, N.Y.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale or distribution of encyclopedias, reference or educational material and other publications or other items of merchandise to the general public, and in the inducement and collection of payments for said publications or other items of merchandise from members of the general public.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, said publications or other items of merchandise to be shipped or distributed from its places of business or from its sources of supply to purchasers and prospective purchasers thereof located in the various States of the United States other than the State where such publications or other items of merchandise were shipped or distributed. Furthermore, respondent disseminates, and has disseminated through the U.S. mail advertising material for the promotion of such publications or other items of merchandise to recipients located in States other than the State of origination of such mailings. In connection with such publications or other items of merchandise, respondent causes and has caused the mailing of invoices, collection notices and various other commercial papers or documents, for the purpose of inducing and collecting payment for said publications or other items of merchandise, among and between the several States of the United States. Respondent maintains, at all times mentioned herein has maintained, a substantial course of trade in such publications or other items of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent has and is disseminating promotional material relating to continuity book programs. Such promotional material is distributed in mass through the U.S. mail for the purpose of inducing the recipient of such material to become a subscriber to said continuity book programs. A continuity book program is a method of distribution whereby persons receive individual volumes of a set of publications on an approval basis.

The promotion material disseminated by respondent is both voluminous and verbose. The recipient of such material is advised of the availability of obtaining the first volume of a set of publications without cost in return for the recipient's agreement to become a subscriber to respondent's continuity book program. While placing extensive emphasis on the virtues of the program and on the minimal obligation of the recipient, respondent's promotional material does not contain adequate material disclosures of the fact that only the first few volumes of the set of publications are mailed to subscribers singly and individually with the remaining volumes being mailed to subscribers by means of bulk shipments. Among and including the statements and representations set forth in said promotional material, but not all inclusive thereof, are the following:

The International Wildlife Encyclopedia

[Return coupon mailed by recipient to respondent]

> As a subscriber you will be notified in advance of all future shipments. You may reject any shipments simply by notifying us. Also, if not completely delighted with any volume after FREE examination in your home, you may return it at our expense and owe nothing.

* * * * *

> You may cancel AT ANY TIME after taking as many or as few volumes as you like -

even none at all if you so choose. The magnificent FIRST VOLUME is yours to keep ABSOLUTELY FREE in any case.

Family, Life and Health Encyclopedia

[Advertising piece]

As publishers of the FAMILY, LIFE AND HEALTH ENCYCLOPEDIA, we are frankly puzzled!

You see, we can't imagine why *everyone* doesn't send in for their *free* copy of volume one - a big, deluxe library volume, filled with pictures - and all absolutely *free*, with no obligation to buy another book ever!

* * * * *

You will *not* receive a bill. You will *not* receive another volume, *unless you wish.* If you decide that you do not want any more volumes simply tell us.

Perhaps you say to yourself; "I know all about buying books by mail. They will send me books that I have not ordered and then send me bills for these unordered books."

This cannot happen because this is *not* a Book Club. There are no monthly cards to return. Once you tell us to cancel we CANCEL. You never receive another book.

Man, Myth and Magic

[Advertising piece]

There is absolutely no need for you to decide now whether or not you would like additional volumes of Man, Myth and Magic. *You do not obligate yourself in any way by sending for your free first volume.* It is our complementary gift to you!

PAR. 5. Through the use of said statements or others of similar import and meaning but not specifically set forth herein, respondent has represented, and is continuing to represent, directly or by implication:

(a) That subscribers to respondent's continuity programs are accorded the option of receiving a single book at a time, and thereby are afforded the opportunity to receive and review on approval each book separately and to reject or accept same, until the expiration of the continuity programs.

(b) That no further volumes of books will be received after said subscribers have notified respondent to cancel their subscriptions to the programs.

(c) That persons who subscribe to respondent's continuity programs do so without risk or obligation.

PAR. 6. In truth and in fact:

(a) Subscribers to respondent's continuity programs are not accorded the option of receiving a single book at a time, and thereby are not afforded the opportunity to receive and review on approval each book separately and to reject or accept same, until expiration of their continuity programs. Respondent does not adequately advise subscribers of the material fact, when the subscribers initially receive promotional material concerning the continuity programs, that all but the first few books are shipped in mass by means of single bulk shipments.

(b) Subscribers to respondent's continuity programs, in many instances, continue to receive volumes of books after notifying respondent to cancel their subscriptions to the programs.

(c) Subscribers to respondent's continuity programs are subject to risks or obligations. Once a person subscribes to the continuity programs, respondent imposes the following duties or obligations on the subscribers: must notify respondent to prevent shipment of additional books; must return to respondent all books found unacceptable, must pay for all books not returned to respondent. Subscribers also incur the risk that due to delays in mailing delivery or computer error, they will receive unordered merchandise or incorrect billings for books that have either been returned to respondent or for books that have been shipped to subscribers after said subscribers cancelled their subscription to the continuity programs.

Therefore, respondent's statements, representations, acts and practices, and its failure to adequately disclose material facts, as set forth in Paragraphs Four through Six, hereof, were and are, false, misleading, deceptive and unfair.

PAR. 7. In the further course and conduct of its business, as aforesaid, a substantial majority of the persons who initially subscribe to any of respondent's continuity book programs subsequently cancel or otherwise terminate their relationship with respondent prior to shipment of all of the volumes of books contained in said continuity programs. Respondent has failed to establish and implement adequate procedures to insure that subscribers who subsequently cancel or otherwise terminate their relationship with respondent will not receive volumes of books from respondent after their severance from the continuity programs.

As a result of respondent's failure to establish and implement adequate cancellation procedures, subscribers have received unauthorized, unwanted shipment of books and have received repeated, unrelented mailings of bills, dunning letters, and similar correspondence relating to such books. Due to receipt of such books, bills and dunning letters, subscribers have had to expend their time and energies to dispose of the books sent to them and to attempt to correct respondent's erroneous billing notices.

Therefore, respondent's failure to establish and implement adequate cancellation procedures were and are unfair acts and practices.

PAR. 8. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of publications and other items of merchandise of the same general kind and nature as sold by respondent.

PAR. 9. The use by respondent of the aforesaid unfair, and false, misleading and deceptive statements, representations and practices and the failure to disclose material facts, have had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that such statements and representations were, and are, true and complete, or into the purchase or retention, and payment for, substantial quantities of said publications and other items of merchandise by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Marshall Cavendish Corporation is a corporation organized, existing and doing business under and by virtue of the laws

of the State of Delaware, with its office and principal place of business located at 110 E. 59th St., New York, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Marshall Cavendish Corporation, a corporation, its successors and assigns, and its officers, and its agents, representatives, employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale or sale, inducing or collecting payments for, and distribution of any encyclopedia or educational series of books, or of any merchandise, hereinafter such books and merchandise sometimes collectively referred to as products, through the use of a continuity program that provides contractually for the delivery, on an approval basis, of any of said products to any person at intervals, with the balance of the program sent in one or more multi-unit shipments, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Any person has the option to receive each product, separately and individually, and to accept or reject same, unless such representation is true.

(b) Any person will not receive any further products after the respondent has received and processed a properly identified notice of his cancellation of any such continuity program, unless such representation is true; or misrepresenting, in any manner, the consequences resulting from any person's cancellation of his participation in any such continuity program.

(c) Any person incurs no risk or obligation by joining any such continuity program unless such representation is true; or misrepresenting, in any manner, any condition, right, duty or obligation imposed on said person.

2. Disseminating, or causing the dissemination of, any advertisement for such continuity program by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which fails to disclose in a clear and conspicuous manner a description of the material conditions and terms of any such continuity program, and the material duties and obligations of any subscriber thereto, including:

(a) A description of each product, the billing charge to be made therefor, the anticipated total number of products included in any such continuity program, the number of products included in each shipment, except that as to the last two shipments, respondent may instead disclose the approximate number of volumes in the second to last shipment and the fact that the last shipment contains the balance of the products to be sent, and the number of and the approximate intervals between each such shipment.

(b) A description of the procedures, including any time limitations, for cancellation prior to delivery, and for rejecting after examination by returning any product, and the fact that the respondent will grant an allowance or credit against billing charges for any unwanted product that has been rejected or returned pursuant to the terms of the continuity program; and

(c) That in order for any communication, including any cancellation, to be processed by the respondent prior to the shipment of any product, such communication must be received by the respondent within the time period provided to the subscriber in accordance with Paragraph 4, *infra*.

3. Failing to disclose, clearly and conspicuously, on any return coupon, order form or any other document used for responding to any such continuity program offered, and, in magazine or newspaper advertising, in immediate and close conjunction with any return coupon, order form or any other document used for responding to any such continuity program offered, the following information:

(a) The anticipated total number of products included in any such continuity program;

(b) The number of products included in each shipment, except that as to the last two shipments, respondent may instead disclose the approximate number of volumes in the second to last shipment and the fact that the last shipment contains the balance of the products to be sent; and

(c) The number of and the approximate intervals between each such shipment.

4. Failing to notify the subscriber subsequent to enrollment, clearly and conspicuously, in conjunction with the delivery of products sent to any subscribers, of the time period or periods after which the respondent will initiate processing of any future shipment or shipments.

5. Failing to establish and implement adequate procedures so that the subscriber will be provided with any such notifications required by Paragraph 4, *supra*, at least 15 days prior to the anticipated processing date of any subsequent shipment.

6. Failing to advise the subscriber, clearly and conspicuously, in close conjunction with the notification required in Paragraph 4, *supra*,

that the subscriber must advise the respondent prior to the anticipated processing date if any change is desired in the status of the subscriber's account.

7. Preparing shipping labels for any shipment of any product in such continuity program for which the recipient will incur a monetary obligation, until at least four days after the anticipated processing date established pursuant to Paragraph 4, *supra*, in connection with that shipment.

8. Failing to establish and implement adequate procedures to credit, for the full invoiced amount thereof, any properly identified return of any product sent to a subscriber to any such continuity program, and to guarantee to the postal service or the subscriber postage adequate to return such product to the respondent, when:

(a) The product is sent to a subscriber after the respondent has received and processed such notice of cancellation prior to the anticipated processing date established in conjunction with the shipment of such product as required by Paragraph 4, *supra;* or

(b) Such notice of cancellation is received by the respondent within 4 days of the anticipated processing date established pursuant to Paragraph 4, *supra*, but has been mailed by the subscriber and postmarked at least three days prior to the date disclosed as aforesaid.

9. Failing to establish and implement adequate procedures to prevent the sending of any product to any subscriber to any such continuity program, or mailing any bill or invoice therefor, after the respondent has received and processed any properly identified notice of cancellation from said subscriber prior to the date upon which the respondent may initiate the processing for the shipment of said product pursuant to Paragraph 7, *supra*.

10. Failing to establish and implement adequate procedures to do the following, after receipt of any properly identified claim for adjustment in connection with any bill or invoice or any defense raised by any alleged debtor in connection with any such continuity program;

(a) Make any such adjustment within 14 days of receipt of such claim; or

(b) Acknowledge the receipt of the claim or defense within 14 days of receipt by the respondent and suspend all collection procedures with such alleged debtor until 25 days after complying with the procedures set forth in (c), below; and

(c) Make the requested adjustment within 60 days, or, within said period, inform the alleged debtor in writing of the respondent's understanding of the facts alleged in the claim or defense.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

THE GREYSTONE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2680. Complaint, July 14, 1975 - Decision, July 14, 1975

Consent order requiring a New York City seller and distributor of encyclopedia and other educational material, among other things to cease distributing any product through the use of a continuity program that provides for the delivery, on approval, any product at intervals with the balance being sent in one or more multi-unit shipments in violation of the Federal Trade Commission Act.

Appearances

For the Commission: *Edward D. Steinman.*

For the respondent: *Peter D. Standish, Weil, Gotshal* and *Manges,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Greystone Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Greystone Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 225 Park Ave. S., New York, N.Y.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale or distribution of encyclopedia, reference or educational material and other publications or other items of merchandise to the general public, and in the inducement and collection of payments for said publications or other items of merchandise from members of the general public.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, said publications or other items of merchandise to be shipped or distributed from its places of business or from its sources of supply to purchasers and prospective purchasers thereof located in the various States of the United States other than the state where such publications or other items of merchandise were shipped or distributed. Furthermore, respondent disseminates, and has disseminated through the U.S. mail advertising material for the promotion of such publications or other items of merchandise to recipients located in States other than the State of origination of such mailings. In connection with such publications or other items of merchandise, respondent causes and has caused the mailing of invoices, collection notices and various other commercial papers or documents, for the purpose of inducing and collecting payment for said publications or other items of merchandise, among and between the several States of the United States. Respondent maintains, at all times mentioned herein has maintained, a substantial course of trade in such publications or other items of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent has and is disseminating promotional material relating to continuity book programs. Such promotional material is distributed in mass through the U.S. Mail for the purpose of inducing the recipient of such material to become a subscriber to said continuity book programs. A continuity book program is a method of distribution whereby persons receive individual volumes of a set of publications on an approval basis.

The promotion material disseminated by respondent is both voluminous and verbose. The recipient of such material is advised of the availability of obtaining the first volume of a set of publications without cost in return for the recipient's agreement to become a subscriber to respondent's continuity book program. While placing extensive emphasis on the virtues of the program and on the minimal obligation of the recipient, respondent's promotional material does not contain adequate material disclosures of the fact that only the first few volumes of the set of publications are mailed to subscribers singly and individually with the remaining volumes being mailed to subscribers by means of bulk shipments. Among and including the statements and representations set forth in said promotional material, but not all inclusive thereof, are the following:

The Practical Encyclopedia of Good Decorating and Home Improvement

[Advertising piece]

> Frankly, I do not understand why *everyone* does not send in for free Volume 1 - since it is absolutely free (we even pay the postage) and since there is absolutely no obligation to buy any volumes now or ever.
>
> * * * * *
>
> Let me assure you that Volume 1 *is actually free*. There are no strings attached. If you decide that you do not want any more volumes you simply tell us. You *will never* receive a bill - you *will never* receive another volume* * *
>
> * * * * *
>
> Perhaps you say to yourself: "I know all about buying books by mail. They will send books that I have not ordered and then send me bills for these unordered books."
>
> This cannot happen because this is *not* a Book Club. There are no monthly cards to return. Once you tell us to CANCEL, we CANCEL. You never receive another book.

PAR. 5. Through the use of said statements or others of similar import and meaning but not specifically set forth herein, respondent has represented, and is continuing to represent, directly or by implication:

(a) That subscribers to respondent's continuity programs are accorded the option of receiving a single book at a time, and thereby are afforded the opportunity to receive and review on approval each book separately and to reject or accept same, until the expiration of the continuity programs.

(b) That no further volumes of books will be received after said subscribers have notified respondent to cancel their subscriptions to the programs.

(c) That persons who subscribe to respondent's continuity programs do so without risk or obligation.

PAR. 6. In truth and in fact:

(a) Subscribers to respondent's continuity programs are not accorded the option of receiving a single book at a time, and thereby are not afforded the opportunity to receive and review on approval each book separately, and to reject or accept same, until expiration of their continuity programs. Respondent does not adequately advise subscribers of the material fact, when the subscribers initially receive promotional material concerning the continuity programs, that all but the first few books are shipped in mass by means of bulk shipments.

(b) Subscribers to respondent's continuity programs, in many instances, continue to receive volumes of books after notifying respondent to cancel their subscriptions to the programs.

(c) Subscribers to respondent's continuity programs are subject to risks or obligations. Once a person subscribes to the continuity programs, respondent imposes the following duties or obligations on the subscribers: must notify respondent to prevent shipment of additional books, must return to respondent all books found unacceptable; must pay for all books not returned to respondent. Subscribers also incur the risk that due to delays in mailing delivery or computer error, they will receive unordered merchandise or incorrect billings for books that have either been returned to respondent or for books that have been shipped to subscribers after said subscribers cancelled their subscription to the continuity programs.

Therefore, respondent's statements, representations, acts and practices, and its failure to adequately disclose material facts, as set forth in Paragraphs Four through Six, hereof, were and are, false, misleading, deceptive and unfair.

PAR. 7. In the further course and conduct of its business, as aforesaid, a substantial majority of the persons who initially subscribe to any of respondent's continuity book programs subsequently cancel or otherwise terminate their relationship with respondent prior to shipment of all of the volumes of books contained in said continuity programs. Respondent has failed to establish and implement adequate procedures to insure that subscribers who subsequently cancel or otherwise terminate their relationship with respondent will not receive volumes of books from respondent after their severance from the continuity programs.

As a result of respondent's failure to establish and implement adequate cancellation procedures, subscribers have received unauthorized, unwanted shipment of books and have received repeated, unrelented mailings of bills, dunning letters, and similar correspondence relating to such books. Due to receipt of such books, bills and dunning letters subscribers have had to expend their time and energies to dispose of the books sent to them and to attempt to correct respondent's erroneous billing notices.

Therefore, respondent's failure to establish and implement adequate cancellation procedures, were and are unfair acts or practices.

PAR. 8. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of publications and other items of merchandise by reason of said erroneous and mistaken belief.

PAR. 9. The use by respondent of the aforesaid unfair, and false, misleading and deceptive statements, representations and practices and the failure to disclose material facts, have had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that such statements and representations were, and are, true and complete, or into the purchase or retention, and payment for, substantial quantities of said publications and other items of merchandise by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in §2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Greystone Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 225 Park Ave. South, New York, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent The Greystone Corporation, a corporation, its successors and assigns, and its officers, and its agents, representatives, employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale or sale, inducing or collecting payments for, and distribution of any encyclopedia or educational series of books, or of any merchandise, hereinafter such books and merchandise sometimes collectively referred to as products, through the use of a continuity program that provides contractually for the delivery, on an approval basis, of any of said products to any person at intervals, with the balance of the program sent in one or more multi-unit shipments, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Any person has the option to receive each product, separately and individually, and to accept or reject same, unless such representation is true.

(b) Any person will not receive any further products after the respondent has received and processed a properly identified notice of his cancellation of any such continuity program, unless such representation is true; or misrepresenting, in any manner, the consequences resulting from any person's cancellation of his participation in any such continuity program.

(c) Any person incurs no risk or obligation by joining any such continuity program unless such representation is true; or misrepresenting, in any manner, any condition, right, duty or obligation imposed on said person.

2. Disseminating, or causing the dissemination of, any advertisement for such continuity program by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which fails to disclose in a clear and conspicuous manner a description of the material conditions and terms of any such continuity program, and the material duties and obligations of any subscriber thereto, including:

(a) A description of each product, the billing charge to be made therefor, the anticipated total number of products included in any such continuity program, the number of products included in each shipment, except that as to the last two shipments, respondent may instead disclose the approximate number of volumes in the second to last shipment and the fact that the last shipment contains the balance of the products to be sent, and the number of and the approximate intervals between each such shipment.

(b) A description of the procedures, including any time limitations, for cancellation prior to delivery, and for rejecting after examination by returning any product, and the fact that the respondent will grant an allowance or credit against billing charges for any unwanted product that has been rejected or returned pursuant to the terms of the continuity program; and

(c) That in order for any communication, including any cancellation, to be processed by the respondent prior to the shipment of any product, such communication must be received by the respondent within the time period provided to the subscriber in accordance with Paragraph 4, *infra.*

3. Failing to disclose, clearly and conspicuously, on any return coupon, order form or any other document used for responding to any such continuity program offered, and, in magazine or newspaper advertising, in immediate and close conjunction with any return coupon, order form or any other document used for responding to any such continuity program offered, the following information:

(a) The anticipated total number of products included in any such continuity program;

(b) The number of products included in each shipment, except that as to the last two shipments, respondent may instead disclose the approximate number of volumes in the second to last shipment and the fact that the last shipment contains the balance of the products to be sent; and

(c) The number of and the approximate intervals between each such shipment.

4. Failing to notify the subscriber subsequent to enrollment, clearly and conspicuously, in conjunction with the delivery of products sent to any subscribers, of the time period or periods after which the respondent will initiate processing of any future shipment or shipments.

5. Failing to establish and implement adequate procedures so that the subscriber will be provided with any such notifications required by Paragraph 4, *supra*, at least 15 days prior to the anticipated processing date of any subsequent shipment.

6. Failing to advise the subscriber, clearly and conspicuously, in close conjunction with the notification required in Paragraph 4, *supra*, that the subscriber must advise the respondent prior to the anticipated processing date if any change is desired in the status of the subscriber's account.

7. Preparing shipping labels for any shipment of any product in such continuity program for which the recipient will incur a monetary obligation, until at least 4 days after the anticipated processing date established pursuant to Paragraph 4, *supra*, in connection with that shipment.

8. Failing to establish and implement adequate procedures to credit, for the full invoiced amount thereof, any properly identified return of any product sent to a subscriber to any such continuity program, and to guarantee to the postal service or the subscriber postage adequate to return such product to the respondent, when:

(a) The product is sent to a subscriber after the respondent has received and processed such notice of cancellation prior to the anticipated processing date established in conjunction with the shipment of such product as required by Paragraph 4, *supra;* or

(b) Such notice of cancellation is received by the respondent within 4 days of the anticipated processing date established pursuant to Paragraph 4, *supra*, but has been mailed by the subscriber and postmarked at least three days prior to the date disclosed as aforesaid.

9. Failing to establish and implement adequate procedures to prevent the sending of any product to any subscriber to any such continuity program, or mailing any bill or invoice therefor, after the respondent has received and processed any properly identified notice of cancellation from said subscriber prior to the date upon which the respondent may initiate the processing for the shipment of said product pursuant to Paragraph 7, *supra*.

10. Failing to establish and implement adequate procedures to do the following, after receipt of any properly identified claim for adjustment in connection with any bill or invoice or any defense raised by any alleged debtor in connection with any such continuity program;

(a) Make any such adjustment within 14 days of receipt of such claim; or

(b) Acknowledge the receipt of the claim or defense within 14 days of receipt by the respondent and suspend all collection procedures with such alleged debtor until 25 days after complying with the procedures set forth in (c), below; and

(c) Make the requested adjustment within 60 days, or, within said period, inform the alleged debtor in writing of the respondent's understanding of the facts alleged in the claim or defense.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

THE A & R AGENCY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2681. Complaint, July 14, 1975-Decision, July 14, 1975

Consent order requiring a New York City advertising promoter, among other things to cease using misrepresentations to sell advertising in ethnic publications, and from placing and seeking payment for unauthorized advertisements.

Appearances

For the Commission: *Moira P. McDermott.*

For the respondents: *Richard C. Shadyac*, Annandale, Va. and *Stanley R. Stern*, Brooklyn, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe The A & R Agency, a partnership doing business in its own name and as Daily Challenge, Spanish Newspaper Agency, Jewish Newspaper Agency, Scandanavian Newspaper Agency, Italian Newspaper Agency, Chinese Newspaper Agency, Catholic Newspaper Agency, German Newspaper Agency, Recorder Newspaper Agency, Caribbean Echo, Bronx Home Newspaper Agency, Polish Publication Agency, Hungarian Newspaper Agency, Greek Newspaper Agency, and Anthony Abraham individually and as a partner in said partnership and Anthony Clausi individually and as an employee of said partnership, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The A & R Agency is a partnership organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 350 Fifth Ave., New York, N.Y.

Respondent Anthony Abraham is an individual and is the only active partner in the partnership respondent. Respondent Anthony Clausi is an individual and is employed as manager of the partnership respondent. Said individual respondents formulate, direct and control the acts and practices of the partnership respondent, including the acts and practices hereinafter set forth. The address of respondent Anthony Abraham is 727 S. Alhambra Cir., Coral Gables, Fla., and the address of respondent Anthony Clausi is that of the partnership respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the solicitation of advertisements to be published in a number of newspapers, magazines, and other publications and in the collection of accounts arising out of their said business.

PAR. 3. In the course and conduct of their business, respondents engage in extensive commercial activities among the various States of the United States. By long distance telephone and other means, respondents contact prospective purchasers of advertising space in states other than the State of New York and seek to sell advertising space to such persons. Respondents transmit through the United States mails to such persons invoices, statements, letters and other business communications and receive from them bank checks, letters and other instruments of a commercial nature. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business respondents and their agents or representatives contact prospective purchasers of advertising space by telephone and other means and seek to induce them to purchase advertising space in many newspapers and periodicals among which are the Daily Challenge, El Tiempo and Menora.

In connection with such solicitations, respondents and respondents' agents and representatives, have made numerous statements regarding the character and volume of circulation of the individual publications.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

That the Daily Challenge has a circulation of 10,000 subscribers in Wilmington, Del., or 350,000 circulation in New England, New York and Washington, D.C., or reaches hundreds of Black homes by mail or is the largest newspaper in the East serving the Black community; that El Tiempo has a circulation of 200,000 or 500,000; that Menora has a guaranteed paid circulation of 72,000, or is read by 50,000 Jewish families in the New York area, or has a general circulation of more than 100,000 or 250,000 or 100,000 readers in Long Island.

PAR. 5. In truth and in fact, the various statements and representations made by respondents and respondents' agents and representatives regarding the character and volume of said publications were and are false and exaggerated. The total circulation of the Daily Challenge is about 34,000; of El Tiempo 33,000 and of Menora 30,000.

Therefore, the statements and representations set forth in Paragraph Four hereof were, and are, false, misleading and deceptive.

PAR. 6. In the course and conduct of their business, respondents and their agents or representatives seek to induce prospects to purchase advertising space in various publications by representing that the readership of a publication is of a special type or class. For example: that the Daily Challenge's readers are Black professionals, and that Menora is the Jewish businessman's paper, is widely circulated among prominent Jewish doctors, lawyers, and professionals, and goes to Jewish investment houses.

PAR. 7. In truth and in fact, the various statements and representations made by respondents and respondents' agents and representatives regarding the type or class of subscribers or readers of the said publications were and are false and exaggerated. The Daily Challenge carries no news of special interest to Black professionals and the Menora is published in the Hungarian language and there is a limited number of American Jewish people who can read Hungarian.

Therefore, the statements and representations set forth in Paragraph six hereof, were, and are, false, misleading and deceptive.

PAR. 8. In the course and conduct of their business, respondents have also engaged in the practice of placing advertisements of various persons and firms in various publications without having received authorization from such persons or firms. Respondents have then sought to exact payment from said persons and firms for such unauthorized advertisements.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive practices as set forth in Paragraphs Four and Six has had, and now has, the capacity and tendency to mislead prospective advertisers into the purchase of advertising space by reason of said practices. The unfair and deceptive practice engaged in by respondents of publishing wholly unauthorized advertisements as set forth in Paragraph Eight has subjected firms and individuals to harassment and unlawful demand for payment of nonexistent debts.

PAR. 10. In the course and conduct of their business, respondents have engaged in the following additional unfair, false, misleading and deceptive practices:

1. In a substantial number of instances, respondents have represented that advertisements will appear in special sections of a publication when in fact the publication is not divided into sections and does not segregate advertisements according to type but commingles advertisements.

2. In a substantial number of instances, respondents have represented that advertisements will appear in special editions of a publication when in fact there was no special edition of the publication.

3. In a substantial number of instances, respondents have placed advertisements on dates which are contrary to those selected by the advertisers and have not advised the advertisers of the change or the reason therefor.

4. In a substantial number of instances, respondents' agents engaged in the solicitation of advertisements have represented themselves as employees of the publication for which the advertisement is being solicited.

PAR. 11. In the conduct of their business, and at all times mentioned herein respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of advertising space in newspapers, magazines and other publications.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity or tendency to mislead prospective advertisers into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of advertising space by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The A & R Agency is a partnership organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Fifth Ave., New York, N.Y.

Respondent Anthony Abraham is an individual and is the only active partner in the partnership respondent. His address is 727 S. Alhambra Cir., Coral Gables, Fla. Respondent Anthony Clausi is an individual and is employed as manager of the partnership respondent. His address is 40 Royal Park Terrace, Hillsdale, N.J. They formulate, direct and control the policies, acts and practices of said partnership, and their principal office and place of business is located at 350 Fifth Ave., New York, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents The A & R Agency, a partnership, doing business in its own name and as Daily Challenge, Spanish Newspaper Agency, Jewish Newspaper Agency, Scandanavian Newspaper Agency, Italian Newspaper Agency, Chinese Newspaper Agency, Catholic Newspaper Agency, German Newspaper Agency, Recorder Newspaper Agency, Caribbean Echo, Bronx Home Newspaper Agency, Polish Publication Agency, Hungarian Newspaper Agency and Greek Newspaper Agency and Anthony Abraham individually and as a partner in said partnership and Anthony Clausi individually and as an employee of said partnership, and their successors and assigns, respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the offering for sale or sale of advertising space in newspapers, magazines or any other publication, and in connection with the collection of or attempt to collect past due or allegedly past due accounts arising out of the publication of any advertisement, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that the circulation, whether paid or unpaid, of any newspaper, magazine or other publication is more than the circulation figures provided in writing by the publisher of said publication as stated in its certification or statements to governmental authorities or as verified by an accounting audit by independent certified public accountants and/or as they appear in the independent Audit Bureau of Circulation Reports.

2. Representing, directly or by implication, that the readership of any newspaper, magazine or other publication is more than twice the circulation figure provided for in Paragraph 1 of this order.

3. Representing, directly or by implication, that a publication for which an advertisement is being solicited is read by a certain type or class of subscriber or reader or covers a specified geographical area when such is not the fact; or misrepresenting in any manner the nature or type of reader or geographic area covered by such publication.

4. Placing, printing or publishing, or causing to be placed, printed, or published, any advertisement on behalf of any person, firm or corporation in any publication unless a prior authorization, order or agreement to purchase said advertisement has been received by respondents.

5. Sending or causing to be sent bills, collection letters or notices to any person, firm or corporation with regard to any advertisement which has been or is to be printed, inserted or published on behalf of said person, firm or corporation, or in any other manner seeking to exact payment for any advertisement, without a prior authorization, order or agreement to purchase such advertising, either orally or in writing.

6. Representing that advertisements placed by respondents for its customers will appear in special editions or in special sections of a

publication when in fact there is no such special edition of or special section in the publication for which the advertisement is solicited.

7. Placing orders for advertisements to appear on dates which differ from the dates selected by respondents' customers without advising such customers of the changes and the reasons therefor and without obtaining authorization for such changes.

It is further ordered, That:

A. Respondents' advertising solicitors or agents in making contact with any person, firm or corporation for the purpose of selling advertising clearly disclose that they are employed by The A & R Agency, or Daily Challenge, or Spanish Newspaper Agency, or Jewish Newspaper Agency, or Scandanavian Newspaper Agency, or Italian Newspaper Agency, or Chinese Newspaper Agency, or Catholic Newspaper Agency, or German Newspaper Agency, or Recorder Newspaper Agency, or Caribbean Echo, or Bronx Home Newspaper Agency, or Polish Publication Agency, or Hungarian Newspaper Agency, or Greek Newspaper Agency, to solicit advertisements for the named publication and disclose the correct and complete name of the publication for which advertising is being solicited and state the number of times a week the publication appears and the language in which the publication is printed.

B. The complete name of the publication and the dates the advertisements appeared be clearly stated on all respondents' invoices to their customers.

C. Respondents furnish tear sheets to their customers on request, for every issue in which the customers' advertisements appear and that such tear sheets show the name of the publication and the dates of publication.

D. Respondents retain all complaints from any source relating to the acts or practices prohibited by this order, for a period of two years after their receipt, and that these records be made available for examination and copying by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business.

E. Respondents notify the Commission at least thirty (30) days prior to any proposed change in the partnership respondent such as dissolution or the addition of partners or any other change in the partnership which may affect compliance obligations arising out of this order.

F. Respondents give written instructions which cover all the provisions of this order to all present and future employees, agents and representatives engaged in the offering for sale, or sale of advertising space in newspapers, magazines or any other media and engaged in the collection of or attempt to collect past due or allegedly past due accounts arising out of the publication of any advertisement and that respondents secure a signed statement acknowledging receipt of said written instructions.

G. The individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which the individual is engaged as well as a description of his duties and responsibilities.

H. The partnership respondent distribute a copy of this order to each of its operating divisions or departments.

I. No provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by the municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of or the statutes administered by the Federal Trade Commission.

J. *It is further ordered*, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

CTC COLLECTIONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2682. Complaint, July 14, 1975-Decision, July 14, 1975

Consent order requiring a West Orange, N.J., debt collection agency, among other things to cease using unfair and deceptive form letters in collecting consumer debts.

Appearances

For the Commission: *Elliot Feinberg.*

For the respondents: *Charles M. Schmidt*, Long Branch, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that CTC Collections, Inc., a corporation, and Loretta Fusaro and Kathleen O'Connor, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent CTC Collections, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 91 Main St., West Orange, N.J.

Respondents Loretta Fusaro and Kathleen O'Connor are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the practice of collecting or attempting to collect any and all kinds of alleged delinquent accounts.

PAR. 3. In the course and conduct of their business as aforesaid, respondents solicit and receive accounts for collection from businesses and professional people located in the State of New Jersey and in various other States of the United States, which accounts the respondents seek thereafter to collect from debtors in the State of New Jersey. In the further course and conduct of their business, respondents transmit collection messages from their place of business within the State of New Jersey to debtors and third parties located in the various other States of the United States. The respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been and now are, in competition in commerce with other corporations, firms and individuals in the attempted collection and collection of consumer debts on behalf of creditors.

PAR. 5. In the course and conduct of their business as aforesaid, and for the purpose of inducing consumers to pay allegedly delinquent accounts, respondents have transmitted and caused to to be transmitted, and are now transmitting and causing to be transmitted form letters, demands for payment and other printed material.

Typical and illustrative of the statements and representations made in said forms and printed materials, but not all inclusive thereof, are the following:

1. The account shown above has been put into our hands for immediate collection and with complete authority to enforce payment and to record this item on your credit history file and to report to such credit agencies as we deem appropriate.

2. Unless payment is received by immediate return mail, we will proceed with other legal means to collect this debt.

3. We know this account can now be collected and since you have not been in touch with us, we are going to proceed with every legal means available to us. This will be costly and time-consuming for you, and can only be avoided by your *immediate* remittance.

4. This is a legal five-day notice before the above creditor brings court suit for the purpose of attaching your pay, property and bank accounts to satisfy this debt.

Unless satisfactory arrangements are made with us for the payment of this debt before that time, you will be served with legal summons by a constable for appearance in court.

5. Therefore: If payment is not received on or before the ——— day of —————— A.D., 19——, proceedings may be taken against you by default.

PAR. 6. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not expressly set out herein, respondents represent and have represented, directly or by implication, that:

1. Respondents have unlimited authority to collect accounts placed with respondents for collection and are authorized to disclose information regarding these accounts to credit reporting agencies.

2. The failure to pay the amount claimed as owing within the time period(s) specified will result in legal action against the debtor.

3. The failure to agree to pay the amount claimed as owing will result in attachment proceedings against the property and wages of the debtor.

PAR. 7. In truth and in fact:

1. Respondents' authority to collect debts is limited and respondents do not have the authority to report on their accounts to credit reporting agencies.

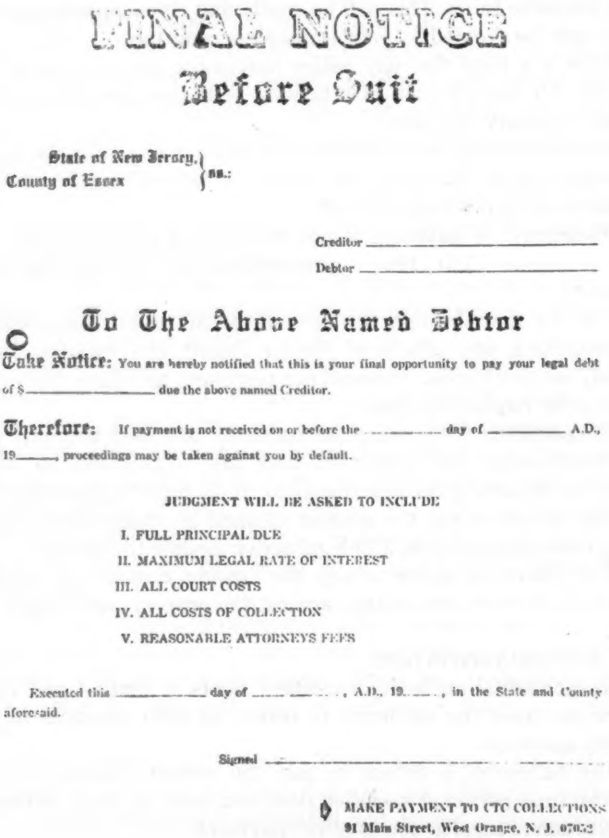
2. The failure of a debtor to pay the amount claimed as owing within the time period(s) specified does not result in most instances in the institution of legal action to effect payment.

3. The failure of a debtor to pay the amount claimed as owing within the time period(s) specified does not result in most instances in the institution of attachment proceedings to effect payment.

Therefore, the statements and representations set forth in Paragraphs Five and Six hereof were and are false, misleading, deceptive and unfair.

PAR. 8. In the course and conduct of their business as aforesaid, and for the purpose of inducing consumers to pay allegedly delinquent accounts, respondents have transmitted and caused to be transmitted, and are now transmitting and causing to be transmitted form letters, demands for payment and other printed material.

Typical and illustrative of respondents forms, but not all inclusive thereof, are the following:



FINAL NOTICE

Before Suit

State of New Jersey,
County of Essex } ss.:

Creditor ____________________

Debtor ____________________

To The Above Named Debtor

Take Notice: You are hereby notified that this is your final opportunity to pay your legal debt of $____________ due the above named Creditor.

Therefore: If payment is not received on or before the ________ day of ________ A.D., 19____, proceedings may be taken against you by default.

JUDGMENT WILL BE ASKED TO INCLUDE

I. FULL PRINCIPAL DUE
II. MAXIMUM LEGAL RATE OF INTEREST
III. ALL COURT COSTS
IV. ALL COSTS OF COLLECTION
V. REASONABLE ATTORNEYS FEES

Executed this ________ day of ________, A.D., 19____, in the State and County aforesaid.

Signed ____________________

MAKE PAYMENT TO CTC COLLECTIONS
91 Main Street, West Orange, N. J. 07052

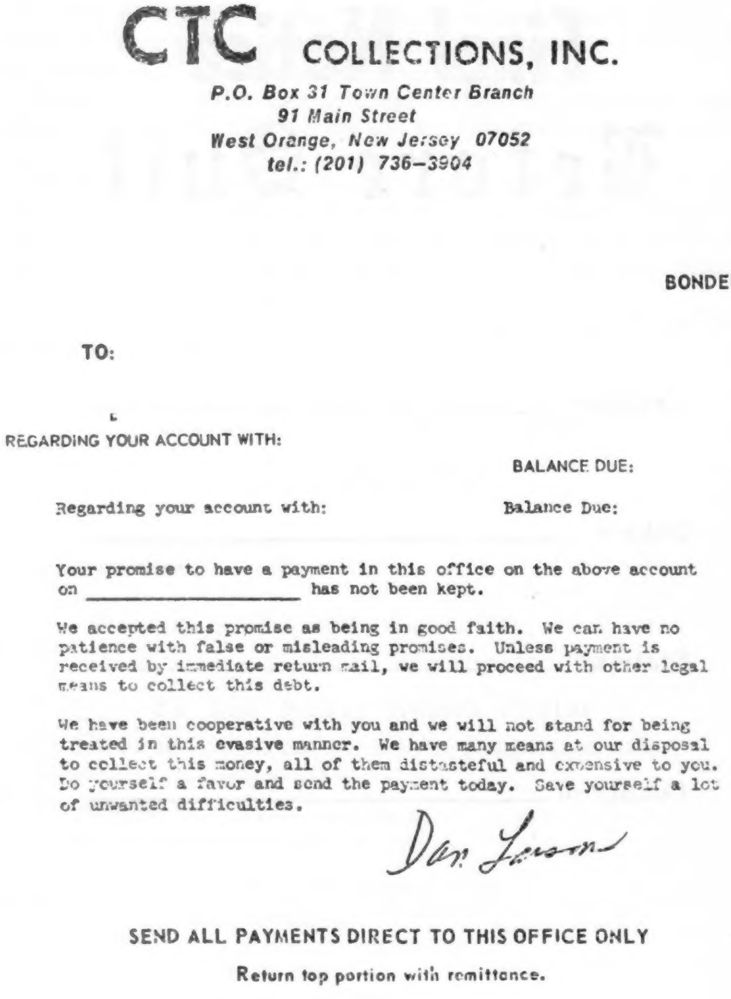
Final Notice
Before Suit

Creditor ______________________________

Debtor ______________________________

State of ______________________________

County of ______________________________



CTC COLLECTIONS, INC.

P.O. Box 31 Town Center Branch
91 Main Street
West Orange, New Jersey 07052
tel.: (201) 736-3904

BONDED

TO:

REGARDING YOUR ACCOUNT WITH:

BALANCE DUE:

Regarding your account with: Balance Due:

Your promise to have a payment in this office on the above account on ____________________ has not been kept.

We accepted this promise as being in good faith. We can have no patience with false or misleading promises. Unless payment is received by immediate return mail, we will proceed with other legal means to collect this debt.

We have been cooperative with you and we will not stand for being treated in this evasive manner. We have many means at our disposal to collect this money, all of them distasteful and expensive to you. Do yourself a favor and send the payment today. Save yourself a lot of unwanted difficulties.

Dan Larson

SEND ALL PAYMENTS DIRECT TO THIS OFFICE ONLY

Return top portion with remittance.

PAR. 9. By and through the use of said forms and the statements and representations set forth therein and others of similar import and meaning but not expressly set out herein, respondents represent and have represented, directly or by implication, that:

1. Said "Final Notice" document in form and content is an official document duly issued or approved by a court of law.

2. Judgment may be entered against the debtor without further notice to the debtor.

3. The creditor has the post judgment rights stated in said forms.

PAR. 10. In truth and in fact:

1. Said "Final Notice" form is not an official document duly issued or approved by a court of law, but on the contrary is wholly private in origin.

2. Judgment may not be entered against the consumer without further notice to the consumer but on the contrary the debtor is entitled to notice and an opportunity to appear and defend himself in a court of law prior to the entry of a judgment.

3. The creditor's rights enumerated are incomplete, inaccurate and vague and are stated to intimidate the debtor rather than to inform him of the creditor's legal rights.

Therefore, the statements and representations as set forth in Paragraphs Eight and Nine hereof were and are false, misleading, deceptive and unfair.

PAR. 11. The use by respondents of the aforementioned false, misleading, deceptive and unfair statements, representations and forms has had, and now has, the tendency and capacity to deceive and mislead persons into the erroneous and mistaken belief that said statements and representations were and are true, and induce the recipients thereof to supply information which they otherwise would not have supplied and into the payment of accounts to respondents, by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, are unethical, oppressive, exploitative and cause substantial injury to consumers, and constituted, and now constitute unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent CTC Collections, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 91 Main St., West Orange, N.J.

Respondents Loretta Fusaro and Kathleen O'Connor are officers of the aforementioned corporate respondent. They formulate, direct and control the acts and practices of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent CTC Collections, Inc., a corporation, its successors and assigns, and its officers Loretta Fusaro and Kathleen O'Connor, individually and as officers of said corporation and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of consumer debts, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or by implication, that respondents possess unlimited authority to collect accounts on behalf of their creditor-clients; or misrepresenting, in any manner, respondents' authority to collect debts on behalf of a creditor.

2. Representing in any manner, directly or by implication, that respondents possess the authority or intend to disclose information regarding debtors to a credit reporting agency.

3. Representing in any manner, directly or by implication, that legal action, including attachment or garnishment proceedings, has been initiated or is being initiated unless respondents have in fact instituted the legal action represented; or that such legal action will be initiated unless respondents are able to establish that at the time the representation was made respondents intended in good faith to institute the legal action represented.

4. Using any form to collect debts or debtor information which simulates a judicial document or is represented by any means to be a document authorized, issued, or approved by a court of law or any other official or legally constituted judicial authority; or misrepresenting, in any manner, the official nature of any document utilized in the collection of debts.

5. Representing in any manner, directly or by implication, that judgment may be entered against a debtor without the debtor having notice of the legal action and an opportunity to appear and defend himself in a court of law.

6. Informing a debtor of a creditor's right after judgment without disclosing at the same time that no judgment may be entered against the debtor unless the debtor has first been given notice and an opportunity to appear and defend himself in a court of law.

7. Representing in any manner, directly or by implication, the post judgment rights of a creditor unless said rights are in fact as specifically represented in the jurisdiction in which collection is sought; or misrepresenting in any manner, directly or by implication, the post judgment rights of a creditor.

It is further ordered, That respondents shall maintain for a period of two years with respect to each delinquent debtor, records which shall consist of copies of all collection letters, dunning notices, requests for information and similar correspondence delivered to such debtor or third parties or an indication of what form items were sent; a record or tabulation of all telephone calls made to or about the debtor showing the identity of the caller, the date and time of the call, the identity of the recipient of the call, the telephone number called, the purpose and result of the call; and copies of all documents pertaining to collection efforts such as referrals to lawyers or other agencies and legal documents utilized in collection efforts.

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each of their operating divisions, collection managers and to all personnel or other parties including attorneys and collection agencies responsible for or engaged in collection of consumer debts.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

BENEFICIAL CORPORATION, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8922. Complaint, Apr. 10, 1973 - Decision, July 15, 1975

Order requiring a Wilmington, Del., seller of personal income tax preparation services and its wholly-owned subsidiary located in Morristown, N.J., among other things to cease misrepresenting the terms and conditions of its guarantees, using the term "instant tax refund," and misusing confidential information obtained from taxpayer customers.

Appearances

For the Commission: *David C. Fix* and *Robert D. Friedman.*

For the respondents: *Edgar T. Higgins,* Morristown, N.J., *Hogan & Hartson,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Beneficial Corporation and Beneficial Management Corporation, corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Beneficial Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1300 Market St. in the city of Wilmington, State of Delaware.

Respondent Beneficial Management Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 200 South St., in the city of Morristown, State of New Jersey. It is a wholly-owned subsidiary of, and is managed, directed and controlled by, respondent Beneficial Corporation.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of personal income tax preparation services and the extension of consumer credit to the general public.

Respondents sell their aforesaid products and services directly and through various corporate subsidiaries and affiliates, hereinafter referred to for convenience as respondents' representatives.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, monies, contracts, business forms and other commercial paper and printed materials in connection with said income tax preparation and personal loan and consumer financing services to be sent by United States mail from respondents' place of business in the State of New Jersey to their local offices and subsidiaries and purchasers of respondents products and services located in various other States of the United States, and maintain and at all times mentioned herein have maintained a substantial course of trade in said services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents and their representatives have disseminated, and caused the dissemination of, certain advertisements concerning the said income tax preparation services by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said income tax preparation services and the extension of consumer credit.

PAR. 5. For the purpose of disseminating such advertisements, respondents and their representatives have employed television and radio commercial broadcasts, newspaper and periodical insertions, direct mail literature and point of sale promotional materials.

Typical of the statements and representations in said advertisements, but not all inclusive thereof, are the following:

1. Radio and Television:

a) This year have your tax returns prepared a better way * * * by computer * * * at Beneficial Finance. With Beneficial's Income Tax Service for as little as $5 * * * you get maximum deductions * * * 100% accuracy * * * Plus you can get an Instant "Tax Refund." The instant you qualify for a loan-you get your refund * * * in cash-instantly. So have your taxes done at Beneficial Finance. and get your Instant "Tax Refund."

b) Where are the smart people having their tax returns prepared this year? At Beneficial Finance. That's right, Beneficial Finance — with its new, fully computerized Income Tax Service. You get all the deductions you're entitled to — and since your return is figured by computer, it's guaranteed accurate. Now * * * here's the big news: At Beneficial, and only at Beneficial, you can get an Instant "Tax Refund." The instant you sign your return and qualify for an on-the-spot loan, Beneficial advances you the full amount of your refund. So there's no waiting all those weeks and weeks for your check from the Government. It's the Instant "Tax Refund"—at Beneficial Finance.

c) If you haven't done your income taxes yet * * * if you're worried about all those new forms and regulations * * * if like so many of us you just can't get down to all that figure work on your tax return—let Beneficial Finance take the load off your mind! For as little as $5, Beneficial's Income Tax Service will do your return by computer. It couldn't be simpler: Beneficial's computer figures out your maximum deductions and prepares your return with 100% accuracy. And, if you have a refund coming, you can get it right away with Beneficial's Instant "Tax Refund" the instant you qualify for a loan, you get your refund—in cash—instantly! Just look in the white pages of your phone book for the Beneficial office near you. And, call up or come in * * * today

2. Newspaper and direct mail.

a) New Income Tax Service offers INSTANT "TAX REFUND"*

Beneficial Finance offers a complete tax preparation service, fully computerized to give you maximum deductions. Accuracy is 100% guaranteed. (Beneficial pays any penalty or interest if it makes an error!)

* If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund-in cash-instantly. Only at Beneficial.

* * * * *

This year, let Beneficial prepare your tax returns! $5 and up.

* * * * *

And if you want cash to pay your taxes, or for any good reason, remember: your're good for more at Beneficial. Offices everywhere * * * open all year. Phone or come in * * * now! Avoid the rush.

b) It's a fact: 7 out of every 10 taxpayers who have their returns prepared by Beneficial's Income Tax Service get refunds.

c) BENEFICIAL INCOME TAX SERVICE * * * for as little as $5

* * * fully computerized to give you maximum deductions and guaranteed 100% accuracy. * * * especially designed for the typical American family.

* * * * *

Then, there are the pitfalls, hazards, and worries about overpayment; underpayment; delays in getting refunds; being questioned or audited, making mistakes; the Internal Revenue Service computer; adding, substracting, multiplying, and dividing, misunderstanding complicated instructions, and coming to grips with the problem itself. That's why smart people-smart taxpayers-will rely on tax experts to prepare their income tax returns this year. And foremost among tax experts are the men at Beneficial.

* * * * *

Beneficial is completely familiar with—and understands—the new tax forms and tax requirements. Beneficial's Managers-experts in money matters — are accustomed to extremely accurate figure work and are therefore, exceptionally competent with tax returns.

* * * * *

Beneficial stands behind and guarantees the accuracy of every tax return it prepares. If Beneficial makes any errors that cost you penalty or interest of any kind, we will pay the penalty or interest.

PAR. 6. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents and their representatives have represented, and are now representing, directly or by implication, that:

1. Respondents will provide taxpayers who have their returns prepared by respondents and to whom a refund is owed by the Internal

Revenue Service with an "instant refund" at the time their returns are prepared.

2. Respondents will reimburse the taxpayer for any payments the taxpayer may be required to make in addition to his initial tax payment, if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

3. Respondents' and their representatives' tax preparing personnel are specially trained and unusually competent in the preparation of tax returns and the giving of tax advice, and that they have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns.

4. The percentage of respondents' tax preparation customers who receive refunds is demonstrably greater than the percentage of the tax paying public at large who receive refunds.

PAR. 7. In truth and in fact:

1. Respondents' "instant tax refund" is not a refund but a personal loan and the recipient of the loan is required to pay finance charges and other costs for such loan.

2. Respondents and their representatives do not reimburse the taxpayer for all payments he is required to make in addition to his initial tax payment if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

3. Respondents' and their representatives' tax preparing personnel are not specially trained and unusually competent in the preparation of tax returns and the giving of tax advice, and they do not have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns.

4. The percentage of respondents' tax preparation customers who receive refunds is not demonstrably greater than the percentage of the taxpaying public at large who receive refunds.

Therefore, the statements and representations set forth in Paragraphs Five and Six hereof were, and are, false, misleading and deceptive.

PAR. 8. In the further course and conduct of their business respondents and their representatives enter into a relationship with their tax preparation customers which is impliedly represented as, and is inherently, confidential and private in nature. As a result of the aforesaid relationship, respondents and their representatives are provided and receive certain information from their tax preparation customers. Respondents and their representatives retain a copy of each income tax return prepared by them and a copy of a financial profile which is filled out for each customer on the basis of information provided by the customer ostensibly for respondents' use in the preparation of the customer's tax return.

Both the aforesaid copy of the tax return and the financial profile contain private and confidential data of both a personal and financial nature for each of respondents' tax preparation customers.

During the initial interview with the customer and at various times subsequent thereto, respondents and their representatives review the information on the retained copy of the customer's tax return and financial profile, and make a determination as to whether to solicit the customer for some type of consumer financing offered by respondents. On the basis of such determination, respondents and their representatives solicit the tax preparation customer, either orally and in person or by mail or telephone, for the purpose of inducing the customer to accept an extension of consumer credit in the nature of a personal loan or otherwise.

Respondents use, and have used, the aforesaid information gathered as a result of the preparation by respondents and their representatives of their customers' income tax returns in the manner hereinabove described without the prior knowledge and consent of said customers, and respondents have failed to disclose such use and intended use to their customers.

PAR. 9. The aforesaid acts and practices of respondents, and the special relationship created by respondents with their customers as described in Paragraph Eight hereof, has had, and now has, the capacity and tendency to mislead respondents' customers into the erroneous and mistaken belief that the information they provided respondents will only be used for the purpose of preparation of their income tax returns and will remain confidential.

Therefore, the respondents' failure to disclose the use of the aforesaid information for purposes other than the preparation of their customers' tax returns is false, misleading and deceptive.

Furthermore, respondents' use of the aforesaid information for purposes other than the preparation of their customers' tax returns without the prior knowledge and consent of their customers is contrary to, and in substantial disregard of, the special relationship between respondents and their customers as described in Paragraph Eight, hereof, and is, and was, unfair.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents and their representatives have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of income tax preparation services of the same general kind and nature.

PAR. 11. The use by respondents and their representatives of the aforesaid false, misleading and deceptive statements and representations, and unfair acts and practices, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of respondents' and their representatives' income tax preparation services by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents and their representatives as herein alleged, were and are all to the prejudice and injury of the public and of respondents' and their representatives' competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY MONTGOMERY K. HYUN, ADMINISTRATIVE LAW JUDGE

OCTOBER 21, 1974

PRELIMINARY STATEMENT

On Apr. 10, 1973, the Federal Trade Commission issued a complaint charging Beneficial Corporation and Beneficial Management Corporation with a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) by engaging in certain acts and practices in connection with their income tax preparation business. Paragraphs Four through Seven of the complaint allege that certain advertising claims made by respondents in connection with their income tax preparation business are false, misleading and deceptive. Paragraphs Eight and Nine of the complaint allege that respondents have used income tax information obtained from their tax preparation customers to solicit the latter for consumer loans and that these practices are deceptive and unfair to the consumer. By answer duly filed, respondents denied that any of their challenged acts or practices violated Section 5 of the Federal Trade Commission Act.

Prehearing procedures commenced in May 1973. In January 1974, the case was reassigned to the present administrative law judge. Respondents' two motions to withdraw the matter from adjudication, duly certified to the Commission by the administrative law judges, were denied by the Commission in August 1973 and April 1974. In November 1973, counsel for the parties entered into a Stipulation For Partial Adjudicated Settlement, which was filed on Dec. 3, 1973. As a result, all of the advertising issues in the complaint, except Paragraph Six (1) and

Paragraph Seven (1) dealing with respondents' "Instant Tax Refund" advertising claims, were settled. Evidentiary hearings with respect to the remaining issues were held in April, May and June 1974, in Washington, D.C. Following reception of further evidence upon a motion by respondents, the evidentiary record was closed on July 23, 1974, and the parties filed their respective proposed findings and orders, and briefs on Aug. 23, 1974.

Any motions not heretofore or herein ruled on specifically or indirectly by necessary effect of the conclusions of this initial decision are hereby denied.

The proposed findings, conclusions and briefs of the parties have been given careful consideration, and to the extent not adopted in this initial decision in the form proposed or in substance, they are rejected as not supported by the evidence or as immaterial.

Having considered the entire record in this proceeding and the demeanor of the witnesses, together with the proposed findings, conclusions and orders and briefs submitted by the parties, the administrative law judge makes the following findings of fact.[1]

FINDINGS OF FACT

I. Respondents and Their Business

1. Respondent Beneficial Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1300 Market St., in the city of Wilmington, State of Delaware (Ans., par. 1).

2. Respondent Beneficial Corporation wholly owns subsidiaries engaged in the consumer loan business; many of those subsidiaries also operate a tax preparation business. In addition, Beneficial Corporation wholly owns Western Auto Supply Company (a nationwide merchandising company), Spiegel, Inc. (a mail order merchandising company), and various other companies engaged principally in the sales finance and creditor insurance business (CX 18 at p. 3). In 1972, Beneficial Corporation had a net income of approximately $82 million (CX 18 at p. 6).

3. Respondent Beneficial Management Corporation is a corporation organized, existing and doing business under and by virtue of the laws

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[1] References to the record are made in parenthesis, using the following abbreviations:

CX - Commission Exhibit
RX - Respondents' Exhibit
Tr. - Transcript of the testimony
CPF - Complaint Counsel's Proposed Findings
RPF - Respondents' Proposed Findings
CB - Complaint Counsel's Brief
RB - Respondents' Brief.

of the State of Delaware, with its principal office and place of business located at 200 South Street, in the city of Morristown, State of New Jersey. It is a wholly-owned subsidiary of respondent Beneficial Corporation and provides various accounting, auditing, management services, including the formulation of advertising and sales policies, for the subsidiaries of Beneficial Corporation who operate the local loan and tax preparation offices (Ans. pars. 1, 2; Higgins, Tr. 204).

4. Respondent Beneficial Corporation through its subsidiaries has for many years been engaged in the consumer loan business and more recently in the tax preparation business. Its subsidiaries, including respondent Beneficial Management Corporation, have formulated and caused the dissemination of advertisements concerning income tax preparation services throughout the United States. Respondents have maintained a substantial course of trade in the offering of consumer loans and income tax preparation services in commerce, as "commerce" is defined in the Federal Trade Commission Act. At all times mentioned in the complaint, respondents have been, and now are, in substantial competition with individuals, firms and corporations engaged in the offering of consumer loans and income tax preparation services of the same general kind and nature as offered by respondents (Ans., pars. 1-5; CX 18, 33, 137; Snyder, Tr. 8).

II. Liability of Respondents

5. Beneficial Corporation is a conglomerate primarily composed of the Beneficial Finance System (a general term used to refer to the Beneficial Corporation subsidiaries which engage in the loan and finance business), Spiegel, Inc., and Western Auto Supply Company (CX at p. 3; Higgins, Tr. 178; finding 2).

6. On Dec. 31, 1972, there were approximately 1800 subsidiaries in the Beneficial Finance System, 1505 of these in the United States. Each of these U.S. local loan offices are owned and operated by a separate subsidiary of Beneficial Corporation [hereinafter local loan subsidiaries]. Approximately 1300 of these offices offer tax preparation services. With the exception of a few shares of a few subsidiaries, Beneficial wholly owns all of the stock of the local loan subsidiaries in the United States (CX 18 at pp. 8-9; Higgins, Tr. 179, 152). Beneficial Management Corporation, also a wholly-owned subsidiary of Beneficial Corporation, furnishes services at cost to the local loan subsidiaries (Ans., par. 2; Higgins, Tr. 204-05).

7. Beneficial Management Corporation of America is a wholly owned subsidiary of Beneficial Corporation. It employs regional and field supervisors throughout the country and is responsible for implementing the procedures which are established by Beneficial Management Corporation (Higgins, Tr. 205-06).

8. Beneficial Management Corporation formulated and approved all the advertising challenged in the complaint and in conjunction with the local loan subsidiaries caused its dissemination to members of the general public (Ans., par. 2; Snyder, Tr. 6-22; findings 36-38, *infra*).

9. Beneficial Management Corporation prepared and disseminated to the local loan subsidiaries various memoranda, directives, and other documents containing instructions on the use of tax information at issue in this case (CX 19-34, 35, 38, 41; Ans. to Requests for Admissions 1, 3, 4; Snyder, Tr. 24-25, 27).

10. Beneficial Corporation's local loan subsidiaries disseminated various point of sale and direct mail advertising pieces which were prepared by Beneficial Management Corporation. The local loan subsidiaries pay for the cost of this advertising (finding 38, *infra;* CX 99-111, 124, 125, 162, 163, 164, 165; Snyder, Tr. 19).

11. Telephone directory advertising is often placed at the request of the local loan subsidiary and is generally paid for by that subsidiary (Snyder, Tr. 18; findings 36-41, *infra*).

12. The acts and practices relating to use of tax information which are alleged to be unfair and deceptive in Paragraphs Eight and Nine of the complaint were actually committed by employees of the local loan subsidiaries (CX 25-27, 29, 34, 35, 38(a)) (findings 59-64, *infra*).

13. Respondent Beneficial Corporation's wholly-owned local loan subsidiaries committed the unfair and deceptive acts and practices alleged in the complaint (findings 9-12, *supra*).

14. Respondent Beneficial Corporation is the sole stockholder of the local loan subsidiaries and either its board of directors or executive committee select who are to be on the board of directors of the local loan subsidiaries (Higgins, Tr. 196-97).

15. The officers of each of the 1143 local loan subsidiaries are identical, except for the president who is, in each region, the regional vice president of Beneficial Management Corporation. This pattern existed throughout the period 1969 through 1974 (CX 145(a); Donohue, Tr. 225-27).

16. All of the officers and directors of the non-New York local loan subsidiaries are employees of either Beneficial Management Corporation or Beneficial Management Corporation of America, both wholly-owned subsidiaries of Beneficial Corporation (Higgins, Tr. 198-201; Findings 3, 6, 7, *supra*).

17. Beneficial Management Corporation of America employs between 75 and 100 persons. Its principal offices are located in the same building as are those of respondent Beneficial Corporation, in Wilmington, Del. It employs various field supervisors and auditors, and regional personnel and promotional supervisors throughout the coun-

try. Its only function is to provide supervision over, and service to, the local loan subsidiaries. It receives all of the funds necessary for its operations from Beneficial Corporation, and generally does not make a profit (Higgins, Tr. 205-20; Donohue, Tr. 245).

18. Mr. Carroll Donohue, who serves as director and vice president and secretary of all the local loan subsidiaries, is not paid a salary by the local loan subsidiaries for performing these services, but is paid by Beneficial Corporation, though he is neither an officer nor director thereof (Donohue, Tr. 220-21, 245).

19. All of the local loan subsidiaries rely solely on Beneficial Corporation for the money that they use in the operations. Funds are advanced to the local loan subsidiaries initially as capital contributions, or as loans. When a local loan subsidiary needs additional loans, it contacts the treasurer's department of Beneficial Corporation to arrange for the needed financing. The decision whether to advance funds in the form of additional capital contribution or loans is made by the treasurer and comptroller of Beneficial Corporation (Higgins, Tr. 192-93; CX 18 at p. 9; CX 150(Z) (34-50)).

20. The accounting for the local loan subsidiaries in the Beneficial Finance System is handled largely by computer. Beneficial Data Processing Company, a wholly-owned subsidiary of Beneficial Corporation, provides the computer service to handle the basic data relating to the loan and finance business. It operates a terminal and computer system in Morristown, N.J., which has a terminal in every local loan office. It obtains all the funds needed for its operation from Beneficial Corporation (Higgins, Tr. 207-08).

21. Beneficial Corporation in effect provides all the financing needed by the local loan subsidiaries for their operations and maintains a close watch over the financial operations of those subsidiaries (findings 19-20, *supra*).

22. Beneficial Corporation operates various plans for the benefit of the employees of the local loan subsidiaries (Higgins, Tr. 208-11; CX 150(n), (Z)(57), (Z) (67), (Z)(2), (Z)(24), 150(m), 150(c); (Z)(13)).

23. Respondent Beneficial Corporation owns and effectively controls the local loan subsidiary corporations (Findings 10-21).

24. Respondents obviously endeavor to have the local loan subsidiaries identified in the public mind as part of the "Beneficial Finance System." All of the local loan subsidiaries are called "Beneficial Finance Company of ——————" (the name of the town in which they are located) (CX 18 at p. 3; finding 5, *supra;* Higgins, Tr. 178-79). The name "Beneficial Finance" is displayed on the outside of most of the local loan offices. All of the advertising for respondents' tax service uses the terms "Beneficial" or "Beneficial Finance" (findings 33-47, *infra*), and

stresses the fact that a large nationwide organization is the entity offering the income tax preparation service. The tax service is referred to as the "Beneficial Income Tax Service." For example, CX 165(b) states: "Beneficial Income Tax Service — A Service of Beneficial Finance System — over 1700 loan and finance offices coast to coast."

25. There is evidence in the record that consumers are of the belief that they are dealing with a large nationwide company when they patronize a Beneficial local loan subsidiary and that such belief is one of the reasons they choose to have their taxes prepared at Beneficial (Deveny, Tr. 375; McIntire, Tr. 426).

26. The combined effect of respondents' advertising and the names of the local loan subsidiaries is to create the reasonable impression that the local subsidiaries are local representatives of some nationwide controlling "Beneficial" entity. That entity is in fact Beneficial Corporation (findings 24-25).

27. Beneficial Management Corporation functions as a service organization for the local loan subsidiaries of the Beneficial Finance System. Beneficial Management Corporation does not directly engage in loan or income tax preparation business. Among the services it provides are supervision, audit, accounting, advertising, and legal services. It provides these services to the local loan subsidiaries at cost and does not make a profit. All of the funds for its operation come from Beneficial Corporation, through capitalization and advances of money as needed. Beneficial Management Corporation has never utilized outside sources of capital (Snyder, Tr. 6; Higgins, Tr. 204-05).

28. Some of respondents' "Instant Tax Refund" advertisements have been copyrighted. These copyrights are held by Beneficial Corporation (CX 113-20).

29. On Apr. 26, 1972, there were 17 members of the board of directors of Beneficial Corporation. Of these 17 members, six worked for Beneficial Corporation or its subsidiaries: Messrs. Benadom, Bowes, Burd, Fultz, Higgins and Tucker. The remaining directors were outside directors (Higgins, Tr. 189-90).

30. Beneficial Corporation exercises control over Beneficial Management Corporation primarily through three men who hold key positions in both companies: Edgar T. Higgins, Cecil M. Benadom and Robert A. Tucker (CX 150).

31. The significance of the overlap demonstrated in finding 30, *supra*, lies in the fact that during most of the time period relevant to this case, these individuals constituted a majority of the executive and finance committees of Beneficial Corporation and were the entire executive committee of Beneficial Management Corporation. Much of the formal decision-making responsibility of both corporations is

exercised by these committees as opposed to the entire boards. Therefore, the three top executive officers of Beneficial Corporation are in a position to control effectively the activities of Beneficial Management Corporation (CX 150(f), (s), (Z)(16), (51), (63), (68), (18-34), (68-87); Higgins, Tr. 190-92; CX 178; finding 14, *supra*).

32. The executive committee of the board of directors of Beneficial Management Corporation approved the decision to enter into the tax preparation business and were aware of the advertisement used with regard to Beneficial Income Tax Service (Snyder, Tr. 7, 10).

III. The Unfair and Deceptive Acts and Practices

A. Stipulation for Partial Adjudicated Settlement

33. On Nov. 30, 1973, complaint counsel and counsel for respondents entered into a Stipulation for Partial Adjudicated Settlement which was filed on Dec. 3, 1973. The effect of this stipulation was to settle all of the advertising issues in the complaint except Paragraph Six (1) and Paragraph Seven (1) which deal with respondents' "Instant Tax Refund" advertising claims. Counsel stipulated that the cease and desist order provisions set forth in Paragraph Two of the Stipulation for Partial Adjudicated Settlement were appropriate relief in the public interest as to the acts and practices which were the subject of the stipulation (see order, *infra*). Counsel also stipulated, *inter alia*, to the following facts concerning these advertising representations:

(A) Subsidiaries of respondent Beneficial Corporation disseminated the following advertisements:

RADIO AND TELEVISION

(1) This year have your tax returns prepared a better way * * * by computer * * * at Beneficial Finance. With Beneficial's Income Tax Service for as little as $5 * * * you get maximum deductions * * * 100% accuracy * * * Plus you can get an Instant "Tax Refund." The instant you qualify for a loan—you get your refund * * * in cash—instantly. So have your taxes done at Beneficial Finance. and get your Instant "Tax Refund."

(2) Where are the smart people having their tax returns prepared this year? At Beneficial Finance. That's right, Beneficial Finance-with its new, fully computerized Income Tax Service. You get all the deductions you're entitled to- and since your return is figured by computer, it's guaranteed accurate. Now * * * here's the big news: At Beneficial, and only at Beneficial, you can get an Instant "Tax Refund." The instant you sign your return and qualify for an on-the-spot loan, Beneficial advances you the full amount of your refund. So there's no waiting all those weeks and weeks for your check from the Government. It's the Instant "Tax Refund"—at Beneficial Finance.

(3) If you haven't done your income taxes yet * * * if you're worried about all those new forms and regulations * * * if like so many of us you just can't get down to all that figure work on your tax return—let Beneficial Finance take the load off your mind! For as little as $5, Beneficial's Income Tax Service will do your return by computer. It couldn't be simpler: Beneficial's computer figures out your maximum deductions and prepares your return with 100% accuracy. And, if you have a refund coming, you can get

it right away with Beneficial's Instant "Tax Refund" the instant you qualify for a loan, and get your refund—in cash—instantly! Just look in the white pages of your phone book for the Beneficial office near you. And, call up or come in * * * today.

NEWSPAPER AND DIRECT MAIL

(1) New Income Tax Service Offers "INSTANT TAX REFUND"*

Beneficial Finance offers a complete tax preparation service, fully computerized to give you maximum deductions. Accuracy is 100% guaranteed. (Beneficial pays any penalty or interest if it makes an error!)

*If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund—in cash—instantly. Only at Beneficial.

* * * * *

This year, let Beneficial prepare your tax returns! $5 and up.

* * * * *

And if you want cash to pay your taxes, or for any good reason, remember: you're good for more at Beneficial. Offices everywhere * * * open all year. Phone or come in * * * now! Avoid the rush.

(2) Its a fact: 7 out of every 10 taxpayers who have their returns prepared by Beneficial's Income Tax Service get refunds.

(3) BENEFICIAL INCOME TAX SERVICE * * * for as little as $5

(B) By and through the use of the above-quoted statement and representations, and others of similar import and meaning, respondents and their representatives have represented, and are now representing, directly or by implication, that:

(1) Respondents will reimburse the taxpayer for any payments the taxpayer may be required to make in addition to his initial tax payment, if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

(2) Respondents' and their representatives' tax preparing personnel are specially trained and unusually competent in the preparation of tax returns and the giving of tax advice, and that they have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns.

(3) The percentage of respondents' tax preparation customers who receive refunds is demonstrably greater than the percentage of the taxpaying public at large who receive refunds.

(C) In truth and in fact:

(1) Respondents and their representatives do not reimburse the taxpayer for all payments he is required to make in addition to his initial tax payment if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

(2) Respondents' and their representatives' tax preparing personnel are not specially trained and unusually competent in the preparation of tax returns and the giving of tax advice, and they do not have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns.

(3) The percentage of respondents' tax preparation customers who receive refunds is not demonstrably greater than the percentage of the taxpaying public at large who receive refunds.

Therefore, the statements and representations set forth above in finding 34 (A) and (B), were and are, false, misleading and deceptive in violation of Section 5 of the Federal Trade Commission Act (Stipulation For Partial Adjudicated Settlement).

B. The "Instant Tax Refund" Advertising

34. From 1969 through 1973, Beneficial Management Corporation either formulated or approved all of the advertising material utilized by respondents' income tax preparation business. The advertisements were disseminated by subsidiaries of Beneficial Corporation. All of respondents' advertising introduced into evidence in this case was in fact disseminated (Ans., pars. 2, 4; Snyder, Tr. 8-12; CX 124). There are in evidence advertising schedules showing respondents' radio and television commercials that were run for the income tax seasons 1970 to 1973, and the areas where said commercials were run (CX 84-88; Ross, Tr. 79-80).

35. Films with audio, for two of the 1973 television commercials, were shown during the hearings and were introduced into evidence (RX 20A, B). Scripts of these two commercials, accurately reflecting the audio portion of each, were also received into evidence (RX 20D; CX 84J). Tape recordings and their transcripts of two of the 1973 radio commercials were played during the hearings and were introduced into evidence (RX 20C, E, F).

36. Telephone directory advertising of respondents' income tax preparation service was initiated in the second half of 1970, and began appearing in directories published in late 1970 or during 1971. A schedule showing the copy of the telephone directory advertising utilized, and where and when placed, prepared by respondents' advertising agency, was received into evidence (RX 89A-T; Ross, Tr. 79-80).

37. The format for newspaper advertisements used during the 1971 tax season in approximately six states was received into evidence (CX 56; Snyder, Tr. 20-21).

38. Beneficial Management Corporation prepares and causes to be printed various point of sale and direct mail advertising pieces, which are then shipped to the local loan offices for dissemination (Snyder, Tr.

19). Examples of these were introduced into evidence (CX 52-55, 57, 59, 76, 95, 100(B-C), 102(B-C), 103(B-H), 104(B-C), 105(A-B), 106(A-B), 107(A-B), 108(A-B), 90-93, 97, 98, 110(A-G).

39. In 1973, approximately one-half to three-quarters of the Beneficial loan offices placed two foot by two and one-half foot advertising poster in their windows and a similar size poster in their lobbies (CX 164A-B), copies of both of which were introduced into evidence (Snyder, Tr. 22-23).

40. All of the advertisements utilized by respondents from 1969 through 1973 prominently featured the "Instant Tax Refund" theme. In almost all of the advertisements, this is the dominant message conveyed, the most effective representation made (See advertisements set forth in findings 41-44, 55-59, *infra*).

41. Prior to February 1970 and prior to 1972, in the case of telephone directory advertisements, respondents' "Instant Tax Refund" advertising provided no explanation of what the "Instant Tax Refund" actually was. (CX 89(e)) is representative of such telephone directory advertisements placed from 1970 until the summer of 1972 (CX 89A-C):

> BENEFICIAL FINANCE SYSTEM
>
> Fully computerized Beneficial Income Tax Service gives you maximum deductions, complete accuracy. Exclusive: Instant "Tax Refund" loans. Phone or come in "WHERE TO CALL"

The "Instant Tax Refund" portion of the radio commercial set forth below was run throughout most of the country in 1969 and early 1970 (CX 85B):

> * * * Do you have a refund coming to you or your income taxes this year? Well, there's no need to wait weeks for your refund check. Get the money right now — even before you mail your return — with a cash advance from Beneficial. We call it the Instant Tax Refund, a special service of Beneficial Finance. Instant Tax Refund. At Beneficial, you're good for more * * * (CX 85F)

42. In the summer of 1972, certain minor changes were made in the copy used in respondents' telephone directory advertisements. The relevant change was the insertion of the word "Plan" between "Instant Tax Refund" and "loans." CX 89P below, is representative of the telephone directory advertisements used in most states from July 1972 until the present (CX 89B):

> BENEFICIAL FINANCE COMPANIES
>
> BENEFICIAL INCOME TAX SERVICE Fully computerized to give you maximum deductions, complete accuracy. Special: As about "Instant Tax Refund" Plan loans, offices in this area * * * find the office near you in the Yellow Pages under "Loans." Call or come in today.

43. The radio and television advertisements using the "Instant Tax Refund" theme underwent certain modifications from 1969 until the

present. In approximately February 1970, the "Instant Tax Refund" representation was slightly changed to include the mention of the word "loan." The portions of the radio and television commercials set forth below are from the transcripts of commercials using the "Instant Tax Refund" theme from February 1970 until the end of the 1970 tax season. CX 85(c) was run throughout the country (CX 85(a)). CX 84(b)-(c) was the only television commercial used during this time period. CX 84(a):

Radio

* * * Now * * * here's the *big* news: At Beneficial, and only at Beneficial, you can get an Instant "Tax Refund." The instant you sign your return and qualify for an on-the-spot loan, Beneficial advances you the full amount of your refund. So, there's no waiting all those weeks and weeks for your check from the Government. It's the Instant "Tax Refund" — at Beneficial Finance * * * (CX 85(c).)

Television

* * * With their new, fully-computerized, Beneficial Income Tax Service. You get * * * maximum deductions * * * 100% accuracy. Plus, an Instant "Tax Refund." Get your refund, instantly with an on-the-spot loan. So this year have your tax returns done at Beneficial Finance. There's an office near you * * * (CX 84(b)-(c).)

44. In late 1970, before the 1971 tax season, the "Instant Tax Refund" representation, in radio and television advertising, was again slightly modified. In television commercials, the phrase "qualify for a loan" was added, and in radio commercials, the words "Advances you the full amount of your refund" were changed to "You get your refund — in cash — instantly." The television commercial transcript set forth below (CX 84(d)) was run throughout the country during the 1971 tax season, until March 1971 (CX 84(e)). The radio commercial transcript set forth below (CX 86(c)) is representative of the "Instant Tax Refund" theme in radio commercials run during this time period.

Radio

* * * Right now, at Beneficial Finance * * * You're good for an Instant "Tax Refund." At Beneficial, you're good for more. Why wait weeks for your refund check from the Government? Get an Instant "Tax Refund" at Beneficial Finance. The instant you qualify for an on-the-spot loan, you get your refund — in cash — instantly. No matter where you may be borrowing, or had a loan before, call Beneficial * * * Get your Instant "Tax Refund." See Beneficial * * * Get your Instant "Tax Refund." Come to where you're good for more. Just look in the White Pages of your phone book for the Beneficial office near you * * * (CX 86(c).)

Television

* * * Plus you can get an Instant "Tax Refund." The instant you qualify for a loan — you get your refund * * * in cash — instantly. So, have your taxes done at Beneficial Finance, and get your Instant "Tax Refund" * * * (CX 84(d).)

45. The final modification in the radio and television versions of the "Instant Tax Refund" advertising was made in March 1971. The word "Plan" was added after the phrase "Instant Tax Refund", and the phrase "lend you the equivalent of your refund in cash" was added.

Although the commercials run subsequent to March 1971 vary, the "Instant Tax Refund" representation remains essentially the same in each (Higgins, Tr. 507-08). The portions of the radio and television transcripts set forth below are representative of the "Instant Tax Refund" theme in commercials run subsequent to March 1971.

Radio

* * * And listen to Beneficial's "Instant Tax Refund" Plan: if you have a refund coming, you don't have to wait weeks for a Government check. The instant you qualify for a loan, Beneficial will lend you the equivalent of your refund, in cash, instantly. It's the "Instant Tax Refund" Plan * * * at Beneficial Finance * * * (CX 87(b).)

Television

* * * And the Beneficial "Instant Tax Refund" Plan. If you have a refund coming, Beneficial will lend you the equivalent of your refund in cash the instant you qualify for a loan * * * (CX 84(f).)

46. Respondents' printed advertisements featuring the "Instant Tax Refund" theme also underwent minor modifications from 1969 until 1973. Beginning in 1970, the print advertising was modified by placing an asterisk after the "Instant Tax Refund" reference and a corresponding asterisk below where respondents purportedly explained the "Instant Tax Refund." CX 56, 57(a) and 60(b) are representative of the "Instant Tax Refund" reference with asterisk modification in print advertisements used from 1970 until March 1971:

New Income Tax Service Offers

INSTANT "TAX REFUND"*

Beneficial Finance offers a complete tax preparation service, fully computerized to give you maximum deductions. Accuracy is 100% guaranteed. (Beneficial pays any interest or penalty if it makes an error!)

*If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund — in cash — instantly. Only at Beneficial * * * (CX 56).

Instant "Tax Refund"*

*If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund — in cash — instantly. (CX 57(a).)

Introducing * * *

Instant "Tax Refund"*

*If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for a loan, Beneficial advances you the full amount of your refund. We call it the Instant "Tax Refund." (CX 60(b).)

47. The final modification of the printed advertising occurred in mid-March 1971. The words "loan" or "plan" were added to the "Instant Tax Refund" reference, and the phrase "lend you the equivalent of

your refund" was introduced (Higgins, Tr. 507-08). CX 93(a), set forth below, is representative of the use of the "Instant Tax Refund" slogan in printed advertising from mid-March 1971 to the present:

> "Instant Tax Refund" Plan
>
> If you have an income tax refund coming, you don't have to wait weeks for a Government check. The instant you qualify for a loan, Beneficial will lend you the equivalent of your refund in cash, instantly. (CX 93(a).)

48. Respondents' "Instant Tax Refund" is an ordinary loan, not distinguishable in any way from any other loan specially or generally advertised or processed in the office of any consumer finance subsidiary of Beneficial Corporation, in terms of months to repay, amounts of loan available, rates of charge, or otherwise (CX 123; Snyder, Tr. 29).

49. Respondents' early advertisements, which contained no explanation whatever as to the nature of the "Instant Tax Refund" offer, had, on their face, the capacity and tendency to mislead the consumer into believing that if he let Beneficial prepare his income tax return and if the return should indicate a refund is due him, then Beneficial would, as a special service, give him a cash advance in the amount of his refund. There was nothing in the advertisements to alert the customer that what was being offered was a normal consumer loan with finance charges (finding 14, *supra*). Respondents' executives admitted that the advertising was unclear; survey reports from their advertising agency showed customers were confused (CX 159(4-5); Ross, Tr. 84-85; CX 155(a); Ross, Tr. 87), and all changes made in the "Instant Tax Refund" advertising was made in an attempt to clarify what the "Instant Tax Refund" was (Snyder, Tr. 53-55, 71; Higgins, Tr. 506-07).

50. Respondents' subsequent attempts at explanatory language in their radio, television, and print advertising do not succeed in exposing the true nature of the "Instant Tax Refund" offer (See, *e.g.*, advertisements set out in findings 42, 45, 47, *supra*). Read in the context of the whole the "explanatory" language does not adequately explain that what is being offered is a regular consumer loan with finance charges. When considered in its entirety, the message is confusing and misleading. The fact is that the modified advertisements contain two different and conflicting claims. The best that can be said is that the advertisements are susceptible of two meanings: one, that Beneficial offers "Instant Tax Refund," the other, that Beneficial offers a consumer loan to its customer — with conditions that are not revealed — if they qualify for such a loan. The former is clearly deceptive; therefore the advertisement as a whole is misleading. Moreover, the manner in which the attempted explanation is presented adds to the confusion and deception inherent in such advertising. In print, the "explanation" is generally far less prominently featured than

is the "Instant Tax Refund" reference. (See, *e.g.*, exhibits listed at finding 47, *supra*). In the radio and television advertising, the dominant theme is the "Instant Tax Refund," not the "explanatory" language (CX 84-88).

51. There is, furthermore, substantial evidence in the record in the form of credible consumer testimony to the effect that members of the public were in fact confused, misled and deceived by respondents' "Instant Tax Refund" advertising, even in its most modified form (CX 158(c); Martin, Tr. 661-63, 691; RX 20(d); Flot, Tr. 713-17, 727, 729-30, 735-38, 745-46, 764-70; CX 87(c); Moyers, Tr. 771-76, 778-79, 780; CX 80(A-B); Snyder, Tr. 808-09; CX 84(k)).

52. The administrative law judge finds therefore that even as finally modified, respondents' "Instant Tax Refund" advertising has the tendency and capacity to deceive the public (findings 50-51, *supra*).

IV. Misuse of Tax Information

C. Respondents' Conduct Prior to Passage of Section 316 of the Revenue Act of 1971

53. Prior to actually doing so, respondents discussed internally for a number of years the possibility of conducting an income tax preparation business in their local loan offices. Discussions on the subject also took place between respondent Beneficial Management Corporation and its advertising agency Al Paul Lefton Co., Inc., with the idea that a tax preparation business in the local loan offices could generate additional loan business, through the sale of loans to tax customers (Snyder, Tr. 6-8; Ross, Tr. 83-84).

54. Respondents entered the tax preparation business in 1969, the purpose being to use the tax preparation business as a "feeder" to the loan business. Tax advertising was to enhance and develop the loan business, and great emphasis was placed on converting each tax customer into a loan customer (Higgins, Tr. 503, 508-09; Ross, Tr. 114; CX 20, 22, 24-27, 34, 38(a)). The loan and tax preparation businesses were and are completely interrelated (Higgins, Tr. 513-15).

55. Respondents' tax preparation business was in fact highly effective in producing new loan business for the local offices (CX 154(19), (22-30); CX 156(a); CX 157(i); CX 127(c); CX 142(a)-(b); CX 143(b); Higgins, Tr. 508-09).

56. Respondents made extensive use of temporary employees to work in their local offices during the tax preparation season. These employees were used primarily to fill out tax interview sheets for tax preparation customers; they were not required to be experienced in tax matters, nor was much training required to learn to fill out interview sheets (CX 31, 32; Snyder, Tr. 34-35). Both temporary tax employees (if

experienced) and other office personnel would solicit consumers for loans (Snyder, Tr. 34; Taylor, Tr. 161; CX 27, 32, 34).

57. Prior to December 1971, Beneficial Management Corporation prepared and disseminated certain instructions to the local loan subsidiaries of Beneficial Corporation that were engaged in income tax preparation on procedures to be followed in operating the tax business (CX 19-34, 35, 38, 41; Answer to Requests for Admissions, No. 1, 3, 4; Snyder, Tr. 24-25, 27).

58. Prior to December 1971, the general procedure followed by the local offices in their tax preparation business was as follows:

Employees in the local offices filled out tax interview sheets (CX 10, 11) and data sheets (CX 9) when necessary, for each tax customer. This entailed the customer's disclosure of a wide variety of personal and financial information (CX 10, 11, 34(b)). When completed, the sheets contained all the information necessary to complete a customer's federal tax return (CX 24, 38(a); Snyder, Tr. 31-32). The interview sheets and data sheets were sent to Programmed Proprietary Systems, Inc., a computer service which returned to the local office the completed tax return (CX 30; Snyder, Tr. 32). The customer returned to the office to pick up his completed tax return (CX 30). Copies of the interview sheets, data sheets, and completed Form 1040's were kept in the permanent files of the local office (CX 23, 29, 30).

59. The information furnished for tax preparation purposes gave respondent a valuable sales tool, as respondents realized. As CX 34(b) states:

> When you've completed the Tax Interview Form you'll have in front of you nearly all the information you need for making a loan. Take advantage of it. What more do you need?

The local office did make every attempt to take advantage of the opportunities that such information provided to sell the customer a loan (CX 20, 22, 24, 27, 34(d), 38(a), 41).

60. Respondents did not confine themselves to soliciting tax preparation customers for "Instant Tax Refund" loans, but attempted to sell loans for a variety of purposes (CX 25-26; Snyder, Tr. 28-29). They used the information appearing on tax interview sheets to determine the particular type of loan to offer the customers (CX 25-27, 34, 35, 38(a)). For example, CX 26 states:

> Right on the Tax Interview Form it shows you what banks or loan companies the customer owes. It is an easy matter to go on from there and list other debts and show how all the bills can be consolidated, the bank loan can be paid off, the loan company can be paid off, the balance on the car can be cleared - all with a Bill Consolidation Loan (CX 26).

CX 25 states:

> When you get through taking the tax interview form you can determine — within reasonable limits — about how much the taxpayer will have to pay in taxes. Here's your

chance, of course, to sell a loan to pay the Government the taxes the customer owes (Plus Bill Consolidation (CX 25)).

61. Failure to make a sale in the course of the first interview would not end the office's attempts to use the customer's tax information to sell him a loan (findings 62-64).

62. Employees in the local offices used the information available on the tax interview forms to run credit checks on customers to whom they did not sell loans on the first interview. These customers were then approached again, with a "firm offer of a loan amount" made to them when they returned to the local office to pick up their completed tax returns (CX 27, 34(d)).

63. Employees in the local offices used the information available on the tax interview forms to determine credit worthiness of tax customers in order to decide whether to offer them a Beneficial Credit Card. The Beneficial Credit Card is an identification card issued to customers so that they can identify themselves and be able to borrow money at local offices away from their home (CX 27, 35; Snyder, Tr. 37).

64. Employees in the local offices used the information on tax interview forms to solicit tax customers for loans or "Credit Cards" by telephone or otherwise long after these customers had concluded their tax business with the local office (CX 29, 35).

D. Respondents' Conduct Subsequent to Passage of Section 316 of the Revenue Act of 1971

65. Section 316 of the Revenue Act of 1971 was passed Dec. 10, 1971, and became effective Jan. 1, 1972. Beginning in December 1971, respondents disseminated instructions to employees in the field on new procedures to be followed in soliciting tax customers for loans (CX 126(a)-(f), 127, 129, 131, 132, 134, 138, 139, 142, 143). These included the use of a "BOR-56 Authorization" form by the local offices (CX 126(f)). This was supposedly a consent form, allowing the respondents to solicit the tax preparation customer for other business of the respondents. The offices were instructed to have each tax customer sign the BOR-56 before any tax work was done (CX 126(b)). Completed tax forms were placed in a special "Customer Tax Folder" (CX 126(d)). If the customer had signed a BOR-56, respondents felt free to solicit him for a loan. "Loan Information Sheets" were then filled out, containing such data as bills owed by the customer, bank loans outstanding, loan company loans outstanding, car loans. All such information was kept in a "Customer Loan Folder," the only source to which the local office could refer in processing a loan (CX 139(i), (k); CX 142(b), (c); CX 126(d)).

66. Respondents continued to emphasize the importance of selling loans to every tax customer, and to use the tax preparation relationship

as a lead-in to the sale of loans (CX 127(j), (k); 129(d), (f); 130(c); 138(b), (h), (i); 139(f), (k), (m), (u), (z); 140(h); 142, 143).

67. The BOR-56 form fails to disclose clearly to the tax preparation customer respondents' intended use of tax information to solicit him for loans. It is inadequate on its face as a consent form (CX 126(f)). Substantial evidence in the record supports the finding that consumers do not understand the nature of the BOR-56 (Deveny, Tr. 372; Dillard, Tr. 392-95; Harp, Tr. 409-11, 414-16; Bolt, Tr. 485-87; Flot, Tr. 717, 738-39).

E. Deception

68. Respondents failed to disclose to tax preparation customers the fact that information given for the purpose of tax preparation would not be kept confidential and used only for that purpose (finding 67).

69. There is substantial evidence in the record that respondents' tax preparation customers consider the information they provide for tax preparation to be private, personal, and confidential, and that they did or would feel taken advantage of by being solicited for loans based on that information without their consent (Dillard, Tr. 397-98; Snyder, Tr. 809-11, 835-36; Flot, Tr. 724-27; Moyers, Tr. 776-78, 793, 797-98, 804-06; McIntire, Tr. 428-29; Heath, Tr. 494-95).

70. Respondents' practices in using tax information to solicit for loans were deceptive (findings 68-69, *supra*).

F. Respondents' Acts and Practices Were Unfair

71. Existing, established public policy, manifested in federal and state statutes as well as in the ethical codes of professional associations, regards individual income tax information as confidential (26 U.S.C. §7216, Tr. 351; 26 U.S.C. §7213, Tr. 356; 26 U.S.C. §6103, Tr. 356; Code of Virginia §58-27.4, Tr. 356; California Business and Professions Code §17530.5, Tr. 356; CX 81, Tornwall, Tr. 250-55; CX 79, Hechinger, Tr. 130-35, 148; Canon 4, Code of Professional Responsibility of the American Bar Association, Ethical Consideration 4-5, Disciplinary Rule 4-101, Tr. 356).

72. Respondents' failure to respect the confidentiality of individual income tax information by allowing such information to be used to solicit tax customers for loans without their consent offends public policy and constitutes an unfair practice under *FTC* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972); (findings 65-71, *supra*).

DISCUSSION

Stipulation for Partial Adjudicated Settlement and Remaining Issues

As a result of the Stipulation for Partial Adjudicated Settlement, filed of record by the parties on Dec. 3, 1973, it was agreed that certain advertising issues set forth in Paragraphs Six (2) through (4) and Seven

(2) through (4) of the complaint be settled without further litigation and an agreed-to order contained in the Stipulation may be entered covering the foregoing issues. Thus, the remaining issues to be litigated were: (1) whether respondents' advertising containing the "Instant Tax Refund" slogan is false, misleading and deceptive in violation of Section 5 (Paragraphs Six (1) and Seven (1) of the complaint); (2) whether the unauthorized use of income tax information by respondents for consumer loan purposes is a deceptive act or practice in violation of Section 5 (Paragraphs Eight and Nine of the complaint); and (3) whether such unauthorized use of income tax information by respondents is also unfair to the consumer in violation of Section 5 (Paragraphs Eight and Nine of the complaint).

The "Instant Tax Refund" Advertising

With respect to the "Instant Tax Refund" advertising which started in 1969 and continues to date, it is convenient to consider separately (1) the pre-February 1970 "Instant Tax Refund" advertisements, which did not employ any explanatory language, and (2) the post-February 1970 "Instant Tax Refund" advertisements, which contain some explanatory language designed to qualify the "Instant Tax Refund" slogan.

A. Pre-February 1970 "Instant Tax Refund" Advertisements

We need not dwell long on the first group of advertisements for they patently and indisputably have the capacity and tendency to mislead the consumer into believing that if he lets Beneficial prepare his income tax return and if the return indicates any refund due him, then Beneficial will, as a special service, give him a cash advance, namely, an "Instant Tax Refund." CX 85F, a radio commercial which was run throughout most of the country in 1969 and early 1970, is a striking example of this group (Also finding 41).

It is well settled that the Commission has the authority to draw its own inferences from challenged advertisements. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965). The Commission and the courts have long held that an advertisement is deceptive if it has the tendency or capacity to deceive the public. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F.2d 676 (2d Cir. 1944). And, in making this determination, the Commission looks to the impression the advertisement makes on the gullible and credulous rather than on the trained and experienced. *Id.* Also see *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 116 (1937); *Aronberg* v. *Federal Trade Commission*, 132 F.2d 165, 167 (7th Cir. 1942); *Merck [Co., Inc.* v. *Federal Trade Commission*, 392 F.2d 921, 926 (6th Cir. 1968); *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370

U.S. 917 (1962). Indeed, the central purpose of Section 5 is "* * * to abolish the rule of *caveat emptor* which traditionally defined rights and responsibilities in the world of commerce." *Federal Trade Commission* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963).[2]

B. Post-February 1970 "Instant Tax Refund" Advertisements

Beginning in February 1970, Beneficial made certain changes in the "Instant Tax Refund" advertisements designed to explain that what was being offered by these advertisements was in fact a consumer loan. The initial change was the addition of an asterisk to the "Instant Tax Refund" slogan in printed advertisements. The asterisk directed the reader to an explanatory sentence which stated in substance that "if you have a refund coming, you don't have to wait weeks for a government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund-in cash-instantly." Similar explanations were contained in all other advertising references to the "Instant Tax Refund" slogan. For example, see Paragraph 2(a) of the complaint.

In late 1970, the "Instant Tax Refund" advertisements were again modified. In television commercials, the phrase "qualify for a loan" was added, and in radio commercials, the words "advances you the full amount of your refund" was changed to "you get your refund-in cash-instantly" (finding 44). Beginning in March 1971, the "Instant Tax Refund" slogan itself was expanded to include the words "loan" or "plan" (RX 13; CXs 71, 72, 83), and the expanded slogans were further accompanied by various explanatory language which stated in substance: the instant you qualify for a loan, Beneficial will lend you the equivalent of your refund in cash, instantly (findings 45, 47).

Respondents contend that the "Instant Tax Refund" advertising thus modified and accompanied by further explanatory language adequately informs the consumer that what is being offered is a consumer loan. The administrative law judge is not able to accept this contention. When viewed and considered as a whole, the message is confusing and misleading. *Sebrone Co.* v. *Federal Trade Commission*, 135 F.2d 676, 679 (7th Cir. 1943); *Aronberg* v. *Federal Trade Commission*, 132 F.2d 165, 167 (7th Cir. 1942). This confusion is due to the fact that these advertisements contain two different and essentially conflicting claims. They first imply that Beneficial's tax preparation customers will get an "Instant Tax Refund." They then go on to imply that the promised "tax refund" is a "loan" and you must qualify for it. Furthermore, these advertisements are capable of misleading the public into believing that

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[2] The record is also clear that respondents were made keenly aware of the confusion resulting from the use of this group of advertisements and decided to employ some form of explanatory language in conjunction with the "Instant Tax Refund" slogan beginning in February 1970 (Snyder, Tr. 53-55, 57; Ross, Tr. 115-18; Higgins, Tr. 506-07; CX 159; also see finding 49).

"loan" in this context means "a cash advance" offered as a special service to Beneficial tax preparation customers, for a nominal fee not related to interest charges, and that "qualify" in this context simply means that the tax preparation customer must have a refund due from the government (See findings 50, 51). In other words, regardless of the literal truthfulness of the advertisement, the overall implication in the mind of the viewer-audience has the capacity and tendency to mislead. *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F.2d 52 (4th Cir. 1950); *Bockenstette* v. *Federal Trade Commission*, 134 F.2d 369 (10th Cir. 1943).

This is especially true because the "Instant Tax Refund" slogan is an explicit and dominant theme and no qualifying language which may follow it can entirely undo the initial impact of that theme. *Cf. The J. B. Williams Co., Inc.* v. *Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

The most charitable conclusion which can be drawn from these advertisements is that they are confusing, that they are susceptible of two meanings. Namely, one that Beneficial offers an "Instant Tax Refund" and the other that Beneficial offers a consumer loan to its customers if they qualify for such a loan. The former is clearly deceptive. Section 5 condemns such advertisements. In Judge Augustus Hand's words, the Commission can "insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein.' " *General Motors Corp.* v. *Federal Trade Commission*, 114 F.2d 33, 36 (2d Cir. 1940). Also see *Rhodes Pharmacal Co., Inc.* v. *Federal Trade Commission*, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd on other grounds*, 348 U.S. 940 (1955); *Murray Space Shoe Corporation* v. *Federal Trade Commission*, 304 F.2d 270 (2d Cir. 1962); *Giant Food Inc.* v. *Federal Trade Commission*, 322 F.2d 977, 981 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964); *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438, 443 (1924).

Furthermore, there is substantial evidence in the record which tends to show that the modified "Instant Tax Refund" advertisements confused and misled the public and that a number of consumers recalled the dominant theme of these advertisements to be an offer of "Instant Tax Refund" (Martin, Tr. 663-65, 672, 691-93; Snyder, Tr. 826-27; Moyers, Tr. 785). This, in return, reinforces the administrative law judge's impression of Beneficial's current television and radio commercials that they prominently feature the "Instant Tax Refund Plan" and play down the explanation (RX 20B and D).[3]

Unauthorized Use of Income Tax Information for Loan Purposes

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[3] It is true that some of respondents' consumer witnesses testified to a clear understanding of these advertisements to mean an offer of a consumer loan. However, they were for the most part persons who were

(*Continued*)

A. Deceptive Act

Complaint counsel contend that the use by Beneficial of confidential tax information for the purpose of soliciting consumer loans from its tax preparation customers is deceptive because the customers are not told in advance that Beneficial will make such use of the confidential tax information furnished to it. The theory appears to be that Beneficial's failure to disclose this material fact constitutes a deceptive act in violation of Section 5. In order to support this theory, complaint counsel further contend that Beneficial, by virtue of certain affirmative representations it makes, creates an expectation on the part of its tax preparation customers that the income tax information they furnish Beneficial will be kept confidential.

In the administrative law judge's view, however, confidentiality inheres in the very nature of personal income tax information regardless of whether Beneficial makes, or does not make, any affirmative representations regarding confidentiality (See further discussion, *infra*, pp. 31-32 [pp. 145, 146, herein]). Furthermore, the record shows the element of confidence is an important aspect of the relationship between a taxpayer and a tax preparer (findings 69, 71, Crossley Survey). Beneficial's failure to disclose the material fact that the tax information will be used for loan solicitation purposes in these circumstances clearly is a deceptive practice in violation of Section 5. *All-State Industries of N.C., Inc.* v. *Federal Trade Commission*, 423 F.2d 423 (4th Cir. 1970), *cert. denied*, 400 U.S. 828.[4]

Furthermore, what is deceptive here is the use of the "Instant Tax Refund" advertising as a *device* to lure tax preparation customers to Beneficial's offices for the purpose of soliciting them for consumer loans. In a real sense, Beneficial's practice in this respect is akin to the so-called "bait and switch" device, which is a deceptive act in violation of Section 5. *Tashof* v. *Federal Trade Commission*, 437 F.2d 707 (D.C. Cir. 1970); *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F.2d 103 (4th Cir. 1963). The rationale of these cases applies with equal force to this case. It is the administrative law judge's determination that Beneficial's use of the "Instant Tax Refund" slogan for the purpose of obtaining leads to loan prospects or luring tax service customers to

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knowledgeable of the operations of the consumer loan industry, including Beneficial, by reason of prior dealings or otherwise (Tr. 371, 384, 423, 406-07, 495, 472, 480-81, 611-12). It is well settled that testimony by some consumers that they personally would not be misled or deceived does not preclude a finding by the Commission that the challenged advertisement is deceptive. *Double Eagle Lubricants, Inc.* v. *Federal Trade Commission*, 360 F.2d 268 (10th Cir. 1965), *cert. denied*, 384 U.S. 434 (1966).

Furthermore, as pointed out hereinabove, the purpose of Section 5 is to protect the gullible and credulous as well as the trained and knowledgeable, *supra*, p. 26 [p. 141, herein].

[4] It is well recognized that in such confidential relationships, *caveat emptor* has no place and equity imposes on the parties the duty to act in accordance with the highest standards of morality. Cardozo, *The Nature of the Judicial Process*, 109-110 (1922); Pound, *The Spirit of the Common Law*, 24-25 (1921). Such duty includes that of full disclosure of material facts. 2 Pomeroy. *Equity Jurisprudence* §902. *Cf.* 1 Story, *Equity Jurisprudence*, §206.

Beneficial's loan offices for the purpose of making loans is equally a deceptive act in violation of Section 5.

B. Unfairness

Complaint counsel further argue (1) that the use by Beneficial of confidential tax information for the purpose of soliciting consumer loans is offensive to the public policy regarding personal privacy, and (2) that Beneficial's loan solicitation of its tax customers is immoral, unethical, oppressive and unscrupulous. For these reasons, it is argued, that Beneficial's practices are unfair to the consumer within the meaning of the Section 5 under *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934) ("*Keppel*") and *Federal Trade Commission* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972) ("*S&H*"). It is the determination of the administrative law judge that the challenged practices are unfair under *Keppel* and *S&H* because (1) they offend the well-established public policy regarding the confidentiality of income tax information, and (2) they are unethical, exploitative and unscrupulous.

In their defense, respondents have advanced several arguments. *First*, it is argued that a business practice, in order to be unfair to consumers within the meaning of Section 5, must be a violation of some public policy codified into a statute or recognized by common law. In this connection, respondents contend that, until the enactment of Section 316 of the Revenue Act of 1971 (26 U.S.C. §7216), the principle of confidentiality of individual income tax information did not acquire such a status. *Second*, it is argued that, to the extent that the confidentiality principle was recognized, it did not apply to the so-called commercial tax preparers, such as Beneficial, in any event. Respondents contend that Beneficial's tax customers did not regard Beneficial's tax preparers as tax experts or professionals who would be strictly bound by the confidentiality principle. Indeed, respondents further suggest that, because the fees charged by Beneficial for its tax service are substantially smaller than those customarily charged by lawyers and accountants, Beneficial's tax customers did not expect, or should not have expected, Beneficial to be strictly bound by the confidentiality principle. In the administrative law judge's view, these arguments are without merit and should be rejected.

The fact is that Congress, by the enactment of the 1971 Revenue Act, codified the confidentiality principle, prescribing criminal sanctions. Equally importantly, long before the 1971 Revenue Act, Congress explicitly demonstrated its public policy concerns regarding the confidentiality of income tax information. For example, 26 U.S.C. §6103 provides in substance that income tax returns are open to inspection only upon order of the President and under rules and regulations approved by the President. 26 U.S.C. §7213 prescribes criminal penalties for federal employees who disclose information contained in an income tax return.[5]

In the final analysis, the confidentiality principle inheres in the very nature of personal income tax information and governs the *relationship* between the taxpayer and another person who may be entrusted with the information by the taxpayer. The relationship thus is fiduciary in nature. Therefore, the administrative law judge is unable to accept the argument that the amount of fees paid determines whether or not the person entrusted with such tax information is to be bound by the principle of confidentiality. This is not to ignore the reality that money is a universal measure of commercial transactions. I simply conclude that the relationship existing between a taxpayer and a tax preparer entrusted with his tax information imposes upon the latter, as a matter of equitable principle, the duty of confidentiality regardless of the amount of fee paid or the professional status of the latter.[6]

More importantly, respondents' argument that a business practice, in order to be unfair to consumers within the meaning of Section 5, must be a violation of some public policy codified into a statute or recognized by common law is an attempt to restrict the Trade Commission's Section 5 power to enforcement of *existing* statutes. In essence, it is an attempt to turn the clock back half a century to the days of *Gratz*.[7] However, the attempts to restrict the Trade Commission's Section 5 power to existing or recognized methods of competition have been consistently rejected by the Court since *Keppel*.[8] Respondents would now, in this case involving unfairness to the consumer, rely on the same argument rejected by the Court in the unfair-method-of-competition cases.

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[5] It has been stated that the purpose of the statute is to "prevent the disclosure of confidential information to those who have no legitimate interest in it." *Star* v. *Rogalny*, 22 F.R.D. 256 (1958) (E.D. Ill.) That the policy behind §6103 is directly related to that behind the federal prohibition of use and disclosure by income tax preparers can be seen from Senator Mathias' comparison of the former provision and his proposed law. 117 Cong. Rec. S. 8318, Mar. 29, 1971. A great many states have provisions similar to 26 U.S.C.A. §7213 making State income tax return information confidential. See, *e.g.*, District of Columbia, Sec. 47-1564c, D.C. Code; Virginia, Code of Virginia §58-46; Maryland, An. Code Md. §300; Massachusetts, Sec. 58, Ch. 62, G.L.; Minnesota, Sec. 290.61; Ohio, Sec. 5747.18 R.C.; New York, Sec. 697, Tax Law, Ch. 60 C.L.; Michigan, Sec. 206.465, C.L.

[6] There is testimony in this record that the confidentiality of tax information is taken for granted even in cases where the tax preparers are laymen (Tr. 776).

[7] In that case, the Court, narrowly circumscribing the Trade Commission's discretion to define and declare an act an unfair method of competition, struck down the Commission's cease and desist order banning tying arrangements and said: "The words 'unfair method of competition' are not defined by the statute. * * * They are clearly inapplicable to practices never before regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." (253 U.S. at 423-427).

[8] *Keppel* recognized for the first time the Trade Commission's power to go beyond established common law principles to determine that lottery sales were an unfair method of competition in violation of Section 5. The court said: "We do not intimate either that the statute does not authorize the prohibition of other and hitherto unknown methods of competition or, on the other hand, that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences. New or different practices must be considered as they arise in the light of the circumstances in which they are employed." (291 U.S. at 314). Also see *FTC* v. *Motion Picture Adv. Service Co., Inc.*, 344 U.S. 392 (1953); *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357 (1965); *FTC* v. *Texaco Inc.*, 393 U.S. 223 (1968); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966).

Contrary to respondents' argument, however, the Trade Commission's power to define and prohibit *new* unfair acts as they arise, and do so apart from existing statutes or established public policy, is not open to question. The clear holding of the *Keppel* and *S&H* cases is that the Commission has that power. In *Keppel*, the Court accepted a gambling analogy to uphold a Trade Commission ban against lottery sales of candies to children. There, the Court was essentially striking at the unfairness of a practice which exploited the vulnerabilities of children. In *S&H*, the Court, reaffirming the Trade Commission's power to prohibit trade practices which are unfair to consumers (405 U.S. at 239-244),[9] merely insisted that the Trade Commission articulate the basis upon which the practice was found to be unfair (405 U.S. at 248).

What then are the standards against which the challenged practice in this case may be judged? In *S&H*, the Court adumbrated a broad and expansive approach: "in measuring a practice against the elusive, but congressionally mandated standard of fairness, [the Commission], like a court of equity, [consider] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." (405 U.S. at 244). Two things are clear. First, the Trade Commission may proceed on equitable principles, like a court of equity.[10] Second, the Commission may consider "public values."[11]

Applying the Court's broad guidelines to the instant case, the well-recognized principle of confidentiality of individual income tax information is clearly a valid standard in the circumstances of this case.

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[9] As early as in 1923, Justice Cardozo looked to the Trade Commission to build up "a body of precedent which will fix the proprieties of commercial usage." Cardozo, *The Growth of the Law*, 126 (1924). In Judge Learned Hand's words, the Trade Commission's powers "are not confined to such practices as would be unlawful before it acted" and its duty is to "discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop." *Federal Trade Commission* v. *Standard Education Soc.*, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd on other grounds*, 302 U.S. 112 (1937).

[10] It is elementary that equitable principle is essentially based on general grounds of morals and the community's sense of decency and fair play. See Maitland, *Equity*, 1-11 (1909); Main, *Ancient Law*, 27-28, 65-66, 401 (notes by Pollock) (Beacon Paperback Ed. 1963); Pound, *An Introduction of the Philosophy of Law*, 57-58 (1922). More than two millenia ago, Aristotle articulated the ethical basis of equity. *Nicomachean Ethics*, V, 11; *Rhetoric*, I, 13. It is of interest to note a parallel between Aristotle's concept of equity (*Rhetoric*, I, 13) and the organic concept of "unfair methods of competition" and "unfair practices" embodied in Section 5 of the Federal Trade Commission Act. See *Federal Trade Commission* v. *Motion Picture Adv. Service*, 344 U.S. 392, 394-395 (1953); *S&H*, *supra*, 405 U.S. at 244.

[11] In *S&H*, (405) U.S. at 244-245, n. 5), the Court accepted without comment the factors the Trade Commission considers in determining whether a practice is unfair, as stated in the Commission's 1964 *Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*. These factors were:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

The standards set forth in (2) clearly show that the Trade Commission may prohibit as unfair to consumers, a practice that has not been proscribed by the common or statutory law or judicial decisions. See Note "Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Redefined," 26 Rutgers L. Rev. 427, 433 (1973).

The confidentiality principle has long been incorporated into the codes of ethics of the legal and accounting professions. Congress long ago established the public policy regarding confidentiality of income tax information (26 U.S.C. §§6103, 7213). In 1971, it was made a statutory command to tax preparers, backed by federal criminal sanction. Furthermore, the record is clear that customers of the so-called commercial tax preparers, such as Beneficial, did expect tax preparers to be bound by the principle before 1972 (finding 69). Respondents' argument that commercial tax preparers were not expected to adhere to this principle at all, or not as strictly as lawyers and accountants until the Revenue Act of 1971, would astound their tax customers as well as the general public. In these circumstances, the use by Beneficial of confidential individual income tax information, obtained ostensibly for the purpose of income tax preparation, for the purpose of soliciting or making consumer loans to the same customer is offensive to the public policy, unethical, unscrupulous, unconscionable and clearly unfair to the consumer.[12]

It cannot be gainsaid that the so-called commercial income tax preparers, such as Beneficial, provide a service very much in demand by the consumer. They perform a legitimate and highly useful function. However, respondents do not contend that the trade realities peculiar to the commercial tax preparation business are so compelling as to require that the deep-rooted concept of confidentiality of individual income tax information yield to them or be modified in some way.[13] Nor is there any basis for such an argument in this record. The ultimate product of commercial civilization need not be abandonment of all traditional values.

That breach of confidence in fact occurred in this case was due to the peculiarities of Beneficial's own business operations, namely (1) combination of the tax preparation business and consumer loan business and (2) use of confidential tax information for the purposes of Beneficial's loan business. The record indicates that historically

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[12] In this connection, it is significant to note the evolving concept of unconscionability codified in Section 2-303 of the *Uniform Commercial Code*, which Congress has adopted for the District of Columbia (D.C. Code Ann. Art. 28 (1967)). It is generally recognized that this section reflects in part the congressional concern for consumer interests and a public policy of vindicating that interest where justice requires. A comment to that section of the *Uniform Commercial Code* states that "the principle is one of the prevention of oppression and unfair surprise," *Uniform Commercial Code* §2-302, Comment 1. Commentators have suggested that, in developing the standards of unconscionability, the courts should not only look to established common law concepts of unfairness but "pass directly on the unconscionability of the contract." *Id.* Also see generally Note, "Unconscionable Contracts: The Uniform Commercial Code," 45 Iowa L. Rev. 843 (1960); Leff, "Unconscionability and the Code-The Emperor's New Clause," 115 U. Pa. L. Rev. 485 (1967); Note, "Section 5 of the Federal Trade Commission Act - Unfairness to Consumers," 1972 Wis. L. Rev. 1071, 1094-1095.

[13] Needless to say, business realities are highly relevant to Section 5 analysis. See dissenting opinion of Brandeis', J. in *Federal Trade Commission v. Gratz*, 253 U.S. 421, at 434-437 (1920); *Federal Trade Commission v. Keppel Bros., supra*, 291 U.S. at 314. In the broadest sense, it has long been recognized that the law cannot long resist the needs of economic life that is strong and just. Cardozo, *The Growth of the Law*, 118 (1924). Also see Holmes, *The Common Law*, 5 (Belknap Ed., 1963); *Collected Legal Papers*, 187 (1920); Cardozo, *The Nature of Judicial Process*, 61-62 (1921).

Beneficial entered the tax preparation business mainly as a means of augmenting its consumer loan business (findings 53-54). In a manner of speaking, therefore, the danger of breach of confidence with respect to tax information was inherent both in the purpose and implementation of Beneficial's business plan from its inception. In this sense, it is arguable that the mere combination of tax preparation and consumer loan business under the same roof and common management of Beneficial may raise a Section 5 question for every such combination contains a seed of very real danger that the confidentiality may in fact be breached. This issue was eliminated by complaint counsel from this case (Mar. 13, 1974 admissions, Paragraph 20) and the administrative law judge has, of course, no occasion to make a determination of this issue one way or the other. However, it is beyond question that the *actual* use of tax information obtained in the tax preparation business for the purposes of soliciting or making consumer loans of any kind by Beneficial, including the so-called tax refund loan,[14] is a violation of the well-organized principle of confidentiality and is clearly unfair to consumers within the meaning of Section 5.

It should be stressed that the administrative law judge does not hold the challenged practice to be unfair simply because it is unethical. Whether a practice is morally or ethically objectionable in a general way is the beginning, not the end, of a Section 5 analysis. Here, the determination that the challenged practice is unfair with the meaning of Section 5 is not simply based on the fact that it is repugnant to some broad ethical desiderata, such as the need to protect personal privacy of individuals. Rather, it is based on a particularized standard, befitting the particular fact situations of this case, namely, the unauthorized use of confidential individual income tax information, ostensively obtained for the purpose of income tax preparation, for the purpose of soliciting or making consumer loans. What is being condemned is the essentially exploitative and unscrupulous misuse of confidential information in a breach of fiduciary relationship involved in this case. As Justice Cardozo observed long ago, Section 5 requires that "the careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 79 (1933). Therefore, respondents' arguments that there is no established public policy with respect to the protection of personal privacy in general or that personal privacy is routinely disregarded in the conduct of some businesses, such as the direct mailing industry and the sale of various mailing lists, do not save respondents' challenged act from Section 5's proscription.[15]

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[14] The record is replete with evidence tending to show that (1) the customers responding to Beneficial's "Instant Refund" advertisement were solicited for general consumer loans and, in some instances, for consolidation loans, both totally unrelated to the amounts of income tax refunds due them and (2) the financial information furnished by the customer in the course of the income tax preparation phase was used by Beneficial for the purpose of soliciting these unrelated loans (findings 60, 66).

Trade Commission's Section 5 Jurisdiction and Section 316 of the 1971 Revenue Act

With respect to Section 316 of the Revenue Act of 1971 (26 U.S.C. §7216), respondents further argue that that Revenue Code provision is directed precisely at conduct of the type alleged in Paragraphs Eight and Nine of the complaint, and that this legislative enactment has the effect of precluding the Trade Commission from taking any action against respondents under Section 5 of the Federal Trade Commission Act. These arguments are without merit.

Firstly, the Revenue Act of 1971 does not expressly repeal any of the provisions of the F.T.C. Act. Nor does it give tax preparers an express exemption from Section 5 of the Federal Trade Commission Act. And "[i]mmunity from the antitrust laws is not lightly implied." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348 (1963). This well-established principle applies to the Federal Trade Commission Act, which was designed to supplement and bolster the Sherman and Clayton Acts by reaching not only existing violations of them, but trade practices which conflict with their basic policies as well as those which are unfair to competitors or consumers. *S&H*, *supra*, 405 U.S. at 245-246. *Cf. United States* v. *Western Pacific R. R. Co.*, 352 U.S. 59, 63-65 (1956).

Secondly, the Trade Commission's instant proceeding in no way invades the exclusive jurisdiction of the courts to enforce the criminal sanctions prescribed by the Revenue Code. Rather, this is simply another instance where Congress provided for concurrent jurisdictions with cumulative remedies. The Trade Commission's jurisdiction and power to enforce the Federal Trade Commission Act has been consistently sustained against challenges that statutes enforced by other agencies should be construed to preclude such jurisdiction. See *e.g.*, *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, *supra*, 143 F.2d at 679. See also *Irwin* v. *Federal Trade Commission*, 143 F.2d 316, 325 (8th Cir. 1944); *Waltham Watch Co.* v. *Federal Trade Commission*, 318 F.2d 28, 31-32 (7th Cir. 1963), *cert. denied*, 375 U.S. 944; *Brandenfels* v. *Day*, 316 F.2d 375, 378 (D.C. Cir. 1963); *cert. denied*, 375 U.S. 824; *American Cyanamid Co.* v. *Federal*

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[15] Complaint counsel forcefully argue that there is an established public policy of protecting personal privacy and the right of an individual to control the dissemination of information of personal nature. The administrative law judge agrees that a broad principle of protecting privacy has evolved gradually during the past 40 years. In general, however, the courts and Congress have engrafted numerous exceptions based on their notion of a balancing of conflicting interests in particular situations. The instant case is clearly governed by a deep-rooted and particularized public policy regarding the confidentiality of income tax information and there is no need to invoke the broader emerging concept of privacy.

Trade Commission, 363 F.2d 757 (6th Cir. 1966), 401 F.2d 574 (6th Cir. 1968),

It is also well settled that a party may be subject to simultaneous jurisdiction by more than one agency under different statutes. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); *United States* v. *RCA*, 358 U.S. 334, 343-344 (1959); *United States* v. *Borden Co.*, 347 U.S. 514 (1954); *Safeway Stores, Inc.* v. *Freeman*, 369 F.2d 952, 957 (D.C. Cir. 1966). Similarly, courts have consistently held that concurrent Food and Drug Administration-Trade Commission proceedings involving the same issues are proper, and that the statutory remedies of the two agencies are cumulative and not mutually exclusive. *United States* v. *1 Dozen * * * Boncquet Tablets*, 146 F.2d 361 (4th Cir. 1944); *United States* v. *Five Cases * * * Capon Springs Water*, 156 F.2d 493 (2d Cir. 1946). Furthermore, in cases where the Trade Commission has concurrent jurisdiction under different statutes, the enforcement standards of the Federal Trade Commission Act may also be different. See *e.g., Brandenfels* v. *Day, supra; American Cyanamid Co.* v. *Federal Trade Commission, supra;* and the FDA cases cited hereinabove. This is such a case.

In view of the foregoing discussion, respondents' argument that their use of the so-called BOR-56 consent form fully complies with the requirements of Section 316 of the 1971 Revenue Act, a question the administrative law judge has no occasion to decide, is entirely irrelevant to this Section 5 proceeding. For our purposes, it is enough that the present BOR-56 consent form, together with the manner in which it was used by respondents, is not sufficient to cure the unfairness at issue here (findings 65-67).

The Liability of Beneficial Corporation

We need dwell on respondents' argument that Beneficial Corporation, a holding company which owns and controls the Beneficial loan and tax service subsidiaries, is not liable for the practices challenged in this proceeding. The record is abundantly clear that Beneficial Corporation, in addition to its control by ownership, in fact exercises an absolute control over the affairs of its operating subsidiaries, which it collectively calls the Beneficial Finance System, not only through a pervasive web of interlocking directorates and managements but also through its absolute power of the purse (findings 21, 23, 30, 31). Indeed, the "Instant Tax Refund" slogan, which respondent so strenuously insist on retaining for continued use, has been copyrighted by Beneficial Corporation itself (finding 28). It is well settled that those who place in the hands of others the instrumentality by which unfair or deceptive acts are accomplished may be held responsible for these practices. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922).

THE REMEDY

It is well settled that the Trade Commission has broad discretion in fashioning an appropriate remedy once a Section 5 violation is found in order to ensure discontinuance of the condemned act. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1957); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). The Commission's discretion in this respect is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946); *OKC Corp.* v. *Federal Trade Commission*, 455 F.2d 1159 (10th Cir. 1972).

Complaint counsel have proposed an order which, except for a few modifications, is substantially similar to the notice order which was attached to the complaint.

Respondents urge two reasons why in their view the imposition of any order would not be in the public interest: (1) discontinuance and (2) the enactment of the 1971 amendment to the Internal Revenue Code. In the administrative law judge's view, they are invalid and should be rejected.

A. Discontinuance

Respondents' argument that the misleading advertisements ceased years ago and that, therefore, no order need be entered is contrary to the administrative law judge's conclusion, elaborated hereinafter, that only the excision of the "Instant Tax Refund" slogan will provide adequate protection. *Infra*, pp. 42-44 [pp. 153,154 herein]. In any event, it is well settled that discontinuance of abandonment of the offending practice does not render a cease and desist order improper. The statutory scheme of the Federal Trade Commission Act clearly contemplates the issuance of an appropriate order in order to protect the public from any resumption of the unfair practices without further resort to the statutory sanctions available for future enforcement. *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F.2d 838 (7th Cir. 1961); *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Montgomery Ward Co.* v. *Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967); *Doherty, Clifford, Steers & Shenfield, Inc.* v. *Federal Trade Commission*, 392 F.2d 921 (6th Cir. 1968).

B. The Revenue Act of 1971

Respondents next contend that, because the use of individual income tax information by commercial tax preparers for any purpose other than the preparation of tax returns of their clients has been made a criminal offense by Section 316 of the Revenue Act of 1971 (26 U.S.C. §7216), there is no longer any need for the Trade Commission to issue a cease and desist order against unauthorized use by Beneficial of confidential income tax information for the purpose of soliciting or making consumer loans in the future. This argument is without merit for the same reasons discussed hereinabove in connection with the Commission's Section 5 power to proceed in this case. Essentially, the Commission's remedy is cumulative, and not mutually exclusive with the statutory remedy provided for by the Revenue Code. *Supra*, pp. 39-40[pp. 150-151]. Furthermore, the Trade Commission has a broad equitable power to prescribe a more stringent or different remedy than that provided for by the Revenue Act of 1971, or the regulations promulgated thereunder, in order to adequately protect the consumer. In the final analysis, therefore, respondents' argument in this respect is directed to the Commission's discretion. And, on the basis of this record, the administrative law judge concludes that the issuance of a cease and desist order is necessary and proper.

C. Provision Against the Use of "Instant Tax Refund" Slogan

Complaint counsel assert that nothing short of an outright prohibition against further use of the "Instant Tax Refund" slogan, or any variation thereof, would provide an adequate remedy in the circumstances of this case. They stress that mere insertion of an explicit qualifier or other explanatory language in advertisements containing the "Instant Tax Refund" slogan will not do. Respondents vigorously claim that the "Instant Tax Refund" slogan, which is a registered trademark and has been heavily promoted by them over the past few years, constitutes a valuable proprietary right, that the insertion of explicit and appropriate phrase stating that what is being offered is a loan in reasonable proximity of the slogan would adequately cure the alleged deception, and that under the circumstances, the extreme and harsh remedy of an outright ban against any use of the slogan would be unreasonable, arbitrary and capricious and a violation of due process. The administrative law judge is of the view that the same reasons which render unfair and deceptive the post-February 1970 "Instant Tax Refund" advertisements discussed hereinabove, compel the conclusion that further use of the deceptive slogan should be prohibited. See *supra*, pp. 26-28, [pp. 142-143, herein]. Furthermore, it is well settled that qualifying language that is contradictory to the deceptive trade name cannot be used. *Federal Trade Commission* v. *Army and Navy Trading Co.*, 88 F.2d 776, 780 (D.C. Cir. 1937); *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F.2d 429 (4th Cir. 1939);

Bakers Franchise Corp. v. *Federal Trade Commission*, 302 F.2d 258, 262 (3d Cir. 1962); *Resort Car Rental System Inc.* v. *Federal Trade Commission*, F.2d (July 31, 1973). This is such a case. See *supra*, p. 28, [p. 143, herein].

For the same reason, respondents' argument that their proprietary right in the slogan should be respected by the Commission must be rejected. As Justice Cardozo so aptly put it in a leading case, to cling to a benefit which is the product of misrepresentation, however innocently made, would constitute "a kind of fraud." Respondents must extricate themselves from it by purging their advertisement of the offending slogan. Under the circumstances, only a complete excision of the "Instant Tax Refund" slogan or any variation thereof, can provide an adequate protection. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

Furthermore, the "Instant Tax Refund" slogan is calculated to exploit the common and natural desire of taxpayers to get back from the government as speedily as possible any money they may have paid above and beyond what they actually owe in taxes. In this sense, the slogan is more than simply deceptive and misleading. It is, in a real sense, exploitative. See *supra*, pp. 30, 37, [pp. 144, 149, herein]. In these circumstances, it would be unthinkable to permit respondents to continue to use the "Instant Tax Refund" slogan or any variation thereof in their future advertisements.

D. The Requirements for a Consent Form

Complaint counsel have proposed detailed requirements for a consent form which may be used by respondents in order to cure the deceptive and unfairness of their practices condemned herein. In the administrative law judge's view, these requirements are reasonably related to the violation found and appear to be designed to protect the consumers adequately in the circumstances of this case. These requirements will therefore be adopted by the administrative law judge.

E. The Provision Requiring Respondents to Send a Letter to their Tax Service Customers for the Most Recent Year

Complaint counsel have also proposed an order provision which would require respondents to send a letter explaining the terms of the cease and desist order entered in this case to the last known address of each of their tax preparation customers for the most recent tax years. Indeed, respondents have contended that the "Instant Tax Refund" slogan has been identified by the consumer with Beneficial and that it constitutes a valuable proprietary interest. It is arguable, therefore, that something more than mere prohibition of the offending advertisements is required in order to counter the residual effects of these advertisements. It is beyond question that the Trade Commission has the power to require corrective advertisement as a part of an affirmative remedy where appropriate, *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78 (1934); *American Cyanamid* v. *Federal Trade Commission*, 401 F.2d 574 (1968), *cert. denied*, 394 U.S. 920 (1969). Nevertheless, the administrative law judge is of the view that the record evidence does not justify a provision for corrective advertisement in this case. First, Beneficial's use of the offending advertisements has been of a relatively recent origin. It started some 4 years ago (findings 41). Second, the advertising campaign using the offending slogan has been largely seasonal, limited to the income tax season. Finally, the administrative law judge is concerned with the possibly counterproductive effects corrective advertisements may have upon those consumers who have never been exposed to Beneficial's "Instant Tax Refund" advertising campaigns. In this sense, any requirement for corrective advertisements may very well operate to dilute the central provision of the remedy in this case, namely, the excision of the "Instant Refund" slogan or any variation thereof from the future advertisements of Beneficial. For these reasons, the administrative law judge does not include a corrective advertisement provision in the order.

The administrative law judge rejects complaint counsel's argument that respondents be required to send a letter explaining the terms of the order to respondents' past tax customers. The necessity for and utility of such a notification letter is highly dubious. In the administrative law judge's view, the most effective protection that can be devised for respondents' tax preparation customers in this case is a total ban against the use of the "Instant Tax Refund" slogan by respondents in the future. This is adequate in the circumstances of this case.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has, and has had jurisdiction over respondents, and the acts and practices charged in the complaint and involved herein, took place in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Respondents Beneficial Corporation and Beneficial Management Corporation are jointly responsible for the unlawful acts and practices committed in this case and both are subject to the order issued herein.

3. Respondents have engaged in false, misleading and deceptive advertising.

4. Respondents' use of information gathered as a result of their preparation of customers' tax returns for purposes other than the

preparation of those tax returns is false, misleading, deceptive and unfair.

5. The use by respondents of the aforesaid false, misleading and deceptive advertising and deceptive and unfair acts and practices has had, and now has, the capacity and tendency to mislead members of the public into the purchase of respondents' income tax preparation services, and were and are to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

6. The order set forth below is the necessary and appropriate relief in this case.

As a consequence of the foregoing and of the findings of fact set out above, the following order is entered:

ORDER

It is ordered, That respondents Beneficial Corporation and Beneficial Management Corporation, corporations and their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation of income tax returns or the extension of consumer credit in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "instant tax refund," or any other word or words of similar import or meaning.

2. Using any guarantee without clearly and conspicuously disclosing the terms, conditions and limitations of any such guarantee; or misrepresenting, in any manner, the terms and conditions of any guarantee.

3. Representing, directly or by implication, that respondents will reimburse their customers for any payments the customer may be required to make in addition to his initial tax payment, in instances where such additional payment results from an error by respondents in the preparation of the tax return.

4. Failing to disclose, clearly and conspicuously, whenever respondents make any representation, directly or by implication, as to their responsibility for, or obligation resulting from, errors attributable to respondents in the preparation of tax returns, that respondents will not reimburse the taxpayer for any deficiency payment assessed against the taxpayer which results from the said errors.

5. Representing, directly or by implication, that the percentage of

respondents' customers who receive tax refunds is demonstrably greater than the percentage of the tax paying public at large who receive refunds; or misrepresenting, in any manner, the magnitude or frequency of refunds received by respondents' tax preparation customers.

6. Representing, directly or by implication, that respondents' tax preparing personnel are specially trained or unusually competent in the preparation of tax returns and the giving of tax advice; or that they have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns; or misrepresenting, in any manner, the competence or ability of respondents' tax preparing personnel.

7. Using any information concerning any customer of respondents, including the name and/or address of the customer, for any purpose which is not essential or necessary to the preparation of a tax return if such information was obtained by respondents as a result of the preparation of the customer's tax return which includes any information given by the customer after he has indicated, in any way, that he is interested in utilizing respondents' tax preparation services, unless prior to obtaining such information respondents have both (1) specifically requested from the customer the right to use the tax return information of the customer and (2) have executed a separate written consent signed by the customer which shall contain:

1. Respondent's name;
2. The name of the customer;
3. The specific purpose for which the consent is being signed;
4. The exact information which will be used;
5. The particular use which will be made of such information;
6. The parties or entities to whom the information will be made available;
7. The date on which such consent is signed;
8. A statement that the tax return information may not be used by the tax return preparer for any purpose other than that stated in the consent, and;
9. A statement by the taxpayer that he consents to the use of such information for the specific purpose described in subparagraph (3) of this paragraph.

Nothing in the above provision is intended to relieve respondents of any further requirements imposed on them by the Revenue Act of 1971, Pub. L. 92-178, title III, §316(a) Dec. 10, 1971; 26 U.S.C. §7216 or regulations issued pursuant to it.

It is ordered, That respondents herein shall notify the Commission at least 30 days prior to any proposed change in the structure of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent corporations which may affect compliance obligations arising out of this order.

OPINION OF THE COMMISSION

BY ENGMAN, *Commissioner:*

In this case respondents Beneficial Corporation and Beneficial Management Corporation, which we shall refer to jointly as Beneficial unless otherwise noted, appeal from the administrative law judge's initial decision and order.

Beneficial operates a nationwide system of consumer loan offices and, starting in late 1969, the loan offices began offering a personal income tax preparation service. The complaint in this matter, which was issued on Apr. 10, 1973, charged Beneficial with a variety of offenses under Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), stemming from the advertising and operation of the income tax service. During adjudication, counsel for the parties signed a stipulation for partial adjudicated settlement, by which Beneficial admitted violations, and consented to appropriate order provisions, concerning advertising misrepresentations of Beneficial's reimbursement policy, its competence to prepare tax returns, and the number of customers for whom it has secured government refunds. The law judge accepted this stipulation and we see no reason to overrule him. However, the order provisions which the law judge entered respecting these issues do not correspond in some particulars to the stipulated order provisions, and, on the joint motion of Beneficial and complaint counsel, we shall substitute the latter.

After the partial admission, the remaining issues to be adjudicated were the lawfulness of Beneficial's advertisements featuring its "Instant Tax Refund" slogan, the lawfulness of Beneficial's soliciting loans with information given by its tax service customers, and the liability of respondent Beneficial Corporation. The law judge found against respondents on each of these issues in an initial decision filed Oct. 21, 1974. Respondents have appealed on each issue.

We affirm the administrative law judge. Except to the extent that they are inconsistent with this opinion, the findings and conclusions of the law judge are adopted as those of the Commission.

I. LIABILITY OF BENEFICIAL CORPORATION

Every local loan office of what is known as the Beneficial Finance System is a separate corporation wholly owned, with the exception of a few shares of a few companies, by Beneficial Corporation. At the end of 1972, 1,505 of these local loan corporations operated domestically. (CX 18 at 8)[1] Beneficial Corporation also wholly owns respondent Beneficial Management Corporation, which provides management services, at cost, to the local loan subsidiaries. Other wholly-owned Beneficial Corporation subsidiaries include Beneficial Management Corporation of America, which implements the local loan policies set by Beneficial Management Corporation, and Beneficial Data Processing Corporation, which provides accounting services for the local loan subsidiaries. (I.D. Pars. 7, 20). It is undisputed that the conduct challenged in this matter was performed, directly at least, by subsidiaries, and that Beneficial Corporation must be subject to vicarious liability or none at all.

In determining a parent corporation's liability, we examine the "pattern and framework of the whole enterprise." *Art National Mfgs. Dist. Co.* v. *Federal Trade Commission*, 298 F.2d 476, 477 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962). And if the facts demonstrate even latent control, the applicable standard is met:

> [W]here a parent possesses latent power, through interlocking directorates, for example, to direct the policy of its subsidiary, where it knows of and tacitly approves the use by its subsidiary of deceptive practices in commerce, and where it fails to exercise its influence to curb illegal trade practices, active participation by it in the affairs of the subsidiary need not be proved to hold the parent vicariously responsible. Under these circumstances, complicity will be presumed.

P.F. Collier & Son Corp. v. *Federal Trade Commission*, 427 F.2d 261, 270 (6th Cir.), *cert. denied*, 400 U.S. 926 (1970).

Despite this clear statement, respondents contend that we should be governed instead by the common law rule, restated in *National Lead Co.* v. *Federal Trade Commission*, 227 F.2d 825, 829 (7th Cir. 1955), *rev'd. on other grounds*, 352 U.S. 419 (1957), that to pierce the corporate veil we must find evidence of such complete control of the subsidiary by the parent that the subsidiary is a mere tool and its corporate identity a mere fiction. We reject the contention that any such stringent standard applies.

> Manifestly, where the public interest is involved, as it is in the enforcement of Section 5 of the Federal Trade Commission Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the policy of the statute.

P.F. Collier, *supra*, 427 F.2d at 267. *See also, e.g., Goodman* v. *Federal Trade Commission*, 244 F.2d 584, 590 (9th Cir. 1957).

Accordingly, we have examined the overall pattern of Beneficial

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[1] The following abbreviations are used in this opinion:

I.D. - Initial Decision of administrative law judge (cited by paragraph where adopted without change)

Tr. - Transcript of testimony

CX - Commission exhibit

RX - Respondents exhibit

Corporation's relation with its subsidiaries, and we find for several reasons that an order should issue against the parent.

First, respondent Beneficial Corporation shares a common management with respondent Beneficial Management Corporation. The president of the former serves as president and chairman of the board of the latter, and sits on the executive committee of each. The first vice president of Beneficial Corporation also sits on both executive committees. Beneficial Corporation's chairman of the board is additionally general counsel of Beneficial Management Corporation and, likewise, a joint executive committee member. These three men were a majority of Beneficial Corporation's executive committee and were the entire executive committee of Beneficial Management Corporation during much of the relevant period. The executive committee of Beneficial Management Corporation approved the start of the income tax preparation business (I.D. Pars. 30, 31, 32).

Through its domination of the service subsidiaries, Beneficial Corporation also controls each of its local loan subsidiaries. While no officer or director of the parent serves directly as an officer or director of any local loan subsidiary, Beneficial Corporation chooses local officers and directors from the ranks of the management subsidiaries.

Since at least 1969, Beneficial Corporation has installed each regional vice-president of Beneficial Management Corporation as a director of all local loan subsidiaries in his region; typically, the same man also serves as president of all the local loan subsidiaries in the region. The remainder of each local board is filled by a small group of employees of Beneficial Management Corporation of America. Thus, the president of Beneficial Management Corporation of America and two other employees of that corporation serve on the boards of all 1,143 local loan subsidiaries outside New York, and are a majority of those boards; the same three men are also, respectively, secretary, vice-president, and treasurer of these 1,143 subsidiaries. (CX 145a; Tr. 198-201, 221, 226).

The administrative law judge correctly called these patterns of control "a pervasive web of interlocking directorates and managements," (I.D. at 40 [p. 151, herein]). Here, as in *P.F. Collier, supra*, 427 F.2d at 268, the men who directed the policy and operations of the parent also directed the policy and operations of the wholly-owned subsidiaries.

Second, Beneficial Corporation also exercises complete financial control over the affairs of its subsidiaries. The local loan offices receive all cash for making consumer loans from the parent company, either by capitalization or by loan. Beneficial Data Processing Corporation performs all of the accounting for the local loan subsidiaries. The service subsidiaries provide their services to the local loan companies at cost, and themselves borrow needed funds from Beneficial Corporation. (I.D., Pars. 19, 20). Without the continuing support and intervention of the parent, neither the local loan subsidiaries nor the service subsidiaries would be independently viable.

Third, Beneficial Corporation also allows or encourages local loan subsidiaries to hold themselves out as part of a single nationwide Beneficial entity. Each of them is similarly named — Beneficial Finance Company of Pittsburgh, or of Knoxville, or of Charlotte. Moreover, they are jointly identified through advertising as the Beneficial Finance System, with offices nationwide and around the world. Consumers believed themselves to be dealing with a nationwide Beneficial organization. (Tr. 375, 426). As in *P.F. Collier, supra*, 427 F.2d at 269, Beneficial Corporation allowed its subsidiaries to trade on its own name and good will. Moreover, by clothing its subsidiaries with apparent authority to act for it, Beneficial Corporation is liable when they use that authority to deceive the public. *Cf. Goodman* v. *Federal Trade Commission, supra*, 244 F.2d at 591-93.

Fourth, Beneficial Corporation has set up a retirement plan for all employees of the local loan companies and the service subsidiaries and has contributed several million dollars to the plan. Beneficial Corporation has also set up various other employee plans, such as a stock plan and a Thrift Club plan (Tr. 208-10; I.D. Par. 22).

Finally, the very advertising slogan which is a subject of this case is copyrighted by Beneficial Corporation. That the parent owns the slogan while the subsidiaries use it is further evidence, if any is needed, of the closely intertwined nature of Beneficial Corporation and its flock of subsidiaries. But the copyright ownership by itself is also sufficient to fix liability on Beneficial Corporation. As respondents vigorously point out when arguing to keep the slogan, a copyrighted phrase is a property right. And the law is clear that one who places into another's hands the instrumentality by which unfair or deceptive acts or practices are accomplished may be held responsible for those practices. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *C. Howard Hunt Pen Co.* v. *Federal Trade Commission*, 197 F.2d 273, 281 (3d Cir. 1952).

As we have noted, a sufficient standard is whether the parent, having latent power to halt illegal practices of its subsidiary, instead tacitly approved them. That standard is clearly met. In fact, Beneficial Corporation's control was more than latent, for the parent was intimately entwined with the management, the finances, the employees, and the marketing practices of its subsidiaries. The paper division of Beneficial's business into 1,800 separate companies does not mask overall existence of a single enterprise. *See Zale Corporation, et al.* v.

Federal Trade Commission, 473 F.2d 1317 (5th Cir. 1973). Whether looking at the pattern or framework of the whole enterprise or at the individual factors mentioned, we find Beneficial Corporation liable. Indeed, even though the common law standard argued by respondents is inapplicable, in this case that more stringent standard is met as well, for the subsidiaries were simply convenient fictions for Beneficial Corporation's use.

II. INSTANT TAX REFUND ADVERTISING

As the administrative law judge found, substantially all of Beneficial's tax preparation advertising has featured the "Instant Tax Refund" theme. The first advertisements, in late 1969 and early 1970, gave little or no explanation of what Beneficial was actually offering. For example, one radio commercial states:

> * * * Do you have a refund coming to you on your income taxes this year? Well, there's no need to wait weeks for your refund check. Get the money right now - even before you mail your return - with a cash advance from Beneficial. We call it the Instant Tax Refund, a special service of Beneficial Finance. Instant Tax Refund. At Beneficial you're good for more. * * * (CX 85(f).)

By February 1970, after initial public response demonstrated widespread misunderstanding of the Instant Tax Refund (Tr. 65-66), Beneficial began to alter its advertising. Broadcast advertisements since then have variously referred to the " 'Instant Tax Refund' Plan" or " 'Instant Tax Refund' loans," and have included such explanatory language as "lend you the equivalent of your refund in cash" or "qualify for a loan." A typical television advertisement is:

> * * * And the Beneficial "Instant Tax Refund" Plan. If you have a refund coming, Beneficial will lend you the equivalent of your refund in cash the instant you qualify for a loan. * * * (CX 84(f).)

Print advertisements also changed somewhat from their original form. After 1970 Beneficial placed an asterisk after the Instant Tax Refund reference with a corresponding asterisk below accompanied by explanatory language, or otherwise used the words "loan" or "Plan" with explanatory language. For example, CX 63 states:

> New Income Tax Service offers "Instant Tax Refund" Plan*
>
> * * * * *
>
> *When you get your taxes prepared at Beneficial you can take advantage of our "Instant Tax Refund" Plan. The instant you qualify for a loan, Beneficial will lend you the equivalent of your refund — in cash — instantly * * * even before you mail your return. * * *

In truth, it is admitted, what Beneficial is offering is its everyday loan service. The Instant Tax Refund is not a refund at all but a personal consumer loan, with regular finance charges, costs, and repayment period. (complaint, Par. 7(1); Ans., Par. 7; I.D. Par. 48). Such a loan is always available to anyone meeting Beneficial's credit standards, whether or not the customer is owed a tax refund by the government, but Beneficial will not make any loan to a person failing to meet its credit standards, even if the customer is due a government refund. The size of the loan Beneficial wishes to sell is not related to any tax refund, but to the customer's credit limit (CX 143e, 143i; Tr. 169).

A.

Beneficial takes a narrow view of the dispute on appeal. According to Beneficial, the only issue which its Instant Tax Refund advertising presents is whether Beneficial offers real tax refunds. The broader issue, whether consumers are deceived over what Beneficial actually does offer, is presumably irrelevant. Beneficial suggests that deciding this case on other than the narrow issue of actual refunds will import a new theory neither charged nor litigated.

We reject the idea that any such narrow question is before us. Beneficial had ample notice of the issues in this case, which were, and are, whether the Instant Tax Refund advertising is unfair or deceptive under the Federal Trade Commission Act, and specifically whether the Instant Tax Refund advertising misrepresents that Beneficial is offering no more nor less than its normal consumer loan service with its normal finance charges. The complaint raises these issues by quoting Beneficial's advertising (Par. 5), charging that it seems to offer some "instant refund" (Par. 6(1)), and then alleging that in fact Beneficial is offering not a refund at all but a personal loan with finance charges (Par. 7(1)).[2] A clearer and more precise allegation is difficult to conceive. It certainly goes beyond the minimum standards of notice pleading acceptable in administrative hearings. *A.E. Staley Mfg. Co.* v. *Federal Trade Commission*, 135 F.2d 453, 454 (7th Cir. 1943).

During litigation, Beneficial clearly understood that this case related to the total truth of its offer and not just to actual tax refunds. Consistent with the position taken in its prehearing brief before the law judge that its advertisements "fairly and fully inform the public precisely what is involved,"[3] Beneficial asked each of its consumer witnesses if they realized consumer loans with normal finance charges were offered (*e.g.*, Tr. 364-65, 401, 460, 469-73). Beneficial also attempted to show that consumers understand the word "loan" to imply finance charges (*e.g.*, Tr. 56-58, 114-15). Even assuming that only the narrow issue of actual tax refunds was alleged in the complaint, which we do not find, we have consistently held that a party cannot subsequently challenge as beyond the pleadings an issue which was litigated, if he has had actual notice and opportunity to defend. *Grand Caillou Packing Co.*, 65 F.T.C. 799, 820-821 (1964), *rev'd in part on other grounds sub nom. LaPeyre* v. *Federal Trade Commission*, 366 F.2d 117 (5th Cir. 1966). *See also, e.g., Armand Co.* v. *Federal Trade Commission*, 84 F.2d 973 (2d Cir.), *cert. denied*, 299 U.S. 597 (1936); Rule 3.15(a)(2), 16 C.F.R. §3.15(a)(2). In short, Beneficial has had a full and fair opportunity to litigate whether its advertising misrepresented the total truth of its offer, and we will decide that point.

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[2] The full charging paragraphs read:

PAR. 6. [Respondents have represented that]

* * * * *

1. Respondents will provide taxpayers who have their returns prepared by respondents and to whom a refund is owned by the Internal Revenue Service with an "instant refund" at the time their returns are prepared.

* * * * *

PAR. 7. In truth and in fact:

1. Respondents' "instant tax refund" is not a refund but a personal loan and the recipient of the loan is required to pay finance charges and other costs for such loan.

B.

Turning, therefore, to Beneficial's advertising, we conclude that the Instant Tax Refund advertisements, in both their plain and adorned forms, had a capacity and tendency to mislead the public about the truth of Beneficial's loan offer, and thus violated Section 5. We find this both on the basis of our own expertise and judgment, from having examined the advertising, *see, e.g., Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965), and on the basis of ample record evidence (*e.g.*, Tr. 53-55, 115-18, 506-07, CX 159).

The early Instant Tax Refund advertising is, on its face, totally misleading about the true nature of Beneficial's offer. Instead of making clear that Beneficial is simply offering its everyday loan service, the advertising implies that Beneficial will give a special cash advance to income tax preparation customers with a government refund due, in the amount of their refund. The natural impression, since the Instant Tax Refund is stressed as exclusive and special, is that this cash advance is different from a normal consumer loan.

Beneficial was acutely aware that the early advertising was misleading consumers about the nature of its offer, for it made all the subsequent changes in an attempt to clarify the real meaning (Tr. 53-55, 115-19, 504-08). The extent of the early advertising's deception is epitomized by a report from Beneficial's advertising agency on the consumer impact of its first Instant Tax Refund campaign (CX 159):

> Results of this initial wave of interest depend on the office and its location. In center-

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[3] Respondents' trial brief, before the law judge, Oct. 30, 1973, at 4.

> city offices, particularly those near ghetto areas, the impression gathered from managers was that many of the phone calls came from totally uncreditworthy "riff-raff" * * * people with no steady job record, with very low incomes, whose sole concern was in the Instant Tax Refund. Many thought they could simply get their government checks immediately at Beneficial. Others didn't have the required $5 deposit. There were many loud arguments and unpleasantnesses * * * including one or two incidents of violence being threatened. Managers in these situations tend to agree that advertising should have dealt more directly with the qualifications required to obtain an Instant Tax Refund.
>
> In other offices — in steady, stable white middle class neighborhoods — many customers also needed explanations about the loan aspects of the Instant Tax Refund. But naturally there were fewer hopeless applicants, and managers in places like that feel much better about the high response level and are much calmer about the advertising claim.[4]

In the face of this, we are unpersuaded that, as Beneficial argues, consumers could decipher the real meaning of its advertising because the Instant Tax Refund phrase was placed in quotations or because Beneficial's identity as a consumer loan business may have given a clue. At any rate, consumers are not obliged to guess about the meaning of advertising. *Cf. Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 116 (1937).

Beneficial contends that it eliminated any early faults by adding the explanatory language characteristic of its later advertising. Although, as we discuss *infra*, the later advertising is not appreciably less misleading than the early, even assuming that Beneficial did discontinue its early deception in this case we find it an insufficient defense. Whether a cease and desist order should be entered when discontinuance is claimed rests within the discretion of the Commission. *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313, 322 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966). And the Commission has required respondents to meet a heavy burden to prevail on such a claim. *Compare, e.g., Argus Camera, Inc.*, 51 F.T.C. 405 (1954), *with Fedders Corp.*, Dkt. 8932, 3 CCH Trade Reg. Rep. Par. 20,825 (Jan. 14, 1975) [85 F.T.C. 38]. Assuming discontinuance of the early deception to have occurred, we can detect no reason to accept that discontinuance as a defense here, for we have no assurance that the deception will not be resumed. Beneficial is still in the tax preparation business and could revert at any time to similar deceptive practices. *See Giant Foods*, 61 F.T.C. 326, 357 (1962), *aff'd.*, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 967 (1964). Moreover, such changes as it made in its advertising came partly from the prodding of various regulatory agencies, so were not totally voluntary (Tr. 11, 55, 70-71, 506-07). *See*

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[4] Although we have rejected Beneficial's narrow construction of the complaint, we note that this memorandum indicates some consumers at least did believe Beneficial actually would provide real tax refunds.

Eugene Dietzgen Co. v. *Federal Trade Commission*, 142 F.2d 321, 330 (7th Cir.), *cert. denied*, 323 U.S. 730 (1944).

At any rate, no discontinuance occurred, for, as we have noted, despite continual revision Beneficial's later advertising did not succeed in shedding the deceptive and misleading characteristics. The addition of the words "loan" and "plan" and "qualify" was not, in our view, sufficient to clarify exactly what Beneficial was really offering. As the law judge noted, the advertising at best is open to two interpretations. Though some consumers may understand that regular consumer loans are offered,[5] another interpretation is that Beneficial is offering a special, tax-related service apart from its everyday loan business. Of course, where two interpretations of an advertisement are possible, one of which violates Section 5, the advertising is unlawful. *Murray Space Shoe Corp.* v. *Federal Trade Commission*, 304 F.2d 270, 272 (2d. Cir. 1962).

Beneficial insists that we examine the later advertisements in their entirety, and consider the overall explanation of the Instant Tax Refund phrase. *Cf. Parker Pen Co.* v. *Federal Trade Commission*, 159 F.2d 509, 512 (7th Cir. 1946). We have done so. But as noted we find the explanation confusing and misleading. For example, addition of the supposedly explanatory word "plan" seems to us to heighten the implication of the Instant Tax Refund's uniqueness, rather than clarify that it is not unique at all. Thus, we have no occasion to determine whether the explanation, considering the advertising as a whole, was sufficiently conspicuous to dispel the impression generated by the dominant Instant Tax Refund slogan, for nothing amounting to real explanation was included.

The testimony of consumers confirms our view that the later advertising has a capacity to mislead in a material respect. A number of consumers failed to understand that Beneficial was offering only its normal loan service with normal finance charges. Their reasonable impression was that they would pay only a small fee and that the main qualification for the Instant Tax Refund was being due an actual Government refund (Tr. 663, 691, 713-16, 775, 808-09). The consumers, had they realized from the advertising that the "Instant Tax Refund" was simply Beneficial's ordinary loan business, would not have gone to Beneficial's offices at all (Tr. 665, 729, 745-46, 778).

We may assume, as Beneficial would have us, that respondents never intended to deceive consumers. But intent is not an element of a deceptive advertising charge under Section 5. *Regina Corp.* v. *Federal*

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[5] Beneficial produced a number of such consumers. It appears from their testimony, however, that most of them understood the Instant Tax Refund for what it was because of their prior dealings with loan companies and not because they independently comprehended the advertising (*e.g.*, Tr. 371, 391, 423, 472, 480-81, 495).

Trade Commission, 322 F.2d 765, 768 (3d Cir. 1963). The simple fact is that Beneficial's Instant Tax Refund advertising had a capacity and tendency to deceive, and did in fact deceive, the consuming public.

C.

The law judge's order bans the use of the Instant Tax Refund phrase or similar words. He found that no qualifying language could remedy the deception and that only purging Beneficial's advertisements of the phrase would suffice. Beneficial vigorously contends that explanatory language could cure any fault and that forced abandonment of its copyrighted and heavily promoted phrase is unwarranted.

In some instances, it is true, respondents have been allowed to retain trade names which had become valuable business assets, because the misleading qualities of the names could be dispelled by explanation *e.g.*, *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (1933). But *Royal Milling* and its progeny are not limitations on the Commission's authority to enter a fully effective order. If explanatory language is insufficient to qualify a deceptive trade name or is inherently contradictory, its effect is simply to confuse the public and the Commission in framing a proper remedy must excise the offending phrase altogether. *See, e.g., Resort Car Rental Systems, Inc.* v. *Federal Trade Commission*, 518 F.2d 962 (9th Cir. Apr. 14, 1975); *Bakers Franchise Corp.* v. *Federal Trade Commission*, 302 F.2d 258, 262 (3d Cir. 1962); *Carter Products, Inc.* v. *Federal Trade Commission*, 268 F.2d 461, 498 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959); *United States Navy Weekly, Inc.* v. *Federal Trade Commission*, 207 F.2d 17, 18 (D.C. Cir. 1953). Moreover, the Commission has wide latitude in judgment, particularly in determining whether qualifying words will eliminate a deceptive trade name. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946).[6]

In light of these principles, we see no reason for allowing Beneficial to retain the offending slogan. The Instant Tax Refund advertisements, we have held, have the capacity and tendency to mislead and have in fact misled consumers. In fact, since its inception in 1969, the Instant Tax Refund phrase has deceived continuously, and Beneficial's repeated efforts to explain it have not cured the false impression it leaves. Beneficial's inability to remedy the deception, which persists even in the qualifying phrase it offers on this appeal as a settlement, confirms what we believe to be obvious. No brief language is equal to the task of explaining the Instant Tax Refund slogan, for the phrase is inherently contradictory to the truth of Beneficial's offer. In truth, the Instant Tax Refund is not a refund at all, but only Beneficial's everyday loan service, complete with normal finance charges and credit checks; nor is it in the least related to any tax refunds, for the size of the loan Beneficial wishes to sell is geared to the customer's credit limit instead of his government refund and many people due a government refund do not qualify for an Instant Tax Refund loan at all; moreover, depending on the season of the year or the customer's sales resistance, the Instant Tax Refund may be called a Vacation loan, a Taxpayer loan, or a Bill Consolidation loan.

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[6] Though we believe the *Royal Milling* line of cases is compatible with our normal responsibility to enter effective but not overbroad orders, to the extent it may actually be a limitation or exception to the Commission's authority to devise fully effective remedies, then we decline to expand the exception from trade names to advertising slogans. The Instant Tax Refund slogan is unlike the established company names in *Royal Milling*, for it is not the name of anything. It is an empty promotional phrase referring to nothing.

Nor are we inclined to temper our conclusion to ban the phrase simply because Beneficial has copyrighted it and promoted it heavily. The phrase, which is only six years old, has been deceptive from the start, so to protect it is to protect Beneficial's investment in deception. We reject the idea that the more heavily a false claim is advertised, the more tenderly we must treat it.

Beneficial argues that excision of the Instant Tax Refund slogan and words of similar import would prevent any reference to the concept of tax refund loans. This is quite true. The record is absolutely clear that, in Beneficial's business at least, no such concept exists. If, however, Beneficial should begin offering a special loan service actually related in some way to income tax refunds, it may seek to reopen the order. For now we believe the absolute prohibition necessary.[7]

In light of what we have said we must affirm the law judge's order and reject Beneficial's offer of settlement.

III. MISUSE OF CONFIDENTIAL RELATIONSHIP

Finally, respondents appeal the law judge's conclusion that Beneficial misused confidential information gathered in the course of its tax preparation business, by using it to solicit loans without consent. The law judge held Beneficial's practices exploitative, unscrupulous, deceptive, and unfair.

The essential facts are not contested. Beneficial entered the tax preparation business for the explicit purpose of generating loan customers. (I.D. Par. 54; Tr. 84). In practice the tax service, which Beneficial operated from the same offices as its loan business, fulfilled this goal; it was in fact the greatest source of new borrowers which Beneficial had developed in some time (I.D. Par. 55; Tr. 508).

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[7] We are likewise unpersuaded by Beneficial's argument that the First Amendment bars this order. It is too clear to warrant discussion that the First Amendment does not protect commercial speech which has been found to be deceptive and misleading. *Murray Space Shoe Corp.* v. *Federal Trade Commission*, *supra*, 304 F.2d at 272. There is no constitutional right to disseminate false or misleading advertising. *E.F. Drew & Co.* v. *Federal Trade Commission*, 235 F.2d 735, 740 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957).

Beneficial used two different procedures to turn tax customers into borrowers. First, from the beginning of its tax preparation venture in 1969 until December 1971, Beneficial made no effort whatever to limit the use of customers' tax data to the preparation of tax returns. Under the procedure in effect during this period, Beneficial's employees prepared a tax interview sheet for each customer who presented himself for tax preparation. This sheet, which contained a variety of financial information, was sent to a computer firm for actual preparation of the return, and the customer frequently had to return a second time to pick up his completed return (I.D. Par. 58). Beneficial explicitly instructed its personnel to use the tax data appearing on the information sheet to solicit loans. For example, CX 26 states:

> Right on the Tax Interview Form it shows you what banks or loan companies the customer owes. It is an easy matter to go on from there and list other debts and show how all the bills can be consolidated, the bank loan can be paid off, the loan company can be paid off, the balance on the car can be cleared - all with a Bill Consolidation Loan.

In addition, if the customer were not sold a loan during the first interview, Beneficial solicited again during the second visit and continued to solicit thereafter by telephone and otherwise (I.D. Pars. 62, 64). Personnel were instructed to run a credit check on those who, on their first visit, were reluctant to borrow money, (I.D. Par. 63), and to present these customers on their second visit with completed loan papers awaiting only a signature (I.D. Par. 62).

After December 1971, Beneficial revamped its procedure because of the enactment of the Revenue Act of 1971. Section 316 of that Act, 26 U.S.C. § 7216, imposed criminal penalties upon commercial tax preparers for using customers' tax data for non-tax purposes without consent. Under the new procedure, Beneficial continued to stress turning tax customers into loan customers, but Beneficial's employees required each tax customer to sign a supposed consent form before soliciting any loan. The form, which Beneficial called a BOR-56 Authorization, purported to authorize Beneficial to solicit the customer for "any business" in which Beneficial may engage, and to stipulate that any data appearing on a loan application was not given for tax preparation. In addition to completing a tax interview sheet, Beneficial's employees were instructed to complete for each customer a loan interview sheet containing similar or identical financial information and to base their loan solicitation on the latter document. Beneficial maintained a separate "customer loan folder" for the loan information (I.D. Pars. 65, 66).

A.

Beneficial contends for two reasons that our consideration of its loan solicitation practices should be limited. First, the pre-Revenue Act conduct is supposedly irrelevant, because, according to Beneficial, the law judge drew no legal conclusions from his extensive factual findings on this issue; apparently Beneficial argues that he tacitly dismissed this part of the case and the Commission should not alter his disposition. Second, the law judge's post-Revenue Act findings are, Beneficial says, beyond the scope of the complaint and thus should be dismissed.[8]

Neither of these arguments is supportable. As to the pre-Revenue Act conduct, the law judge's opinion clearly considered and drew legal conclusions from the record evidence. In addition to entering detailed factual findings (I.D. Pars. 53-64), the law judge explicitly held that Beneficial's pre-Revenue Act practices were "offensive to the public policy, unethical, unscrupulous, unconscionable and clearly unfair to the consumer." (I.D. at 36) [p. 148, herein]. Of course, even had the law judge actually ignored Beneficial's pre-Revenue Act conduct, the Commission on review could itself fully consider its lawfulness Rule 3.54(a), 16 C.F.R. §3.54(a).

Beneficial's second argument - that the law judge's theory of post-Revenue Act violation is beyond the scope of the complaint - must be rejected on the same grounds that its similar claim respecting the tax refund advertising was rejected. According to Beneficial, the complaint, which alleged misuse of the "tax return" and the tax "financial profile," does not encompass Beneficial's post-Revenue Act procedure of preparing a separate loan information profile for loan solicitation instead of referring directly to the tax documents. But we do not read the complaint so restrictively. It plainly alleges misuse of a confidential relationship by soliciting loans, without consent, using information given for tax purposes (complaint, Par. 8). Since the law judge explicitly found the post-Revenue Act consent form inadequate to differentiate tax information from so-called loan information in customers' minds, the law judge correctly construed the complaint when he applied it to the post-Revenue Act procedures. Moreover, even accepting the argument that the complaint does not by its explicit terms encompass the post-Revenue Act procedures, we see no indication that the real substance of the dispute was not clarified for Beneficial during adjudication. As we noted before, an administrative complaint is a flexible document; semantic deficiencies will not preclude full resolution of the issues where the party proceeded against has a reasonable opportunity to know the matters in controversy *Avnet* v. *Federal Trade Commission*, 511 F.2d 70, 76 (7th Cir. 1975). Beneficial has offered utterly no information suggesting it was prejudiced, or unfairly surprised, or otherwise unable to litigate the legality of its post-Revenue Act conduct. In fact, Beneficial itself highlighted the issue by raising the supposed lawfulness of its post-Revenue Act conduct as an affirmative defense.

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[8] Apparently in connection with this second argument, Beneficial also seems to argue that the law judge was improperly influenced by a personal belief that a dual loan and tax business is *per se* unfair. However, the law judge offered no such opinion and in fact specifically declined to rule on the issue (I.D. at 37) [p. 149, herein]. The legality of dual operation was eliminated as an issue by complaint counsel on Mar. 13, 1974.

We conclude, therefore, that the substantive lawfulness of Beneficial's conduct, both pre-Revenue Act and post-Revenue Act, is properly before us.

B.

We first consider Beneficial's pre-Revenue Act conduct. The law judge found this conduct unfair, because it violated basic public policy respecting the confidentiality of tax data, and deceptive, because it was premised on omission of material facts.

In determining whether Beneficial's conduct was unfair, the appropriate standard is a broad one. The Commission

> does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of unfairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

Federal Trade Commission v. *Sperry & Hutchinson*, 405 U.S. 233, 244 (1972).

In accordance with this mandate, the law judge determined the applicable public policy relating to use of tax data from a wide range of relevant statutory and ethical sources. However Beneficial argues that applicable public policy can only be found in a law or canon running by its terms to Beneficial, and that public policy deduced and synthesized from analogous situations cannot govern its conduct. Accordingly, for the period before the Revenue Act explicitly applied a standard of confidentiality to its business, Beneficial would find no applicable policy.

This argument totally misapprehends the scope of unfairness under Section 5 of the Federal Trade Commission Act. There is no doubt at this point that the Commission may adapt the substance of Section 5 to changing forms of commercial unfairness, and is not limited to vicariously enforcing other law. Therefore, in this case, as in others, those who engage in commercial conduct which is contrary to a generally recognized public value are violating the Federal Trade Commission Act, notwithstanding that no other specific statutory strictures apply *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 313 (1934); *Federal Trade Commission* v. *Sperry & Hutchinson*, *supra*. The passage of the Revenue Act reiterated, but certainly did not create, the policy of tax confidentiality which we apply here.[9]

The policy we apply is evident in the numerous incarnations of our society's concern for the confidentiality and proper use of personal tax data. This theme, broader than the letter of any one law, plainly links those public statutes which variously impose criminal penalties upon federal employees for revealing a tax return,[10] or allow disclosure of income tax returns only under Presidential order or regulation,[11] or forbid disclosure of state income tax returns.[12] The same policy of tax confidentiality is also manifested in the ethical standards of other commercial tax preparers. Accountants,[13] certified public accountants,[14] and lawyers[15] would all be in violation of their ethical canons if they used tax information received from a customer to solicit a loan without consent. While it is not our intent to inject entire professional ethics codes into Beneficial's business, we believe the various similar fiduciary requirements of professional income tax preparers reflect a basic ethical consideration which by its nature is equally applicable to anyone in a position to abuse the confidence of a client.[16]

The reason for this statutory and ethical concern is obvious. Personal financial data is the private business of the individual to whom it relates. Its inherent confidentiality requires that the relationship between the tax preparer and his customer be a fiduciary one. This basic fiduciary nature is reflected in the personal expectations of consumers (tr. 256, 778). Numerous witnesses testified that they expect confidentiality from tax preparers and regard loan solicitation based on tax data as breach of confidentiality (*e.g.*, 493-94, 666, 724-25, 809-10).

Beneficial argues, however, that its misuse of tax information was minimal because the information was not transferred out of the company. However, even putting aside the evidence that Beneficial did in fact transfer the names of its tax customers outside the company while running credit checks, (CX 27, 34d; Tr. 37, 721-22), this argument ignores the fact that the confidential relationship is breached whenever the customer's information is used for the financial gain of the preparer. Whether or not respondents brokered the confidential information to other businesses, or simply capitalized on it themselves, is thus unimportant. By the same token, respondents' argument that customers expected to be solicited for loans because of Beneficial's reputation as a consumer loan business, and were not shocked at being solicited, ignores the record evidence that customers would not approve of any such loan solicitation made on the basis of their confidential tax data (Tr. 667, 725). The fact that some tax customers initiated loan discussions themselves, typically by volunteering the amount of their anticipated refunds, demonstrates to us not their disinterest in the confidentiality of their tax data, but rather the effectiveness of the Instant Tax Refund slogan in falsely convincing them that a regular consumer loan was somehow tax-related.[17]

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[9] In light of the pervasive and specific policy of tax confidentiality, we, like the law judge, have no need to decide whether a broader consideration of personal privacy could govern this case. In declining to reach that issue, however, we do not suggest that a generalized right of personal privacy and personal control over private data is an inadequate foundation on which to ground a finding of unlawfulness under Section 5. In fact, the right of privacy has become a widely-valued public policy, with constitutional and statutory underpinning. *Cf.*, *e.g.*, *Roe* v. *Wade*, 410 U.S. 113, 152 (1973); Privacy Act of 1974, 5 U.S.C. §552a. Its violation in a commercial context would likely be unlawful under the Federal Trade Commission Act.

[10] 26 U.S. §7213.

[11] 26 U.S. §6103.

[12] Code of Virginia, §58-46; *see also* I.D. at fn. 5 [p.146, herein].

[13] Tr. 134, 136, 148.

[14] Tr. 252, 255, 263.

[15] *See* Canon 4, Code of Professional Responsibility of the American Bar Association (Disciplinary Rule 4-101 and Ethical Consideration 4-5).

[16] Beneficial argues that some professional income tax preparers also solicit other business from their clients. However, in using tax data to identify other specialized needs of their clients, accountants and lawyers are fulfilling a professional obligation markedly different from Beneficial's practice of trying to sell loans to each of its tax customers (Tr. 142-45, 257-59). The point in looking to other income tax preparers is not to make Beneficial and them indistinguishable, but only to identify an irreducible minimum quantum of fairness and commercial integrity.

Thus, we conclude that Beneficial's loan solicitation practices were indefensible. In the face of the prevailing public policy, the common basic standards of ethical behavior, and the widespread expectations of consumers, Beneficial during the pre-Revenue Act period engaged in wholesale and intentional disregard of the privileged nature of its relationship with its tax customers, and the confidential status of their tax information. Its practices preyed on the vulnerability of customers who were entitled to expect, and did expect, that their information would be handled with integrity and discretion. We cannot disagree with the law judge's characterization of Beneficial's activities as exploitative, unscrupulous, and unconscionable. We find Beneficial's behavior legally unfair.

The same public expectation of confidentiality which makes Beneficial's conduct unfair also makes it deceptive. Although the public expects the fiduciary character of a taxpayer-tax preparer relationship to be honored, Beneficial entered such relationships with no intention of guarding tax information from unauthorized use, and in fact converted tax data for its own profit. Beneficial's failure to disclose these conditions had the capacity to mislead consumers into believing that the information they provided would only be used for preparing their tax returns. Such an omission of facts which are material to an intelligent purchasing decision is unlawful *see, e.g., P. Lorillard Co.* v. *Federal Trade Commission*, 186 F.2d 52, 58 (4th Cir. 1950). The law judge also found that full disclosure of material facts is particularly important in a confidential relationship. Though this is true, the general commercial duty to disclose material facts is sufficient to make Beneficial's actions deceptive.

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[17] One of the questions "most frequently asked," according to an instruction sheet issued to the local loan offices, is "Do you have to see proof that the customer is really entitled to a tax refund loan?" (CX 143i). This question epitomizes the confusion generated by Beneficial's advertising, which seems to offer a special service based on income taxes, but in reality is not related to income taxes at all.

Finally, the law judge found Beneficial's conduct deceptive because, in conjunction with the Instant Tax Refund slogan, it is analogous to bait and switch advertising. Although Beneficial's practices are not a classic bait and switch, the conceptual similarities are striking. Bait advertising is an enticing but insincere offer of goods or services, designed to obtain leads for a different product or service *see, e.g.*, 16 C.F.R. Part 238.0, *Guides Against Bait Advertising.* Beneficial's tax advertising was consciously designed to generate customers for the loan business and, even though the tax preparation service itself was a legitimate offer, the Instant Tax Refund advertised as part of the service was not a legitimate offer at all. Since Beneficial's tax advertising was designed to attract customers with an alluring offer, and the tax service was designed to switch the customers unwittingly to Beneficial's regular loan service, we find as an additional ground of deception that the loan solicitation practices were part of a pattern of conduct akin to bait and switch.

C.

We now turn to Beneficial's post-Revenue Act conduct, which on its face at least was an attempt to avoid use of confidential data. Beneficial argues that its new procedures cured the unfairness and deception in its early practices because it never used tax information to solicit loans after the Revenue Act became effective.

Even assuming this were true, it would not be an adequate defense to Beneficial's clear violations of law prior to the Revenue Act. As we noted earlier, discontinuance of unfairness or deception does not render a cease and desist order improper *Coro, Inc.* v. *Federal Trade Commission*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). We have in rare occasions refrained from entering an order where discontinuance was voluntary, prolonged, and likely to be permanent. But here the discontinuance, assuming there were any, occurred only after a criminal statute prodded Beneficial into making changes. Given Beneficial's dual business and its persistent desire to turn tax customers into loan customers, we find no reason to refrain from issuing an order in this case because of Beneficial's supposed curing of its unlawful conduct.

At any rate, the new procedures did not in fact cure the deception and unfairness. Although the uninhibited conversion of private information which characterized the earlier period gave way to purported authorization forms and separated "tax" and "loan" folders, the net effect of the new procedure was to confuse consumers and continue to abuse their proper expectations concerning the use to which their confidential information would be put. We find Beneficial's post-Revenue Act practices unfair and deceptive in their own right.

The main factor distinguishing the new procedure from the old was the BOR-56 Authorization form which Beneficial required each tax customer to sign. Only if this paper were adequate to allow informed consumer consent to loan solicitation could a waiver of the fiduciary tax relationship occur. However, the law judge found the BOR-56 form totally inadequate on its face as a consent form, and we agree. It does not inform the customer that the fiduciary tax relationship is being terminated and that financial information given thereafter will be used for loan solicitation. Though it authorizes solicitation of "any business" it does not disclose what kind of business and it does not disclose that the solicitation is beginning even as the customer signs the form. Our independent view of the release form's inadequacy is reinforced by the testimony of consumer witnesses, some called by Beneficial, who had various opinions of the form's purpose, all wrong (*e.g.*, Tr. 372, 395, 410, 486).

Obviously consumers have a right to waive the confidentiality of their tax data if they choose. And, since Beneficial does offer a useful service in both the tax and loan businesses, some tax customers will presumably wish to forego their purely fiduciary relationship with Beneficial. But this decision must be based on full disclosure and informed consent.

In light of the inadequacy of the BOR-56 form, the other changes in procedure after the Revenue Act become purely formal and without significance. Though Beneficial prepared what it called a Loan Interview Sheet for each customer, from the unsuspecting customer's point of view the information being gathered was still subject to the fiduciary tax relationship. Though Beneficial scrupulously separated what it called "loan" folders from the "tax" folders, so far as the customer understood every folder was a tax folder. For these reasons, we see no essential difference between Beneficial's post-Revenue Act conduct and its pre-Revenue Act conduct.

D.

The law judge entered an order designed to allow consumers to make an informed choice over waiving the confidentiality of their tax data. Beneficial argues that for several reasons the order is inappropriate.

Beneficial first argues that the Revenue Act of 1971, which provides criminal penalties for tax preparers, as a matter of law preempts the Federal Trade Commission Act in this area and precludes entering an order. Alternatively, Beneficial argues that, as a matter of administrative discretion, the Commission should defer to the Revenue Act either by entering an order coextensive with that Act or entering no order at all.

The contention that the Revenue Act has *pro tanto* deprived the Commission of authority over the commercial misuse of income tax information is not persuasive. The courts have repeatedly rejected the argument that the Federal Trade Commission Act is ousted because of the possibly concurrent operation of another statute enforced by a different agency. The jurisdiction of the Commission has been seen as cumulative *e.g.*, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 689-95 (1948) (Justice Department); *Warner-Lambert Co.* v. *Federal Trade Commission*, 361 F. Supp. 948, 953 (D. D.C. 1973) (Food and Drug Administration); *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757, 771 (6th Cir. 1966) (Patent Office); *Baldwin Bracelet Co.* v. *Federal Trade Commission*, 325 F.2d 1012, 1014 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 923 (1964) (Tariff Commission). In *Baldwin*, as here, the supposedly preemptive law was a criminal statute implemented with Treasury Department regulations. *See also Brandenfels* v. *Day*, 316 F.2d 375, 378 (D.C. Cir.), *cert. denied*, 375 U.S. 824 (1963).

Had Congress intended to limit the jurisdiction of the Commission, it would have done so explicitly, as it has before *cf.*, *e.g.*, Packers and Stockyards Act, 42 Stat. 159, 169 (Aug. 15, 1921), *amended*, 72 Stat. 1749, 1750 (Sept. 2, 1958); McGuire Act, 66 Stat. 631, 632 (July 14, 1952). But the Revenue Act contains no repeal, and the legislative history does not refer to the Commission at all. Nor will we infer repeal, for repeals by implication are not favored. Only where two laws are clearly repugnant to each other and both cannot be carried into effect will the latter prevail. *U.S.* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *L. Heller & Son* v. *Federal Trade Commission*, 191 F.2d 954, 957 (7th Cir. 1951). Here, though the civil requirements of the Federal Trade Commission Act may impose more stringent demands than the criminal standards of the Revenue Act, there is no repugnancy. Like the law judge we view Beneficial's possible compliance with the Revenue Act as irrelevant, and do not decide that issue.

Since the standards of the Revenue Act are irrelevant to this case, we see no reason to enter an order coextensive with that Act or to defer altogether. Our concern is to purge Beneficial's unlawfulness under Section 5. Because the fault we have found lies in the undisclosed use of confidential data, the law judge was correct in entering an order provision requiring full disclosure and consent before loan solicitation may begin. Under the order, Beneficial may not use any information given by a tax customer unless the customer has signed a consent form detailing, *inter alia*, the specific purpose for the consent, the exact information to be used, and the particular use intended. The lack of just this information is what makes the present BOR-56 form inadequate. Thus, the order provision is more than just reasonably related to the offense found, *Jacob Siegel Co.* v. *Federal Trade Commission*, *supra*, 327 U.S. at 613; it is the most obvious and direct way to cure Beneficial's practices.

Beneficial also argues that the lack of a time limit in the order would make it impossible ever to give a loan to any tax customer who signed no consent, even years later. If Beneficial wished to solicit such a loan using information obtained because of the tax relationship, this is absolutely true. But if the loan should arise from the customer's wholly independent action, in a context far removed in time from the income tax experience, making the loan would likely not violate the order. At any rate, Beneficial could cure its supposed problem by securing a signed consent before obtaining information for the loan.[18]

Finally, Beneficial argues that the order does not allow it to solicit tax customers for additional tax business. We will add appropriate language to remedy this.

IV. CONCLUSION

Having considered the entire record, the initial decision of the administrative law judge, and the briefs, the Commission affirms the law judge to the extent set forth in this opinion. An appropriate order accompanies this opinion.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the initial decision; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission, for reasons stated in the accompanying opinion, having denied in part and granted in part the appeal; accordingly

It is ordered, That, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the administrative law judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter;

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[18] Beneficial has raised other hypotheticals which, it says, demonstrate that the order may deprive it of loan business even from willing tax customers. However, we are not persuaded to modify the order by "fantasies." *Federal Trade Commission* v. *National Lead Co.*, *supra*, 352 U.S. at 431. Beneficial has recourse to our compliance procedures if actual situations arise which may be presented in evidentiary form. But Beneficial must expect some fencing in, and foregoing the hypothetical loan business may be a necessary price of simultaneously engaging in two essentially contradictory businesses.

It is further ordered, That the following cease and desist order be, and it hereby is, entered:

It is ordered, That respondents Beneficial Corporation and Beneficial Management Corporation, corporations, and their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation of income tax returns or the extension of consumer credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "instant tax refund," or any other word or words of similar import or meaning.

2. Using any guarantee without clearly and conspicuously disclosing the terms, conditions and limitations of any such guarantee; or misrepresenting, in any manner, the terms and conditions of any guarantee.

3. Representing, directly or by implication, that respondents will reimburse their customers for any payments the customer may be required to make in addition to his initial tax payment, in instances where such additional payment results from an error by respondents in the preparation of the tax return; *Provided, however*, That it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.

4. Failing to disclose, clearly and conspicuously, whenever respondents make any representation, directly or by implication, as to their responsibility for, or obligation resulting from, errors attributable to respondents in the preparation of tax returns, that respondents will not reimburse the taxpayer for any deficiency payment which results from said errors, *Provided, however*, That it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.

5. Representing, directly or by implication, that the percentage of respondents' customers who receive tax refunds is demonstrably greater than the percentage of individual taxpayers at large who receive refunds; or misrepresenting, in any manner, the magnitude or frequency of refunds received by respondents' tax preparation customers.

6. Representing, directly or by implication, that respondents' tax preparing personnel are tax experts or unusually competent in the preparation of tax returns or the rendering of tax advice; or

misrepresenting, in any manner, the competence or ability of respondents' tax preparing personnel.

7. Using information concerning any customers of respondents, including the name and/or address of the customer, for any purpose which is not essential or necessary to the preparation of a tax return if such information was obtained by respondents as a result of the preparation of the customer's tax return which includes any information given by the customer after he has indicated, in any way, that he is interested in utilizing respondents' tax preparation services, unless prior to obtaining such information respondents have both (1) specifically requested from the customer the right to use the tax return information of the customer and (2) have executed a separate written consent signed by the customer which shall contain:

1. Respondent's name;
2. The name of the customer;
3. The specific purpose for which the consent is being signed;
4. The exact information which will be used;
5. The particular use which will be made of such information;
6. The parties or entities to whom the information will be made available;
7. The date on which such consent is signed;
8. A statement that the tax return information may not be used by the tax return preparer for any purpose other than that stated in the consent, and;
9. A statement by the taxpayer that he consents to the use of such information for the specific purpose described in subparagraph (3) of this paragraph.

Provided, however, That nothing herein shall prohibit respondents from using names and addresses only of customers for the purpose of communication with such customers solely concerning respondents' income tax preparation business.

Nothing in the above provision is intended to relieve respondents of any further requirements imposed on them by the Revenue Act of 1971, Pub. L. 92-178, title III, §316(a), Dec. 10, 1971; 26 U.S.C. §7216 or regulations issued pursuant to it.

It is further ordered, That respondents herein shall notify the Commission at least 30 days prior to any proposed change in the structure of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent corporations which may affect compliance obligations arising out of this order.

It is further ordered, That respondents shall, within 60 days after service of this order, file with the Commission a written report, signed by the respondents, setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

CONTROL DATA CORPORATION, ET AL. D. 8940 ELECTRONIC COMPUTER PROGRAMMING INSTITUTE, INC., ET AL. D. 8952 LAFAYETTE UNITED CORPORATION, ET AL. D. 8963

Orders, July 15, 1975

Issues of Commission proceeding, in regard to consumer redress, and concerning relationship of administrative proceedings to later consumer redress actions placed on Commission's docket for review. Briefs to be submitted on two itemized questions.

Appearances

For the Commission: *Edward D. Steinman.*

For the respondents: *Charles A. Price, Oppenheimer, Wolff, Foster, Shephard & Donnelly,* Minneapolis, Minn. and *James F. Hoff,* Bloomington, Minn.

ORDER PLACING MATTERS ON DOCKET FOR REVIEW

These matters are now before the Commission upon two applications for review and a certification by an administrative law judge[1] concerning the question of whether restitution under the Federal Trade Commission Act, should be regarded as an option in formulating remedies in these matters inasmuch as: (1) a United States Court of Appeals has held in *Heater* v. *Federal Trade Commission*, 530 F.2d 321 (9th Cir. 1974) that the Commission lacks the authority to impose such relief; and (2) the Commission has determined not to seek review of that decision.[2] Furthermore, each of these matters expressly or by implication raises fundamental questions concerning the implementation of the recently enacted Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. 93-637 (Jan. 4, 1975).

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[1] In *Electronic Computer Programming Institute*, complaint counsel had moved for issuance of a *subpoena duces tecum* seeking, in part, evidence needed to support restitutionary relief. The administrative law judge in that matter denied the motion on the grounds that it sought information which might not be in furtherance of the legitimate statutory authority of the Commission based on *Heater* v. *F.T.C.*, 530 F.2d 321 (9th Cir. 1974). However, he granted complaint counsel leave to file an application for review of his ruling and to determine whether the matter should be placed on our suspense calendar pending the final outcome of the *Heater* case.

In *Lafayette United Corporation*, this question came to us under different circumstances. There, respondents had moved to strike and dismiss from the complaint the claim for restitution and to quash in part a *subpoena duces tecum* sought by complaint counsel. The law judge denied these motions but, in view of the Commission's decision not to appeal the *Heater* decision, he *sua sponte* certified to the Commission the question of whether it would be in the public interest to allow complaint counsel to continue to seek restitutionary relief.

Finally, in *Control Data Corp.*, the law judge denied respondents' motion to strike from the complaint Paragraph 11, which, they argued, was intended solely to obtain retroactive restitution, but granted them leave to file an application for review of this ruling. The only question approved for review was to be the policy question of how the Commission will proceed in the area of restitution in light of *Heater*.

Section 206 of the Magnuson-Moss Act authorizes the Commission to file actions for consumer redress in federal courts if a final Commission cease and desist order has been entered against respondents for engaging in acts or practices in violation of Section 5 of the Federal Trade Commission Act. The Commission intends to exercise that authority whenever appropriate and reserves the right to proceed under that section with respect to the respondents in these cases if the statutory conditions are met.

The three matters now before the Commission raise the general issue of how the Commission intends to proceed in regard to consumer redress and several specific issues concerning the relationship of the administrative proceedings to possible later consumer redress actions under the Magnuson-Moss Act. Therefore, in order to determine the questions presented, the Commission needs to consider carefully, as to each of these matters, the following questions, based on the assumption that the Commission intends to seek consumer redress, if at all, pursuant to Section 206 of the Magnuson-Moss Act.

(1) To what extent, if any, should evidence be presented and findings be made in the administrative proceedings regarding the nature and extent of the injuries sustained by consumers as a result of the challenged acts or practices?

(2) To what extent, if any, should evidence be presented and findings be made on the issue whether the challenged acts or practices are such that "a reasonable man would have known under the circumstances [that they are] dishonest or fraudulent"?

It is ordered, That the above-captioned matters be placed on the Commission's docket for review pursuant to Section 3.23(b) of the Rules of Practice; and

The parties are invited to submit additional briefs on the aforesaid questions within thirty (30) days of the service of this order. Answering briefs may be submitted within ten (10) days after service of the aforesaid briefs.

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[2] The complaints in these matters all contain a similarly worded paragraph which charges respondents with two distinct violations of Section 5: (1) unfairly retaining monies allegedly obtained by inducing persons, through false and deceptive representations, to pay for courses of instruction which will be virtually worthless in obtaining future employment; and (2) hindering competition by retaining monies obtained from consumers for their courses by false and deceptive representations. In each case, the notice order accompanying the complaint states that, if the facts as alleged therein are proved, the Commission may order restitution for past, present and future losses suffered by consumers.

IN THE MATTER OF

WORLD WIDE SYSTEMS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2683. Complaint, July 16, 1975 - Decision, July 16, 1975

Consent order requiring an Indianapolis, Ind., training school for truck drivers and heavy equipment operators, among other things to cease using deceptive and unfair means to sell instruction courses or any other product or service.

Appearances

For the Commission: *William M. Rice, Jr.*
For the respondents: *M. Daniel Friedland*, Indianapolis, Ind.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that World Wide Systems, Inc., a corporation, and Francis J. Witherbee, individually and as an officer of said corporation, and also doing business as Associated Systems, Atlas Systems, Coastway American Systems and Great Lakes Development Corporation, and Steven L. Bradshaw, individually and as a former officer of said corporation, and also doing business as Associated Systems, Atlas Systems, Coastway American Systems, Great Lakes Development Corporation, New Horizons Unlimited and others, and Eugene C. Kobylarz, individually and doing business as New Horizons Unlimited, Rapidway Systems, Trailmasters and Roads and Lands, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent World Wide Systems, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 1042 E. Washington St., Indianapolis, Ind.

Respondent Francis J. Witherbee is an individual and officer of respondent corporation and also does business as Associated Systems, Atlas Systems, Coastway American Systems and Great Lakes Development Corporation. He formulates, directs and controls the acts and practices of the corporate respondent and said business entities, including the acts and practices hereinafter set forth. His business address is the same as that of said corporate respondent.

Respondent Steven L. Bradshaw is an individual and former officer of said corporate respondent and also does business as Associated Systems, Atlas Systems, Coastway American Systems, Great Lakes Development Corporation, New Horizons Unlimited and others. He formulates, directs and controls the acts and practices of said business entities including the acts and practices hereinafter set forth. His address is 125 Belaire Dr., New Whiteland, Ind.

Respondent Eugene C. Kobylarz is an individual and does business as New Horizons Unlimited, Rapidway Systems, Trailmasters and Roads and Lands. He formulates, directs and controls the acts and practices of said business entities including the acts and practices hereinafter set forth. His business address is 5140 S. Madison Ave., Indianapolis, Ind.

PAR. 2. Respondents are now, and have been for some time last past, engaged in the advertising, offering for sale, sale or distribution of courses of study and instruction purporting to prepare graduates thereof for employment as heavy equipment operators, truck drivers, and related occupations. Said courses when pursued to completion include a series of lessons pursued by correspondence through the United States mails and a period of in-residence training at a place designated by respondents.

PAR. 3. In the course and conduct of their business, respondents now cause and for some time last past have caused, the publication of advertisements concerning the said courses in newspapers of general circulation and have caused the correspondence portion of their courses, when sold, to be sent from respondents' place of business in the State of Indiana to purchasers thereof located in various other States of the United States. Respondents utilized the services of salesmen and telephone solicitors who induced prospective purchasers of said courses located in States other than the State of Indiana to contact said salesmen at respondents' offices both within the State of Indiana and elsewhere, in person, by telephone, by mail, or otherwise. Said salesmen transmitted to and received from respondents contracts, checks, and other instruments of a commercial nature relating to the sale of said courses to said purchasers. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said courses of study and instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, respondents have published or caused to be published in the "Help-Wanted" and other columns of newspapers advertisements containing statements regarding job opportunities, training and wages for persons interested in becoming heavy equipment operators or truck drivers. Typical and illustrative, but not all inclusive of such advertisements, are the following:

SEMI-DRIVERS NEEDED

No experience necessary. Will Train. Earn $300 to $400 per week. For application call (317) 639-6138, or write to Associated Systems, 1040 East Washington St., Indianapolis, Indiana 46202.

GRADERS, SCRAPERS, BULLDOZERS, BACKHOES

No experience necessary. Will train. Earn $300.00 to $400.00 per week. For application call 317-545-6431, or write to World Wide Systems, 1042 East Washington St., Indianapolis, Indiana 46202.

PAR. 5. By and through the use of the statements contained in the advertisements set forth in Paragraph Four and others of similar import and meaning but not expressly set out herein, respondents represent directly or by implication, that:

1. Respondents operate, represent, or are affiliated with a construction company or a trucking company.

2. Respondents are offering employment to qualified applicants who will be trained as heavy equipment operators or truck drivers.

3. Persons receiving training from respondents will earn $300 - $400 per week as heavy equipment operators, truck drivers, or in related occupations upon completion of training.

4. There is a reasonable basis from which to conclude that there is now or will be a need or demand for heavy equipment operators or truck drivers which respondents' training is designed to meet.

PAR. 6. In truth and in fact:

1. Respondents do not operate or represent, and are not affiliated with a construction company or trucking company, but, to the contrary, are engaged in the sale of courses of instruction to prospective purchasers.

2. Respondents do not offer employment to persons who have been trained as heavy equipment operators or truck drivers, but attempt to and do sell courses of instruction to said purchasers.

3. Few, if any, persons who received training from respondents pursuant to said offer have earned amounts such as $300-$400 per week as truck drivers, heavy equipment operators, or in related occupations as a result of such training.

4. Respondents had no reasonable basis from which to conclude that there is now or will be a need or demand for heavy equipment operators or truck drivers which respondents' training is designed to meet.

Therefore, the statements and representations as set forth in

Paragraphs Four and Five were, and are, false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business as aforesaid, respondents cause persons who respond to advertisements to contact respondents' salesmen. For the purpose of inducing the sale of courses offered by respondents, such salesmen make to prospective purchasers many statements and representations, directly and by implication, regarding opportunities for employment as heavy equipment operators and truck drivers available to purchasers of said courses, the assistance furnished to graduates in obtaining employment and other matters. Some of the aforesaid statements and representations appear in brochures, pamphlets and other printed material furnished to said salesmen by respondents and in other statements and representations made orally by said salesmen. Among and typical, but not all inclusive, of such statements and representations are the following:

1. Respondents have been requested by construction and trucking companies to train operators and drivers for jobs as a heavy equipment operator or truck driver with their company upon completion of said training.

2. Graduates of said courses will thereby be qualified for employment as heavy equipment operators or truck drivers without further training or experience.

3. The nature of an initial payment by prospective enrollees of said courses prior to the undertaking of a formal obligation to respondents is not that of a nonrefundable tuition fee.

4. Respondents will permit enrollees of said courses to defer the balance of the cost of said courses remaining after the initial or registration fee has been paid until after the graduate of said courses has obtained employment as a heavy equipment operator or truck driver.

5. Respondents will handle or arrange financing of the balance of the cost of said courses remaining after the initial or registration fee has been paid.

6. Respondents provide a placement service which will secure a job as a heavy equipment operator or truck driver for graduates of said courses who want to work in such capacities.

7. Graduates of said courses who want to work are assured jobs as heavy equipment operators or truck drivers as a consequence of graduating from said courses.

8. Respondents operate and maintain school facilities, and provide training and instruction for prospective heavy equipment operators and truck drivers at these school facilities.

9. Respondents will train enrollees on the best and most up-to-date equipment used in the construction and trucking industries.

PAR. 8. In truth and in fact:

1. Respondents have not been requested by construction or trucking companies to train people for jobs as heavy equipment operators or truck drivers, which jobs shall be offered by such companies to graduates of said training.

2. Graduates of said courses are not thereby qualified for employment as heavy equipment operators or truck drivers without further training or experience.

3. The sum of money that enrollees in said courses are required to pay prior to the undertaking of a formal obligation with respondents is a non-refundable fee.

4. Respondents generally do not permit enrollees of said courses to defer payment of the balance of the cost of said courses remaining after the initial or registration fee has been paid until after employment as a heavy equipment operator or truck driver has been obtained.

5. Respondents seldom if ever arrange financing to enable purchasers to pay the balance of the cost of said courses.

6. The placement service provided by respondents will not secure a job as a heavy equipment operator or truck driver for graduates of said courses who want to work in such capacities.

7. Graduates of said courses who want to work are not assured jobs as heavy equipment operators or truck drivers as a consequence of graduating from said courses.

8. Respondents do not operate and maintain any school facilities for either heavy equipment operator or truck driver training. Respondents have no resident training facilities and all enrollees are sent to an independent school for training.

9. The heavy equipment and trucks provided by the independent training school to which respondents send their enrollees are not the best and most up-to-date equipment used in the construction and trucking industries.

Therefore, the statements and representations as set forth in Paragraph Seven hereof were, and are, false, misleading and deceptive.

PAR. 9. Respondents offered for sale courses of instruction to prepare graduates thereof for jobs as heavy equipment operators and truck drivers without disclosing in advertising or through their sales representatives:

(1) The recent number and percentage of graduates of each school that were able to obtain the employment for which they were trained;

(2) the employers that hired any such graduates;

(3) the initial salary any such graduates received; and

(4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction.

Knowledge of such facts would indicate the possibility of securing future employment upon graduation and the nature of such employment. Thus, respondents have failed to disclose a material fact, which, if known to certain prospective enrollees, would be likely to affect their consideration of whether or not to purchase such course of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive, or unfair.

PAR. 10. In the further course and conduct of their business, and in furtherance of their purpose of inducing the purchase of their courses by the general public, respondents acting directly and furnishing the means and instrumentalities to their salesmen, directly or indirectly, have engaged in the following additional acts or practices:

Respondents have induced members of the general public to sign certain contracts entitled "Application." Respondents thereby have deceptively and misleadingly created the impression that said documents are not legally binding contractual agreements when in fact said documents are legally binding contractual agreements.

Therefore, respondents' statements, representations, acts or practices as set forth herein were, and are, false, misleading, unfair or deceptive acts or practices.

PAR. 11. Respondents have entered into contracts with purchasers of said courses of instruction which contain provisions for the cancellation of said contracts and the refund of tuition monies paid by said purchasers. In many instances, respondents have failed to offer to refund and refused to refund to purchasers who have cancelled their contracts such monies as may be due and owing according to the terms of said contracts.

The use by respondents of the aforesaid practice and their continued retention of said sums, as aforesaid, is an unfair act or practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 12. (a) Respondents have been and are now using the aforesaid unfair, false, misleading or deceptive acts and practices, which a reasonably prudent person should have known, under all of the facts and circumstances, were unfair, false, misleading or deceptive, to induce persons to pay or to contract to pay over to them substantial sums of money to purchase or pay for courses of instruction which to such purchasers in connection with their future employment and careers was, and is, virtually worthless. Respondents have received the said sums and have failed to offer refunds and have failed to refund such sums to or to rescind such contractual obligations of substantial numbers of enrollees and participants in such courses who were unable to secure employment in the positions and fields for which they have been purportedly trained by respondents.

The use by respondents of the aforesaid acts and practices, their continued retention of said sums and their continued failure to rescind such contractual obligations of their customers, as aforesaid, are unfair acts or practices.

(b) In the alternative and separate from Paragraph Twelve (a) herein, respondents, who are in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of courses of vocational instruction, have been and are now using, as aforesaid, false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money to purchase courses of instruction.

The effect of using the aforesaid acts and practices to secure substantial sums of money is or may be to substantially hinder, lessen, restrain, or prevent competition between respondents and the aforesaid competitors.

Therefore, the said acts and practices constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

PAR. 13. By and through the use of the aforesaid acts, practices, statements and representations, respondents place in the hands of others the means and instrumentalities by and through which they mislead and deceive the public in the manner and as to the things hereinbefore alleged.

PAR. 14. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals engaged in the sale and distribution of similar courses of study and instruction.

PAR. 15. The use by respondents of false, misleading and deceptive statements, representations, acts and practices and their failure to disclose material facts, as aforesaid, has had, and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and complete and to induce a substantial number thereof to purchase said courses of study and instruction offered by respondents by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Worldwide Systems, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its office and principal place of business located at 1042 E. Washington St., Indianapolis, Ind.

Respondent Francis J. Witherbee is an officer of said corporation. He also does business as Associated Systems, Atlas Systems, Coastway American Systems, and Great Lakes Development Corporation. He formulates, directs and controls the policies, acts and practices of said corporation and said business entities and his place of business is located at the above-stated address.

Respondent Steven L. Bradshaw was a former officer of said corporation and did business as Associated Systems, Atlas Systems, Coastway American Systems, Great Lakes Development Corporation, New Horizons Unlimited and others. He formulates, directs and controls the policies, acts and practices of said corporation and said business entities and his place of business is located at the above stated address.

Respondent Eugene C. Kobylarz does business as New Horizons

Unlimited, Rapidway Systems, Trailmasters, and Roads and Lands. He formulates, directs and controls the policies, acts and practices of said business entities and his business address is 5140 S. Madison Ave., city of Indianapolis, State of Indiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents World Wide Systems, Inc., a corporation, its successors and assigns, and Francis J. Witherbee, individually and as an officer of said corporation and doing business as Associated Systems, Atlas Systems, Coastway American Systems and Great Lakes Development Corporation, and Steven L. Bradshaw, individually and as a former officer of said corporation and doing business as Associated Systems, Atlas Systems, Coastway American Systems, Great Lakes Development Corporation, New Horizons Unlimited and others, and Eugene C. Kobylarz, individually and doing business as New Horizons Unlimited, Rapidway Systems, Trailmasters and Roads and Lands, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of courses of study and distribution of courses of study and instruction in heavy equipment operation, truck driving or courses of study and instruction in any other subject, trade or vocation, or in connection with any other product or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

1. Representing, directly or by implication, orally or in writing, that:

A. They are, or represent, or are affiliated with, construction or trucking companies or any industry for which enrollees of any courses offered by respondents are being trained; or misrepresenting, in any manner, the nature of their business.

B. Persons receiving training will, or may, earn any specified amounts or misrepresenting in any manner the prospective earnings of such persons after completion of said training.

C. They have been requested by construction and trucking companies or any other business or organization to train persons for specific jobs, or misrepresenting, in any manner, respondents' connection or affiliation with any industry or any member thereof.

D. Graduates of any courses offered by respondents will be qualified thereby for employment at jobs for which said graduates were purportedly trained when additional training or experience is required.

E. The nature of the initial payment by prospective enrollees of courses offered by respondents prior to the undertaking of a formal obligation to respondents is not that of a nonrefundable tuition fee; or misrepresenting in any other manner the nature of any payment made by prospective enrollees of any courses offered by respondents.

F. They, or others, will permit enrollees of any courses to defer payment of the balance of the cost of said courses remaining after the initial or registration fee has been paid until after the enrollee has completed said courses and commenced employment; or misrepresenting in any other manner the terms or conditions under which payment is to be made for said courses.

G. They, or others, will handle or arrange financing of the balance of the cost of said courses remaining after the initial or registration fee has been paid, unless respondents, or others specifically named, will, in fact, handle or arrange said financing.

H. They, or others, provide a placement service which will secure a job for graduates of said courses.

I. Graduates of said courses are assured jobs as a consequence of graduating from said courses.

J. There is a substantial demand, or a demand of any size of proportion, for persons completing any of the courses offered by the respondents in the field of truck driving or heavy equipment operations, or any other field, or otherwise representing, orally or in writing, that opportunities of any type or number, are available to such persons, except as hereinafter provided in Paragraph 6 of this order. *Provided, however,* That respondents shall cease and desist making such representations unless the respondents in each and every instance:

(1) Until the passage of a base period to be determined pursuant to Paragraph 6(b) of Part I of this order, after the establishment of a new school location by respondents in any metropolitan area or county, whichever is larger, where they did not previously operate a school, and after the introduction by respondents of any new course of instruction at any school or location, shall:

(A) Have in good faith conducted a statistically valid survey which establishes the validity of any such representation at all times when the representation is made, and

(B) have disclosed in immediate and conspicuous conjunction with any such representation, that:

All representations for potential employment demand or opportunities for graduates of this school (course) are merely estimates. This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

(2) After the passage of a base period to be determined pursuant to Paragraph 6(b) of Part I of this order, and until two years after the establishment of a new school location by respondents in any metropolitan area or county, whichever is larger, where they did not previously operate a school, and after the introduction by respondents of any new course of instruction at any school or location, shall:

(A) make any representations in the form and manner provided in Paragraph 6(b) of Part I of this order, and

(B) disclose in immediate and conspicuous conjunction with any such representation, that:

This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

2. Placing ads in "Help-Wanted" columns or representing by any means that employment is being offered when such offer is not a bona fide offer of employment.

3. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any course offered by respondents, the full cost of such courses including the fee for any home study lessons and for any residential training.

4. Failing to place the title "CONTRACT," in bold face type, on any document which evidences an agreement between a person and respondents relating to the purchase of any of the courses offered by respondents; and failing to remove from any such document the word "application," or words of similar import or meaning.

5. Failing to show each prospective purchaser the home study portion of said courses and allow said prospective purchaser a reasonable time for examination of said home study materials before said prospective purchaser has paid any money or has signed any contract, or has obligated himself in any other way.

6. Failing to send by certified mail, return receipt requested, to each person that shall contract with respondents for the sale of any course of instruction, a notice, the specific provisions of which will be based upon the record in adjudicative proceedings in this matter, which shall disclose the following information and none other:

(a) The title "IMPORTANT INFORMATION" printed in bold face type across the top of the form.

(b) Paragraphs providing the following information computed in the manner and using a form and for a base period to be approved by the Commission:

(1) The placement rate, ratio or percentage for graduates, and also the numbers upon which such rates, ratios or percentages are based;

(2) A list of firms or employers which are currently hiring graduates of respondents' courses in substantial numbers and in the positions for which such graduates have been trained, and the number of such graduates hired, as to the same graduates used to compute the placement percentage in (b)(1) above;

(3) The salary range of respondents' graduates as to the same graduates used to compute the placement percentage in (b)(1) above;

(4) The percentage of enrollees who have failed to complete their course of instruction, such percentage to be computed separately for each course of instruction offered by respondents at each school, location or facility.

(c) An explanation of the cancellation procedure provided in this order, namely that any contract or other agreement may be cancelled for any reason until midnight of the third business day after receipt by the customer, via the U.S. mails, of this notice.

(d) A detachable form which the person may use as notice of cancellation, which indicates the proper address for accomplishing any such cancellation.

This notice shall be sent by respondents no sooner than the next day after the person shall have contracted for the sale of any course of instruction; respondents, during such period provided for in subparagraph (c) above, shall not initiate contact with such person other than that required by this Paragraph.

Provided, however, That subparagraph (b) above shall be inapplicable to any newly established school that respondents may establish in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or to any course newly introduced by respondents, until such time as the new school or course has been in operation for the base period to be established pursuant to subparagraph (b) above. The following statement shall be included in such notice during such period:

> All representations of potential employment or salaries are merely estimates. This school (course) has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this school (course).

After such time as the new school or course has been in operation for the base period to be established pursuant to subparagraph (b) above, and until two years after the establishment of a new school location in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or the introduction of any new course by respondents, the following statement shall be included in such notice:

This school (course) has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this school (course).

7. Contracting for any sale of any course of instruction in the form of a sales contract or other agreement which shall become binding prior to midnight of the third business day after the date of receipt by the customer of the form of notice provided for in Paragraph 6 above. Upon cancellation of any said sales contract or other agreement as provided in Paragraph 6(c) above, respondents are obligated to refund within three business days to any person exercising the cancellation right, all monies paid or remitted up until the notice of cancellation.

8. Failing to disclose, clearly and conspicuously, in advertisements, in catalogs, brochures and on letterheads that respondents' business is solely and exclusively that of a private school, not affiliated with any members of the construction industry, the trucking industry or any member of any other industry.

9. Failing to refund promptly to purchasers who have cancelled their contracts such monies as may be due and owing according to the terms of such contracts.

II

1. *It is further ordered*, That:

(a) Respondents herein deliver, by registered mail, a copy of this decision and order to each of their present and future franchisees, licensees, employees, sales representatives, agents, solicitors, brokers, independent contractors or to any other person who promotes, offers for sale, sells or distributes any course of instruction included within the scope of this order:

(b) Respondents herein provide each person or entity so described in subparagraph (a) of this paragraph with a form returnable to the respondents clearly stating his or her intention to be bound by and to conform his or her business practices to the requirements of this order; retain said statement during the period said person or entity is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request;

(c) Respondents herein inform each person or entity described in subparagraph (a) of this paragraph that the respondents will not use or engage or will terminate the use or engagement of any such party, unless such party agrees to and does file notice with the respondents that he or she will be bound by the provisions contained in this order;

(d) If such party as described in subparagraph (a) of this paragraph will not agree to file the notice set forth in subparagraph (b) above with the respondents and be bound by the provisions of this order, the respondents shall not use or engage or continue the use or engagement of such party to promote, offer for sale, sell or distribute any course of instruction included within the scope of this order;

(e) Respondents herein inform the persons or entities described in subparagraph (a) above that the respondents are obligated by this order to discontinue dealing with or to terminate the use or engagement of persons or entities who continue on their own the deceptive acts or practices prohibited by this order;

(f) Respondents herein institute a program of continuing surveillance adequate to reveal whether the business practices of each said person or entity described in subparagraph (a) above conform to the requirements of this order;

(g) Respondents herein discontinue dealing with or terminate the use or engagement of any person described in subparagraph (a) above, who continues on his or her own any act or practice prohibited by this order as revealed by the aforesaid program of surveillance.

(h) Respondents herein maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for examination by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business for inspection and copying.

2. *It is further ordered*, That respondents herein present to each interested applicant or prospective student immediately prior to the commencement of any interview or sales presentation during which the purchase of or enrollment in any course of instruction offered by respondents herein is discussed or solicited a 5 in. x 7 in. card containing only the following language:

YOU WILL BE TALKING TO A SALESPERSON

3. *It is further ordered*, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

4. *It is further ordered*, That the respondent World Wide Systems, Inc., shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondents which may affect compliance obligations arising out of this order.

5. *It is further ordered*, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

THE STANDARD OIL COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2684. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a Cleveland, Ohio, energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Diamond Shamrock Corporation.

Appearances

For the Commission: *Barry L. Malter.*

For the respondent: *Richard M. Donaldson*, Cleveland, Ohio.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent The Standard Oil Company (hereinafter referred to as Sohio) is a corporation organized and existing under and by virtue of the laws of the State of Ohio, maintaining its principal place of business at 101 W. Prospect Ave., Cleveland, Ohio. At all times relevant to this complaint, Sohio had capital, surplus, and undivided profits aggregating in excess of $1 million. In 1972, Sohio had sales and operating revenues of $1,446,636,000.

PAR. 2. Respondent Diamond Shamrock Corporation (hereinafter referred to as Diamond Shamrock) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 1100 Superior Ave., Cleveland, Ohio. At all times relevant to this complaint, Diamond

Shamrock had capital, surplus and undivided profits aggregating in excess of $1 million. In 1972 Diamond Shamrock had sales and operating revenues of $617,337,000.

PAR. 3. In 1974, and previously thereto, Mr. Horace A. Shepard served simultaneously as a director of Sohio and Diamond Shamrock. Mr. Shepard resigned from the board of directors of Diamond Shamrock on July 26, 1974, after having been notified of the Commission's intention to issue a complaint in this matter.

PAR. 4. (a) The business of Sohio and Diamond Shamrock encompasses, but is not limited to, the exploration, production and sale of crude petroleum and natural gas.

(b) Respondents engage in the aforesaid activities in the same geographic areas of the United States including, but not limited to, Louisiana, Oklahoma, Texas and Wyoming.

PAR. 5. (a) Sohio and Diamond Shamrock have been and are, by virtue of their business and location of operations, competitors of each other.

(b) The elimination of competition by agreement or otherwise between Sohio and Diamond Shamrock would hinder, foreclose, and restrain competition or tend to create a monopoly in the exploration, production, and sale of crude petroleum and natural gas.

(c) Sohio and Diamond Shamrock each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 6. The director interlock, as herein alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent, The Standard Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 101 W. Prospect Ave., Cleveland, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That The Standard Oil Company, an Ohio corporation (Sohio), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Diamond Shamrock Corporation.

II

It is further ordered, That Sohio shall, within thirty days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of The British Petroleum Company Limited, a United Kingdom Corporation, and any corporation in which Sohio or The British Petroleum Company Limited controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1 million from the exploration, production, and sale of natural gas and crude petroleum and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, Sohio shall, at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of its board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, Sohio shall not permit on its board of directors any individual who fails to submit a written statement pursuant to Paragraphs II and III, or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of Sohio by virtue of its business and location of operations in the exploration, production, or sale of crude petroleum or natural gas. If compliance with Paragraphs I and IV requires any member of Sohio's board of directors to resign or to be removed from the board of directors of Sohio or such other corporation, Sohio shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order. For purposes of this order, Sohio, The British Petroleum Company Limited and any corporation which Sohio or The British Petroleum Company Limited controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock shall not be considered competitors.

V

It is further ordered, That Sohio notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent Sohio shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of Sohio pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

DIAMOND SHAMROCK CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2685. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a Cleveland, Ohio, energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of The Standard Oil Company, an Ohio Corporation.

Appearances

For the Commission: *Barry L. Malter.*
For the respondent: *John A. Wilson*, Cleveland, Ohio.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent The Standard Oil Company (hereinafter referred to as Sohio) is a corporation organized and existing under and by virtue of the laws of the State of Ohio, maintaining its principal place of business at 101 W. Prospect Ave., Cleveland, Ohio. At all times relevant to this complaint, Sohio had capital, surplus, and undivided profits aggregating in excess of $1 million. In 1972, Sohio had sales and operating revenues of $1,446,636,000.

PAR. 2. Respondent Diamond Shamrock Corporation (hereinafter referred to as Diamond Shamrock) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 1100 Superior Ave., Cleveland, Ohio. At all times relevant to this complaint, Diamond Shamrock had capital, surplus and undivided profits aggregating in excess of $1 million. In 1972 Diamond Shamrock had sales and operating revenues of $617,337,000.

PAR. 3. In 1974, and previously thereto, Mr. Horace A. Shepard served simultaneously as a director of Sohio and Diamond Shamrock. Mr. Shepard resigned from the board of directors of Diamond Shamrock on July 26, 1974, after having been notified of the Commission's intention to issue a complaint in this matter.

PAR. 4. (a) The business of Sohio and Diamond Shamrock encompasses, but is not limited to, the exploration, production and sale of crude petroleum and natural gas.

(b) Respondents engage in the aforesaid activities in the same geographic areas of the United States including, but not limited to, Louisiana, Oklahoma, Texas and Wyoming.

PAR. 5. (a) Sohio and Diamond Shamrock have been and are, by virtue of their business and location of operations, competitors of each other.

(b) The elimination of competition by agreement or otherwise between Sohio and Diamond Shamrock would hinder, foreclose, and restrain competition or tend to create a monopoly in the exploration, production, and sale of crude petroleum and natural gas.

(c) Sohio and Diamond Shamrock each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 6. The director interlock, as herein alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint,

and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent, Diamond Shamrock Corporation (Diamond Shamrock), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1100 Superior Ave., Cleveland, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Diamond Shamrock Corporation (Diamond Shamrock), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of The Standard Oil Company, an Ohio corporation (Sohio).

II

It is further ordered, That Diamond Shamrock shall, within thirty days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of any corporation in which Diamond Shamrock controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1 million from the exploration, production and sale of natural gas and crude petroleum; and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, Diamond Shamrock shall, at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of the board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, Diamond Shamrock shall not permit on its board of directors any person who fails to submit a written statement pursuant to Paragraphs II and III or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of Diamond Shamrock by virtue of its business and location of operations in the exploration, production or sale of crude petroleum or natural gas. If compliance with Paragraphs I and IV requires any member of Diamond Shamrock's board of directors to resign or to be removed from the board of directors of either Diamond Shamrock or such other corporation, Diamond Shamrock shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order.

V

It is further ordered, That Diamond Shamrock notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent Diamond Shamrock shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of Diamond Shamrock pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

AMERADA HESS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2686. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a New York City energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Newmont Mining Corp.

Appearances

For the Commission: *Robert B. Greenbaum.*

For the respondent: *Briscoe R. Smith, Milbank, Tweed, Hadley & McCloy,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Amerada Hess Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 1185 Avenue of the Americas, New York, N.Y. At all times relevant to this complaint, Amerada Hess had capital, surplus, and undivided profits aggregating in excess of $26 million. In 1972, Amerada Hess had revenues of approximately $1 billion.

PAR. 2. Respondent Newmont Mining Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 300 Park Ave., New York, N.Y. At all times relevant to this complaint, Newmont Mining Corporation had capital, surplus, and undivided profits aggregating in excess of $44 million. In 1972, it had revenues of approximately $272 million.

PAR. 3. In 1968 William B. Moses, Jr., was elected to the board of directors of Amerada Hess and has served in that capacity from the time of his election to and including the date of this complaint. In 1966 he was elected to the board of directors of Newmont Mining, and he has been a director of Newmont Mining from that time to and including the date of this complaint. On Nov. 25, 1974, Mr. Moses tendered his resignation from the board of directors of Amerada Hess, said resignation to be effective on the date of the Commission's entry of a consent order.

PAR. 4. The business of respondents Amerada Hess and Newmont Mining encompasses, but is not limited to the exploration, production, and sale of crude petroleum and natural gas.

PAR. 5. (a) Amerada Hess and Newmont Mining Corporation by the nature of their business and location of operations are competitors of each other with respect to the exploration, production, and sale of crude petroleum and natural gas.

(b) The elimination of competition by agreement or otherwise between Amerada Hess and Newmont Mining would hinder, foreclose, and restrain competition or tend to create a monopoly in the exploration, production, and sale of crude petroleum and natural gas.

PAR. 6. (a) The activities referred to in Paragraph Four are performed by corporate respondents in various States of the United States and products of those services are sold and distributed in various States.

(b) Amerada Hess and Newmont Mining each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 7. The director interlock, as herein above alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent, Amerada Hess Corporation, (Amerada), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1185 Avenue of the Americas, New York, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Amerada Hess Corporation (Amerada), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Newmont Mining Corporation.

II

It is further ordered, That Amerada shall, within thirty days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of any corporation in which Amerada controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1 million from the exploration, production and sale of natural gas and crude petroleum; and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the

Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, Amerada shall, at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of the board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, Amerada shall not permit on its board of directors any person who fails to submit a written statement pursuant to Paragraphs II and III or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of Amerada by virtue of its business and location of operation in the exploration, production or sale of crude petroleum or natural gas. If compliance with Paragraphs I and IV requires any member of Amerada's board of directors to resign or to be removed from the board of directors of either Amerada or such other corporation, Amerada shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order.

V

It is further ordered, That Amerada notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent Amerada shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of Amerada pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

NEWMONT MINING CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, AND SEC. 8 OF THE CLAYTON ACT

Docket C-2687. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a New York City energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Amerada Hess Corp.

Appearances

For the Commission: *Robert B. Greenbaum.*

For the respondent: *Edwin M. Zimmerman, Covington & Burling,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Amerada Hess Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 1185 Avenue of the Americas, New York, N.Y. At all times relevant to this complaint, Amerada Hess had capital, surplus, and undivided profits aggregating in excess of $26 million. In 1972, Amerada Hess had revenues of approximately $1 billion.

PAR. 2. Respondent Newmont Mining Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 300 Park Ave., New York, N.Y. At all times relevant to this complaint, Newmont

Mining Corporation had capital, surplus, and undivided profits aggregating in excess of $44 million. In 1972, it had revenues of approximately $272 million.

PAR. 3. In 1968 William B. Moses, Jr., was elected to the board of directors of Amerada Hess and has served in that capacity from the time of his election to and including the date of this complaint. In 1966 he was elected to the board of directors of Newmont Mining, and he has been a director of Newmont Mining from that time to and including the date of this complaint. On Nov. 25, 1974, Mr. Moses tendered his resignation from the board of directors of Amerada Hess, said resignation to be effective on the date of the Commission's entry of a consent order.

PAR. 4. The business of respondents Amerada Hess and Newmont Mining encompasses, but is not limited to the exploration, production, and sale of crude petroleum and natural gas.

PAR. 5. (a) Amerada Hess and Newmont Mining Corporation by the nature of their business and location of operations are competitors of each other with respect to the exploration, production, and sale of crude petroleum and natural gas.

(b) The elimination of competition by agreement or otherwise between Amerada Hess and Newmont Mining would hinder, foreclose, and restrain competition or tend to create a monopoly in the exploration, production, and sale of crude petroleum and natural gas.

PAR. 6. (a) The activities referred to in Paragraph Four are performed by corporate respondents in various States of the United States and products of those services are sold and distributed in various States.

(b) Amerada Hess and Newmont Mining each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 7. The director interlock, as herein above alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent, Newmont Mining Corporation (Newmont), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 300 Park Ave., New York, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Newmont Mining Corporation (Newmont) its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Amerada Hess Corporation.

II

It is further ordered, That Newmont shall, within thirty days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of any corporation in which Newmont controls directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1 million from the exploration, production and sale of natural gas and crude petroleum; and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the

Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, Newmont at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of the board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, Newmont shall not permit on its board of directors any person who fails to submit a written statement pursuant to Paragraphs II and III or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of Newmont by virtue of its business and location of operation in the exploration, production or sale of crude petroleum or natural gas. If compliance with Paragraphs I and IV requires any member of Newmont's board of directors to resign or to be removed from the board of directors of either Newmont or such other corporation, Newmont shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order.

V

It is further ordered, That Newmont notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent Newmont shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of Newmont pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

EL PASO NATURAL GAS COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2688. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a Houston, Texas, energy company among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Transcontinental Gas Pipe Line Corp.

Appearances

For the Commission: *Allee A. Ramadhan.*

For the respondent: *Arthur H. Dean* and *Roy H. Steyer, Sullivan & Cromwell,* New York City.

COMPLAINT

The Federal Trade Commission having reason to believe that the above-named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent El Paso Natural Gas Co. (El Paso) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 2727 Allen Pkwy., American General Bldg., Houston, Tex. At all times relevant to this complaint, El Paso Natural Gas Co. had capital, surplus, and undivided profits aggregating in excess of $64 million. In 1972 El Paso Natural Gas Co. had revenues of approximately $1.1 billion.

PAR. 2. Respondent Transcontinental Gas Pipe Line Corp. (Transcontinental) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 2700 S. Post Oak, Houston, Tex. At all times relevant to this complaint, Transcontinental Pipe Line Corp. had capital, surplus, and undivided profits aggregating in excess of $53 million. In 1972, it had revenues of approximately $482 million.

PAR. 3. In 1974 and for some years previously, Mr. Alfred C. Glassell, Jr. and Franz Schneider served simultaneously as directors of El Paso and Transcontinental. On or about Aug. 27, 1974 both individuals resigned from Transcontinental's Board of Directors having been notified of the Commission's intention to issue a complaint in this matter.

PAR. 4. El Paso's and Transcontinental's respective business each encompasses, but is not limited to the exploration, processing, transportation, and sale of natural gas.

PAR. 5. (a) El Paso and Transcontinental, by the nature of their business and location of operations are competitors of each other with respect to the exploration, production, processing, or sale of natural gas.

(b) The elimination of competition by agreement or otherwise between El Paso and Transcontinental would hinder, foreclose, and restrain competition or tend to create a monopoly in the exploration, production, processing or sale of natural gas.

PAR. 6. (a) The activities referred to in Paragraph Four are performed by El Paso and Transcontinental in various States of the United States and products of those services are sold and distributed in many other States of the United States.

(b) El Paso and Transcontinental each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 7. The director interlock, as hereinabove alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent, El Paso Natural Gas Company (El Paso), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2727 Allen Pkwy., American General Bldg., Houston, Tex.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That El Paso Natural Gas Company (El Paso), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its Board of Directors if such individual is or would be at the same time a director of Transcontinental Gas Pipe Line Corporation.

II

It is further ordered, That El Paso shall, within thirty days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of any corporation in which El Paso controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1 million from the exploration, production and sale of natural gas; and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, El Paso shall, at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of the board of directors, but has not been a member of its board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, El Paso shall not permit on its board of directors any person who fails to submit a written statement pursuant to Paragraphs II and III or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of El Paso by virtue of its business and location of operation in the exploration, production or sale of natural gas. If compliance with Paragraphs I and IV requires any member of El Paso's board of directors to resign or to be removed from the board of directors of either El Paso or such other corporation, El Paso shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order.

V

It is further ordered, That El Paso notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent El Paso shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of El Paso pursuant to Paragraphs II and III designating all other corporations of which they are directors.

In the Matter of

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2689. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a Houston, Tex., energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of El Paso Natural Gas Company.

Appearances

For the Commission: *Allee A. Ramadhan.*

For the respondent: *William M. Sayre, Cahill, Gordon [Reindel,* New York City.

Complaint

The Federal Trade Commission having reason to believe that the above-named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

Paragraph 1. Respondent El Paso Natural Gas Co. (El Paso) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 2727 Allen Pkwy., American General Bldg., Houston, Tex. At all times relevant to this complaint, El Paso Natural Gas Co. had capital, surplus, and undivided profits aggregating in excess of $64 million. In 1972 El Paso Natural Gas Co. had revenues of approximately $1.1 billion.

Par. 2. Respondent Transcontinental Gas Pipe Line Corp. (Transcontinental) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 2700 S. Post Oak, Houston, Tex. At all times relevant to this complaint, Transcontinental Pipe Line Corp. had capital, surplus, and undivided profits aggregating in excess of $53 million. In 1972, it had revenues of approximately $482 million.

PAR. 3. In 1974 and for some years previously, Mr. Alfred C. Glassell, Jr. and Franz Schneider served simultaneously as directors of El Paso and Transcontinental. On or about Aug. 27, 1974 both individuals resigned from Transcontinental's board of directors having been notified of the Commission's intention to issue a complaint in this matter.

PAR. 4. El Paso's and Transcontinental's respective business each encompasses, but is not limited to the exploration, processing, transportation, and sale of natural gas.

PAR. 5. (a) El Paso and Transcontinental, by the nature of their business and location of operations are competitors of each other with respect to the exploration, production, processing, or sale of natural gas.

(b) The elimination of competition by agreement or otherwise between El Paso and Transcontinental would hinder, foreclose, and restrain competition or tend to create a monopoly in the exploration, production, processing or sale of natural gas.

PAR. 6. (a) The activities referred to in Paragraph Four are performed by El Paso and Transcontinental in various States of the United States and products of those services are sold and distributed in many other States of the United States.

(b) El Paso and Transcontinental each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 7. The director interlock, as hereinabove alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent Transcontinental Gas Pipe Line Corp. (Transcontinental) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 2700 S. Post Oak, Houston, Tex. At all times relevant to this complaint, Transcontinental Pipe Line Corp. had capital, surplus, and undivided profits aggregating in excess of $53 million. In 1972, it had revenues of approximately $482 million.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Transcontinental Gas Pipe Line Corporation (Transcontinental), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of El Paso Natural Gas Company.

II

It is further ordered, That Transcontinental shall, within thirty (30) days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of any corporation in which Transcontinental controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1 million from the exploration, production and sale of natural gas; and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, Transcontinental shall, at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of its board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, Transcontinental shall not permit on its board of directors any person who fails to submit a written statement pursuant to Paragraphs II and III, or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of Transcontinental by virtue of its business and location of operations in the exploration, production or sale of natural gas. If compliance with Paragraphs I and IV requires any member of Transcontinental's board of directors to resign or to be removed from the board of directors of either Transcontinental or such other corporation, Transcontinental shall be allowed a reasonable time within which to take any legal or other steps which are necessary to secure compliance with this order.

V

It is further ordered, That Transcontinental notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent Transcontinental shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of Transcontinental pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

DIXILYN CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2690. Complaint, July 17, 1975–Decision, July 17, 1975

Consent order requiring a Houston, Tex., energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Austral Oil Company, Inc.

Appearances

For the Commission: *Kenneth A. Rutherford.*

For the respondent: *William T. Lifland, Cahill, Gordon, & Reindel,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Dixilyn Corporation (Dixilyn) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 1012 First City National Bank Bldg., Houston, Tex. At all times relevant to this complaint, Dixilyn had capital, surplus, and undivided profits aggregating in excess of $1 million. In 1973 Dixilyn had revenues of approximately $12 million.

PAR. 2. Respondent Austral Oil Company, Inc. (Austral) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 2700 Exxon Bldg., Houston, Tex. At all times relevant to this complaint, Austral had capital, surplus, and undivided profits aggregating in excess of $2 million. In 1972 it had revenues of approximately $12 million.

PAR. 3. In 1974 and for some years previously, Mr. Willard M. Johnson served simultaneously as a director of Austral and Dixilyn. On or about Aug. 26, 1974, he resigned from Austral's board of directors having been notified of the Commission's intention to issue a complaint in this matter.

PAR. 4. The business of respondents Dixilyn and Austral encompasses, but is not limited to, exploration, production, and sale of crude petroleum and natural gas.

PAR. 5. (a) Dixilyn and Austral by the nature of their business and location of operation are competitors of each other with respect to the exploration, production, or sale of crude petroleum and natural gas.

(b) The elimination of competition by agreement or otherwise between Dixilyn and Austral would hinder, foreclose, and restrain competition or tend to create a monopoly in the exploration, production, or sale of crude petroleum and natural gas.

PAR. 6. (a) The activities referred to in Paragraph Four are performed by corporate respondents in various States of the United States and products of those services are sold and distributed in many other States of the United States.

(b) Dixilyn Corporation and Austral Oil Company each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 7. The director interlock, as hereinabove alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent, Dixilyn Corporation, (Dixilyn), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1012 First City National Bank Bldg., Houston, Tex.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Dixilyn Corporation (Dixilyn), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Austral Oil Company.

II

It is further ordered, That Dixilyn shall, within thirty days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of any corporation in which Dixilyn controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1 million from the exploration, production and sale of natural gas and crude petroleum; and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, Dixilyn shall, at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of the board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, Dixilyn shall not permit on its board of directors any person who fails to submit a written statement pursuant to Paragraphs II and III or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of Dixilyn by virtue of its business and location of operation in the exploration, production or sale of crude petroleum or natural gas. If compliance with Paragraphs I and IV requires any member of Dixilyn's board of directors to resign or to be removed from the board of directors of either Dixilyn or such other corporation, Dixilyn shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order.

V

It is further ordered, That Dixilyn notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent Dixilyn shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of Dixilyn pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

AUSTRAL OIL COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2691. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a Houston, Tex., energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Dixilyn Corporation.

Appearances

For the Commission: *Kenneth A. Rutherford.*

For the respondent: *Richard P. Keeton, Vinson, Elkins, Searls, Connally & Smith,* Houston, Tex.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Dixilyn Corporation (Dixilyn) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 1012 First City National Bank Bldg., Houston, Tex. At all times relevant to this complaint, Dixilyn had capital, surplus, and undivided profits aggregating in excess of $1 million. In 1973 Dixilyn had revenues of approximately $12 million.

PAR. 2. Respondent Austral Oil Company, Inc. (Austral) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 2700 Exxon Bldg., Houston, Tex. At all times relevant to this complaint, Austral had capital, surplus, and undivided profits aggregating in excess of $2 million. In 1972 it had revenues of approximately $12 million.

PAR. 3. In 1974 and for some years previously, Mr. Willard M. Johnson served simultaneously as a director of Austral and Dixilyn. On or about Aug. 26, 1974, he resigned from Austral's board of directors having been notified of the Commission's intention to issue a complaint in this matter.

PAR. 4. The business of respondents Dixilyn and Austral encompasses, but is not limited to, exploration, production, and sale of crude petroleum and natural gas.

PAR. 5. (a) Dixilyn and Austral by the nature of their business and location of operation are competitors of each other with respect to the exploration, production, or sale of crude petroleum and natural gas.

(b) The elimination of competition by agreement or otherwise between Dixilyn and Austral would hinder, foreclose, and restrain competition or tend to create a monopoly in the exploration, production, or sale of crude petroleum and natural gas.

PAR. 6. (a) The activities referred to in Paragraph Four are performed by corporate respondents in various States of the United States and products of those services are sold and distributed in many other States of the United States.

(b) Dixilyn Corporation and Austral Oil Company each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 7. The director interlock, as hereinabove alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent, Austral Oil Company, Inc. (Austral), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2700 Exxon Bldg., Houston, Tex.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Austral Oil Company, Inc. (Austral), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Dixilyn Corporation.

II

It is further ordered, That Austral shall, within thirty (30) days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of any corporation in which Austral controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1,000,000 from the exploration, production and sale of natural gas and crude petroleum; and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, Austral shall, at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of the board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, Austral shall not permit on its board of directors any person who fails to submit a written statement pursuant to Paragraphs II and III or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of Austral by virtue of its business and location of operation in the exploration, production or sale of crude petroleum or natural gas. If compliance with Paragraphs I and IV requires any member of Austral's board of directors to resign or to be removed from the board of directors of either Austral or such other corporation, Austral shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order.

V

It is further ordered, That Austral notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent Austral shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of Austral pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

GENERAL AMERICAN OIL COMPANY OF TEXAS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2692. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a Dallas, Tex., energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Pauley Petroleum, Inc.

Appearances

For the Commission: *Roger B. Pool.*

For the respondent: *Jerry L. Buchmeyer, Thompson, Knight, Simmons & Bullion*, Dallas, Tex.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent General American Oil Company of Texas (General American) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 5646 Milton St., Dallas, Tex. At all times relevant to this complaint, General had capital, surplus, and undivided profits aggregating in excess of $12 million. In 1972 General had revenues of approximately $58 million.

PAR. 2. Respondent Pauley Petroleum, Inc. (Pauley) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 10000 Santa Monica Blvd., Los Angeles, Calif. At all times relevant to this complaint, Pauley had capital, surplus, and undivided profits aggregated in excess of $1 million. In 1972 it had revenues of approximately $28 million.

PAR. 3. In 1974 and for some years previously, Mr. Paul A. Conley served simultaneously as director of Pauley and General American. On or about Oct. 31, 1974 Mr. Conley resigned from Pauley's board of directors having been notified of the Commission's intention to issue a complaint in this matter.

PAR. 4. The business of respondents General American and Pauley encompasses, but is not limited to, exploration, production, and sale of crude petroleum and natural gas.

PAR. 5. (a) General American and Pauley by the nature of their business and location of operation are competitors of each other with respect to the exploration, production, and sale of crude petroleum and natural gas.

(b) The elimination of competition by agreement or otherwise between General American and Pauley would hinder, foreclose, and restrain competition or tend to create a monopoly in the exploration, production, and sale of crude petroleum and natural gas.

PAR. 6. (a) The activities referred to in Paragraph Four are performed by corporate respondents in various States of the United States and products of those services are sold and distributed in many other States of the United States.

(b) General American and Pauley each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 7. The director interlock, as hereinabove alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed

thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent, General American Oil Company of Texas, (General American), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 646 Milton St., Dallas, Tex.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That General American Oil Company of Texas, (General American), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Pauley Petroleum, Inc.

II

It is further ordered, That General American shall, within thirty days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of any corporation in which General American controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1 million from the exploration, production and sale of natural gas and crude petroleum; and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, General American shall, at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of the board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, General American shall not permit on its board of directors any person who fails to submit a written statement pursuant to Paragraphs II and III or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of General American by virtue of its business and location of operations in the exploration, production or sale of crude petroleum or natural gas. If compliance with Paragraphs I and IV requires any member of General American's board of directors to resign or to be removed from the board of directors of either General American or such other corporation, General American shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order.

V

It is further ordered, That General American notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent General American shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of General American pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

PAULEY PETROLEUM, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2693. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a Los Angeles, Calif., energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of General American Oil Company of Texas.

Appearances

For the Commission: *Roger B. Pool.*

For the respondent: *Donald M. Wessling, O'Melveny & Myers*, Los Angeles, Calif.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent General American Oil Company of Texas (General American) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 5646 Milton St., Dallas, Tex. At all times relevant to this complaint, General had capital, surplus, and undivided profits aggregating in excess of $12 million. In 1972 General had revenues of approximately $58 million.

PAR. 2. Respondent Pauley Petroleum, Inc. (Pauley) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 10000 Santa Monica Blvd., Los Angeles, Calif. At all times relevant to this complaint, Pauley had capital, surplus, and undivided profits aggregated in excess of $1 million. In 1972 it had revenues of approximately $28 million.

PAR. 3. In 1974 and for some years previously, Mr. Paul A. Conley served simultaneously as director of Pauley and General American. On or about Oct. 31, 1974 Mr. Conley resigned from Pauley's board of directors having been notified of the Commission's intention to issue a complaint in this matter.

PAR. 4. The business of respondents General American and Pauley encompasses, but is not limited to, exploration, production, and sale of crude petroleum and natural gas.

PAR. 5. (a) General American and Pauley by the nature of their business and location of operation are competitors of each other with respect to the exploration, production, and sale of crude petroleum and natural gas.

(b) The elimination of competition by agreement or otherwise between General American and Pauley would hinder, foreclose, and restrain competition or tend to create a monopoly in the exploration, production, and sale of crude petroleum and natural gas.

PAR. 6. (a) The activities referred to in Paragraph Four are performed by corporate respondents in various States of the United States and products of those services are sold and distributed in many other States of the United States.

(b) General American and Pauley each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 7. The director interlock, as hereinabove alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed

thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent, Pauley Petroleum Inc. (Pauley), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 10000 Santa Monica Blvd., Los Angeles, Calif.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Pauley Petroleum Inc. (Pauley), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of General American Oil Company of Texas.

II

It is further ordered, That Pauley shall, within thirty days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of any corporation in which Pauley controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1 million from the exploration, production and sale of natural gas and crude petroleum; and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, Pauley shall, at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of the board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, Pauley shall not permit on its board of directors any person who fails to submit a written statement pursuant to Paragraphs II and III or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of Pauley by virtue of its business and location of operation in the exploration, production or sale of crude petroleum or natural gas. If compliance with Paragraphs I and IV requires any member of Pauley's board of directors to resign or to be removed from the board of directors of either Pauley or such other corporation, Pauley shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order.

V

It is further ordered, That Pauley notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent Pauley shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of Pauley pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

KERR-McGEE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2694. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring an Oklahoma City, Okla., energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Oklahoma Natural Gas Company.

Appearances

For the Commission: *William A. Horne.*

For the respondent: *J. Randolph Wilson, Covington & Burling,* Wash., D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Kerr-McGee Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at Kerr-McGee Center, Oklahoma City, Oklahoma. At all times relevant to this complaint, Kerr-McGee Corporation had capital, surplus, and undivided profits aggregating in excess of $1 million. In 1972, Kerr-McGee Corporation had revenues in excess of $679 million.

PAR. 2. Respondent Oklahoma Natural Gas Company is a corporation existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 624 S. Boston Ave., Tulsa, Okla. At all times relevant to this complaint, Oklahoma Natural Gas Company had capital, surplus, and undivided profits aggregating in excess of $1 million. In 1973, it had revenues in excess of $133 million.

PAR. 3. Until or about July 10, 1974, and for some years previously, Dean A. McGee served simultaneously as a director of Kerr-McGee Corporation and Oklahoma Natural Gas Company. On or about July 10, 1974, Dean A. McGee resigned from the board of directors of Oklahoma

Natural Gas after having been notified of the Commission's intent to issue a complaint in this matter.

PAR. 4. The business of respondents Kerr-McGee Corporation and Oklahoma Natural Gas Company encompasses, but is not limited to, the exploration for and the production and sale of natural gas.

PAR. 5. (a) Kerr-McGee Corporation and Oklahoma Natural Gas Company, by the nature of their business and location of operations, are competitors of each other with respect to the exploration for and the production and sale of natural gas.

(b) The elimination of competition by agreement or otherwise between Kerr-McGee Corporation and Oklahoma Natural Gas Company would hinder, foreclose, and restrain competition, or tend to create a monopoly in the exploration for and production and sale of natural gas.

PAR. 6. (a) The activities referred to in Paragraph Four are performed by corporate respondents in various States of the United States, and products of said respondents are sold and distributed in many other States of the United States.

(b) Kerr-McGee Corporation and Oklahoma Natural Gas Company each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 7. The director interlock, as hereinabove alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed

thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent, Kerr-McGee Corporation, (Kerr-McGee), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Kerr-McGee Center, Oklahoma City, Okla.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Kerr-McGee Corporation (Kerr-McGee), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Oklahoma Natural Gas Company.

II

It is further ordered, That Kerr-McGee shall, within thirty days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of any corporation in which Kerr-McGee controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1,000,000 from the exploration, production and sale of natural gas, the purchase and refining of crude oil, and the sale of refined petroleum products; and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, Kerr-McGee shall, at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of the board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, Kerr-McGee shall not permit on its board of directors any person who fails to submit a written statement pursuant to Paragraphs II and III or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of Kerr-McGee by virtue of its business and location of operation in the exploration for, production or sale of natural gas or in the purchase or refining of crude oil, or in the sale of refined petroleum products. If compliance with Paragraphs I and IV requires any member of Kerr-McGee's board of directors to resign or to be removed from the board of directors of either Kerr-McGee or such other corporation, Kerr-McGee shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order.

V

It is further ordered, That Kerr-McGee notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent Kerr-McGee shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of Kerr-McGee pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

OKLAHOMA NATURAL GAS COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2695. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a Tulsa, Okla., energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Kerr-McGee Corporation.

Appearances

For the Commission: *William A. Horne.*

For the respondent: *John L. Arrington, Jr., Huffman, Arrington, Scheurich & Kihle,* Tulsa, Okla.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Kerr-McGee Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at Kerr-McGee Center, Oklahoma City, Oklahoma. At all times relevant to this complaint, Kerr-McGee Corporation had capital, surplus, and undivided profits aggregating in excess of $1 million. In 1972, Kerr-McGee Corporation had revenues in excess of $679 million.

PAR. 2. Respondent Oklahoma Natural Gas Company is a corporation existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 624 S. Boston Ave., Tulsa, Okla. At all times relevant to this complaint, Oklahoma Natural Gas Company had capital, surplus, and undivided profits aggregating in excess of $1 million. In 1973, it had revenues in excess of $133 million.

PAR. 3. Until or about July 10, 1974, and for some years previously, Dean A. McGee served simultaneously as a director of Kerr-McGee Corporation and Oklahoma Natural Gas Company. On or about July 10, 1974, Dean A. McGee resigned from the board of directors of Oklahoma

Natural Gas after having been notified of the Commission's intent to issue a complaint in this matter.

PAR. 4. The business of respondents Kerr-McGee Corporation and Oklahoma Natural Gas Company encompasses, but is not limited to, the exploration for and the production and sale of natural gas.

PAR. 5. (a) Kerr-McGee Corporation and Oklahoma Natural Gas Company, by the nature of their business and location of operations, are competitors of each other with respect to the exploration for and the production and sale of natural gas.

(b) The elimination of competition by agreement or otherwise between Kerr-McGee Corporation and Oklahoma Natural Gas Company would hinder, foreclose, and restrain competition, or tend to create a monopoly in the exploration for and production and sale of natural gas.

PAR. 6. (a) The activities referred to in Paragraph Four are performed by corporate respondents in various States of the United States, and products of said respondents are sold and distributed in many other States of the United States.

(b) Kerr-McGee Corporation and Oklahoma Natural Gas Company each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 7. The director interlock, as hereinabove alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed

thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, in the form contemplated by said agreement, makes the following jurisdictional finding, and enters the following order:

1. Respondent, Oklahoma Natural Gas Company (ONG), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 624 S. Boston Ave., Tulsa, Okla.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Oklahoma Natural Gas Company (ONG), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Kerr-McGee Corporation.

II

It is further ordered, That ONG shall, within thirty days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of any corporation in which ONG controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1 million from the exploration for, production and sale of natural gas; and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, ONG at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of the board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, ONG shall not permit on its board of directors any person who fails to submit a written statement pursuant to Paragraphs II and III or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of ONG by virtue of its business and location of operation in the exploration for, production or sale of natural gas. If compliance with Paragraphs I and IV requires any member of ONG's board of directors to resign or to be removed from the board of directors of either ONG or such other corporation, ONG shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order.

V

It is further ordered, That ONG notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent ONG shall, within thirty (30) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of ONG pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

RIDGEWOOD REALTY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2696. Complaint, July 21, 1975 - Decision, July 21, 1975.

Consent order requiring a Golden, Colo., mortgage loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*
For the respondents: *Peter A. Robinson,* Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Ridgewood Realty, Inc., a corporation, and Mike A. Leprino, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ridgewood Realty, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 14618 W. 6th Ave., Golden, Colo.

Respondent Mike A. Leprino is an officer of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of their business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the above-mentioned advertisements, have stated and are stating the amount of downpayment (in dollars and as a percentage of the sale price) or that no downpayment is required, or the amount of an instalment payment without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Respondents, in certain of these advertisements, have stated, and are stating, the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an "annual percentage rate," using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 7. Respondents, in certain other of these advertisements, have stated and are stating the rate of interest as a simple annual rate in conjunction with the "annual percentage rate," but have printed and are printing the simple annual rate more conspicuously than the "annual percentage rate" in violation of Section 226.10(d)(1)(i) of Regulation Z.

PAR. 8. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ridgewood Realty, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 14618 W. 6th Ave., city of Golden, State of Colorado.

Respondent Mike A. Leprino is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Ridgewood Realty, Inc., a corporation, its successors and assigns, its officers, and Mike A. Leprino, individually and as an officer of said corporation, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

3. Stating in any advertisement the simple annual rate of interest in conjunction with the "annual percentage rate" unless the "annual percentage rate" is printed as conspicuously as the simple annual rate as required by Section 226.10(d)(1)(i) of Regulation Z.

4. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or

employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ALPERT CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2697. Complaint, July 21, 1975 - Decision, July 21, 1975

Consent order requiring an Aurora, Colo., mortgage loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*

For the respondents: *Russ W. Bond*, Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Alpert Corporation, a corporation, and Harvey B. Alpert, Leland J. Alpert and Theodore J. Alpert, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Alpert Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 15052 E. Hampden Circle, Aurora, Colo.

Respondents Harvey B. Alpert, Leland J. Alpert and Theodore J. Alpert are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of their business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the above-mentioned advertisements, have stated and are stating the amount of downpayment (in dollars or as a percentage of the sale price), the amount of an instalment payment or the period of repayment without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Respondents, in certain of these advertisements, have stated, and are stating, the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an "annual percentage rate," using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 7. Pursuant to Section 103(q) of the Truth in Lending Act,

respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Alpert Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 15052 E. Hampden Circle, city of Aurora, State of Colorado.

Respondents Harvey B. Alpert, Leland J. Alpert and Theodore J. Alpert are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Alpert Corporation, a corporation, its successors and assigns, its officers, and Harvey B. Alpert, Leland J. Alpert and Theodore J. Alpert, individually and as officers of said corporation, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

3. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

WALDEN REALTY COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2698. Complaint, July 21, 1975 - Decision, July 21, 1975

Consent order requiring a Lakewood, Colo., mortgage loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*

For the respondents: *Victor L. Wallace, II, Calkins, Kramer, Grimshaw and Harring,* Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Walden Realty Company, a corporation, and Paul S. Walden, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Walden Realty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 10155 W. Kentucky Dr., Lakewood, Colo.

Respondent Paul S. Walden is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the above-mentioned advertisements, have stated and are stating the amount of the downpayment (in dollars or as a percentage of the sale price) and the period of repayment without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Walden Realty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 10155 W. Kentucky Drive, city of Lakewood, State of Colorado.

Respondent Paul S. Walden is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Walden Realty Company, a corporation, its successors and assigns, its officers, and Paul S. Walden, individually and as an officer of said corporation, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

GOLDEN KEY HOMES BLDG. CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2699. Complaint, July 21, 1975 - Decision July 21, 1975

Consent order requiring an Englewood, Colo., mortgage loan company broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*

For the respondents: *Jon M. Zall, Atler, Zall & Haligman*, Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Golden Key Homes Bldg. Corp., a corporation, and Michael K. Cooper, Richard M. Cooper and Gary Cooper, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Golden Key Homes Bldg. Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 10521 E. Dorado Ave., Englewood, Colo.

Respondents Michael K. Cooper, Richard M. Cooper and Gary Cooper are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the above-mentioned advertisements, have stated and are stating the amount of the downpayment (in dollars or as a percentage of the sale price) without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Respondents, in certain of these advertisements, have stated, and are stating, the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an "annual percentage rate," using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 7. Respondents, in certain other of these advertisements, have stated and are stating the rate of interest as a simple annual rate in conjunction with the "annual percentage rate," but have printed and are printing the simple annual rate more conspicuously than the "annual percentage rate" in violation of Section 226.10(d)(1)(i) of Regulation Z.

PAR. 8. Pursuant to Section 103(q) of the Truth in Lending Act,

respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Golden Key Homes Bldg. Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 10521 E. Dorado Ave., city of Englewood, State of Colorado.

Respondents Michael K. Cooper, Richard M. Cooper and Gary Cooper are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Golden Key Homes Bldg. Corp., a corporation, its successors and assigns, its officers, and Michael K. Cooper, Richard M. Cooper and Gary Cooper, individually and as officers of said corporation, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

3. Stating in any advertisement the simple annual rate of interest in conjunction with the "annual percentage rate" unless the "annual percentage rate" is printed as conspicuously as the simple annual rate as required by Section 226.10(d)(1)(i) of Regulation Z.

4. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MOORE REALTY CO., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2700. Complaint, July 21, 1975 - Decision, July 21, 1975

Consent order requiring a Denver, Colo., mortgage loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*

For the respondents: *Donald L. Giacomini, Rothberger, Appel and Powers*, Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Moore Realty Co., a corporation, and William M. Moore, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Moore Realty Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 300 Speer Blvd., Denver, Colo.

Respondent William M. Moore is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, mortgaging, offering for sale and sale of new and used housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of these advertisements have stated, and are stating, the amount of the downpayment (in dollars or as a percentage of the sales price) or that no downpayment is required, the amount of an instalment payment, or the period of repayment without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2):

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Respondents, in other advertisements, have stated, and are stating, the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an annual percentage rate, using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 7. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Section 226.2 of Regulation Z, have and are regularly extending consumer credit, as "consumer credit" is defined in Section 226.2 of Regulation Z.

PAR. 8. Respondents, in certain disclosure statements involving second mortgage loans to natural persons for personal, family or household purposes in which a finance charge is imposed or in which payment is to be made in more than four instalments, have and are violating the Truth in Lending Act disclosure requirements as follows:

(1) In some instances, the terms, "finance charge" and "annual percentage rate," are not printed more conspicuously in the disclosure statements than other required terminology as required by Section 226.6(a) of Regulation Z.

(2) In some instances, the disclosure statements, in violation of Section 226.8(d)(1) of Regulation Z, incorrectly use the term "amount financed" as a total figure computed by adding the finance charges to the amount of the loan.

(3) In some instances, the disclosure statements, in violation of Sections 226.5(b) and 226.8(b)(2) of Regulation Z, fail to accurately disclose the "annual percentage rate," to the nearest quarter of one percent.

(4) In some instances, the disclosure statements fail to disclose the number, amount and due dates or periods of payments scheduled to repay the indebtedness as required by Section 226.8(b)(3) of Regulation Z.

(5) In some instances, the disclosure statements fail to identify the amount of a "balloon payment" and state the conditions, if any, under which that payment may be refinanced if not paid when due as required in Section 226.8(b)(3) of Regulation Z.

(6) In some instances, the disclosure statements fail to state whether a rebate of the unearned finance charges upon prepayment in full is available, and, if available, the method of computing said rebate as required by Section 226.8(b)(7) of Regulation Z.

(7) In some instances, the disclosure statements fail to describe any

penalty charge for prepayment of the obligation, if any exists, as required by Section 226.8(b)(6) of Regulation Z.

(8) In some instances, the disclosure statements, in violation of Section 226.6(c) of Regulation Z, include the term, "interest per annum," as additional information in a way which obscures and detracts attention from the "annual percentage rate."

(9) In some instances, the disclosure statements fail to make required disclosures clearly, conspicuously and in meaningful sequence as required by Section 226.6(a) of Regulation Z.

PAR. 9. Subsequent to July 1, 1969, and in connection with the credit sales referred to in Paragraph Seven above, respondents have entered into consumer credit transactions in which they have retained or acquired a security interest in real property which was used or expected to be used as the principal residence of the customer. The customer thereby had the right to rescind the transaction as provided in Section 226.9 of Regulation Z. Respondents, while giving rescission notices, have failed and are failing to accurately disclose the date of the last day on which a customer may cancel the transaction and thereby exercise his right of rescission, as required by Section 226.9 of Regulation Z.

PAR. 10. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Moore Realty Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 300 Speer Blvd., city of Denver, State of Colorado.

Respondent William M. Moore is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Moore Realty Co., a corporation, its successors and assigns, and its officers, and William M. Moore, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit, or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

3. Failing, in any consumer credit transaction, to print in the disclosures the terms "finance charge" and "annual percentage rate" more conspicuously than other required terminology as required by Section 226.6(a) of Regulation Z.

4. Failing, in any consumer credit transaction, to accurately disclose the amount financed as required by Section 226.8 of Regulation Z.

5. Failing, in any consumer credit transaction, to compute and disclose accurately the annual percentage rate to the nearest quarter of one percent as prescribed by Sections 226.5(b) and 226.8(b)(2) of Regulation Z.

6. Failing, in any consumer credit transaction, to accurately disclose the number, amount and due dates or periods of payments scheduled to repay the indebtedness as required by Section 226.8(b)(3) of Regulation Z.

7. Failing, in any consumer credit transaction, to accurately disclose the amount of a balloon payment and state the conditions, if any, under which that payment may be refinanced if not paid when due as required in Section 226.8(b)(3) of Regulation Z.

8. Failing, in any consumer credit transaction, to disclose whether a rebate of the unearned finance charges upon prepayment in full is available, and, if available, the method of computation as required by Section 226.8(b)(7) of Regulation Z.

9. Failing, in any consumer credit transaction, to disclose penalty charges for prepayment of the obligation, if any exist, as required by Section 226.8(b)(6) of Regulation Z.

10. Failing, in any consumer credit transaction, to provide information in addition to disclosures required by Regulation Z without contradicting, obscuring or detracting attention from the required disclosures or misleading or confusing the customer, as prescribed by Section 226.6(c) of Regulation Z.

11. Failing, in any consumer credit transaction, to make all required

disclosures clearly, conspicuously and in meaningful sequence as required by Section 226.6(a) of Regulation Z.

12. Failing, in any consumer credit transaction subject to Section 226.9 of Regulation Z, to accurately state the date by which the customer must give notice of his desire to exercise his right of rescission, as prescribed by Section 226.9(b) of Regulation Z.

13. Failing, in any advertisement or consumer credit transaction, to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the form, manner and amount prescribed by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

PERL-MACK ENTERPRISES, CO., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2701. Complaint, July 21, 1975 - Decision, July 21, 1975

Consent order requiring a Denver, Colo., mortgage loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*
For the respondents: *Alexander J. Makkai, Jr.*, Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Perl-Mack Enterprises, Co., a corporation, and Samuel Primack and Jordon Perlmutter, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Perl-Mack Enterprises, Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 1701 W. 72nd Ave., Denver, Colo.

Respondents Samuel Primack and Jordon Perlmutter are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of their business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the above-mentioned advertisements, have stated and are stating the amount of the downpayment (in dollars or as a percentage of the sale price), the amount of the instalment payment or the period of repayment without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Respondents, in certain of these advertisements, have stated, and are stating, the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an "annual percentage rate," using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 7. Respondents, in certain other of these advertisements, have stated and are stating the rate of interest as a simple annual rate in conjunction with the "annual percentage rate," but have printed and are printing the simple annual rate more conspicuously than the "annual percentage rate" in violation of Section 226.10(d)(1)(i) of Regulation Z.

PAR. 8. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Perl-Mack Enterprises, Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 1701 W. 72nd Ave., city of Denver, State of Colorado.

Respondents Samuel Primack and Jordon Perlmutter are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Perl-Mack Enterprises, Co., a corporation, its successors and assigns, its officers, and Samuel Primack and Jordon Perlmutter, individually and as officers of said corporation, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously

stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

3. Stating in any advertisement the simple annual rate of interest in conjunction with the "annual percentage rate" unless the "annual percentage rate" is printed as conspicuously as the simple annual rate as required by Section 226.10(d)(1)(i) of Regulation Z.

4. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MEDEMA HOMES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2702. Complaint, July 21, 1975–Decision, July 21, 1975

Consent order requiring a Littleton, Colo., mortgage loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Medema Homes, Inc., a corporation, and C. J. Medema and Richard D. Jones, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Medema Homes, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 4901 East Dry Creek Rd., Littleton, Colo.

Respondents C. J. Medema and Richard D. Jones are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the above-mentioned advertisements, have stated and are stating the amount of the downpayment (in dollars or as a percentage of the sale price) without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Respondents, in certain of these advertisements, have stated, and are stating, the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an "annual percentage rate," using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 7. Respondents, in certain other of these advertisements, have stated and are stating the rate of interest as a simple annual rate in conjunction with the "annual percentage rate," but have printed and are printing the simple annual rate more conspicuously than the "annual percentage rate" in violation of Section 226.10(d)(1)(i) of Regulation Z.

PAR. 8. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Medema Homes, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 4901 E. Dry Creek Rd., city of Littleton, State of Colorado.

Respondents C. J. Medema and Richard D. Jones are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Medema Homes, Inc., a corporation, its successors and assigns, its officers, and C. J. Medema and Richard D. Jones, individually and as officers of said corporation, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

3. Stating in any advertisement the simple annual rate of interest in conjunction with the "annual percentage rate" unless the "annual percentage rate" is printed as conspicuously as the simple annual rate as required by Section 226.10(d)(1)(i) of Regulation Z.

4. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

CARLILE-AGEE & ASSOCIATES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2703. Complaint, July 21, 1975-Decision, July 21, 1975

Consent order requiring a Denver, Colo., mortgage loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*

For the respondents: *Gary C. Davenport, Arkin & Hanlon*, Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Carlile-Agee & Associates, Inc., a corporation, Concept 80 Development Corporation, a corporation, and Joseph B. Agee, Sidney H. Sweet and Charles T. Leverett, Jr., individually and as officers of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Carlile-Agee & Associates, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 1660 S. Albion, Suite 1100, Denver, Colo.

Respondent Concept 80 Development Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1660 S. Albion, Suite 1100, Denver, Colo.

Respondents Joseph B. Agee, Sidney H. Sweet and Charles T. Leverett, Jr., are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the above-mentioned advertisements, have stated and are stating the amount of the downpayment (in dollars or as a percentage of the sale price) without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Carlile-Agee & Associates, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 1660 S. Albion, Suite 1100, city of Denver, State of Colorado.

Respondent Concept 80 Development Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1660 S. Albion, Suite 1100, city of Denver, State of Colorado.

Respondents Joseph B. Agee, Sidney H. Sweet and Charles T. Leverett, Jr., are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

IT IS ORDERED, That respondents Carlile-Agee & Associates, Inc., a corporation, its successors and assigns, its officers, Concept 80 Development Corporation, a corporation, its successors and assigns, its officers, and Joseph B. Agee, Sidney H. Sweet and Charles T. Leverett, Jr., individually and as officers of said corporations, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

IT IS FURTHER ORDERED, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

IT IS FURTHER ORDERED, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

IT IS FURTHER ORDERED, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

WITKIN HOMES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2704. Complaint, July 21, 1975-Decision, July 21, 1975

Consent order requiring a Denver, Colo., mortgage loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*

For the respondents: *Daniel C. Smith, Arent, Fox, Kintner, Plotkin and Kahn,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Witkin Homes, Inc., a corporation, and Jack A. Witkin and Philip D. Winn, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Witkin Homes, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 9725 E. Hampden Ave., Denver, Colo.

Respondents Jack A. Witkin and Philip D. Winn are officers and directors of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the above-mentioned advertisements, have stated and are stating that no downpayment is required or the amount of the downpayment (in dollars or as a percentage of the sale price) without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Pursuant to Section 103(q) of the Truth in Lending Act,

respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Witkin Homes, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 9725 E. Hampden Ave., city of Denver, State of Colorado.

Respondents Jack A. Witkin and Philip D. Winn are officers and directors of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Witkin Homes, Inc., a corporation, its successors and assigns, its officers, and Jack A. Witkin and Philip D. Winn, individually and as officers of said corporation, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price or the amount of the loan, as applicable;

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

IT IS FURTHER ORDERED, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

IT IS FURTHER ORDERED, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ALLORA, LTD., ET AL.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2705. Complaint, July 21, 1975–Decision, July 21, 1975

Consent order requiring a New York City importer of wool fabrics, among other things to discontinue false and deceptive labeling; to notify those who purchased the misbranded wool products of the fact that they were misbranded; and prohibiting the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of the wool products and any duty thereon conditioned upon compliance with the Wool Products Labeling Act.

Appearances

For the Commission: *Judith K. Braun.*

For the respondents: *Ellsworth F. Qualey*, New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Allora Ltd., a corporation, trading under its own name or as Allora-Tex, and Oscar Bobis, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Allora Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 450 Seventh Ave., New York, N.Y.

Individual respondent Oscar Bobis is an officer of Allora Ltd. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

Respondents are engaged in the importation and sale of fabrics including but not limited to wool products.

PAR. 2. Respondents, now and for some time past, have imported for introduction into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, and sold in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain wool fabrics stamped, tagged, labeled, or otherwise identified by respondents as "30% acrylic, 25% wool, 23% cotton, 22% man made fibers," whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4 (a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely wool fabrics, with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. Respondents' wool products described in "Paragraph Four" above were imported by the respondents into the United States and, as particularized in said paragraph, were not stamped, tagged, labeled or otherwise identified in accordance with the provisions of the Wool Products Labeling Act of 1939. The invoices of said imported wool products required by the Tariff Act of 1930 failed to set forth the information with respect to said wool products required under the provisions of the Wool Products Labeling Act of 1939, to wit, the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers. The respondents did falsify the consignee's declaration provided for in said Tariff Act of 1930 insofar as it related to the above items of information enumerated in this paragraph in violation of Section 8 of the Wool Products Labeling Act of 1939 and Section 5 of the Federal Trade Commission Act.

PAR. 6. The acts and practices of respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act and the Wool Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Allora Ltd., trading under its own name or as Allora-Tex, is a corporation organized, existing and doing business under and

by virtue of the laws of the State of New York, with its office and principal place of business located at 450 Seventh Ave., New York, N.Y.

Respondent Oscar Bobis is an officer of said corporation. He formulates, directs and controls the acts, practices and policies of said corporation and his address is the same as that of said corporation.

Respondents are engaged in the importation and sale of wool products including but not limited to wool fabrics.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

IT IS ORDERED, That respondents Allora Ltd., a corporation, trading under its own name or as Allora-Tex, its successors and assigns, and its officers, and Oscar Bobis, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the introduction, or importing for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.
2. Failing to securely affix to or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

IT IS FURTHER ORDERED, That respondents Allora Ltd., a corporation, trading under its own name or as Allora-Tex, its successors and assigns, and its officers, and Oscar Bobis, individually and as an officer of Allora Ltd., and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from importing or participating in the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

IT IS FURTHER ORDERED, That respondents notify, by delivery of a copy of this order by registered mail, each of their customers that purchased the products which gave rise to this complaint of the fact that such products were misbranded.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

In the Matter of

LUMBERJACK MEATS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2706. Complaint, July 21, 1975-Decision, July 21, 1975

Consent order requiring a Birmingham, Ala., manufacturer of packaged meat and meat soy protein concentrate products, among other things to cease misrepresenting that its product Bun Pals is all-meat or solely a meat product; exaggerating the products' protein content in comparison with other food products; understating the products' fat content in comparison with other food products; and making price comparisons between its products and other products only in equivalent units of quantity.

Appearances

For the Commission: *Truett M. Honeycutt.*

For the respondents: *Harold Delbaum,* Tarrytown, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Lumberjack Meats, Inc., a corporation; and Harold Abroms, individually and as an officer of said corporation, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Lumberjack Meats, Inc. is a corporation organized existing and doing business by virtue of the laws of the State of Alabama, with its office and principal place of business located at 210-26th Ave., West, Birmingham, Ala.

Respondent Harold Abroms is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as the corporate respondent.

PAR. 2. Respondent Lumberjack Meats, Inc., is now and for some time last past has been engaged in the sale and distribution of a chicken, meat byproduct, meat, and soy protein concentrate product known as Bun Pals.

PAR. 3. Respondent Lumberjack Meats, Inc., causes the said product, when sold, to be transported from its place of business in Alabama to purchasers located in various other States of the United States. Respondent Lumberjack Meats, Inc., maintains, and at all times mentioned herein has maintained a course of trade in said product in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of their business, respondents have disseminated and caused the dissemination of certain advertisements concerning the said product by the United States mails and by various means in commerce as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers located in various States of the United States and having interstate circulation among readers located outside the respective states of their publication, for the purpose of inducing and which were likely to induce, the purchase of said product in commerce, as "commerce" is used in Sections 5 and 12 of the Federal Trade Commission Act, and as a result of such newspaper advertising and the mailing of advertising copy to newspapers for publication, and the mailing of newspapers containing such advertising to out of state readers, respondents have disseminated and caused to be disseminated false advertising by United States mails within the meaning of Section 12(a)(1) of the Federal Trade Commission Act.

PAR. 5. Typical of the statements and representations in such advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following: [see pp. 293-298]

PAR. 6. Through the use of the above advertisements, and others of similar import and meaning but not expressly set out herein, respondents have represented directly or by implication that:

1. Bun Pals is an all meat product in the same sense as pork chops, boneless round, chuck roast, steak, and roast beef.
2. The price of Bun Pals is approximately one half (1/2) or less than the price of the comparative meat product.
3. Bun Pals contain more protein than boneless round, canned ham, and roast beef and as much protein as pork chops, chuck roast and steak.
4. Bun Pals contain less fat than boneless round, boneless chuck roast and steak.

PAR. 7. In truth and in fact:

1. Bun Pals is not an all meat in the same sense as pork chops, boneless round, chuck roast and steak but instead the product is a combination of meat, meat byproducts, and soy protein concentrate which contains substantial quantities of non-meat ingredients.
2. The price of Bun Pals is substantially more expensive in relation to the comparative meat products than the ads depict. For example, Bun Pals are more than one half (1/2) the price of equal quantities of all comparative meat products shown in the aforementioned advertisements except steak. For the latter, the price is one third (1/3) as expensive rather than one fourth (1/4) as the ad depicts.
3. Bun Pals contain less protein than boneless round, canned ham, roast beef, pork chops, chuck roast and steak. In the instance of boneless round, the protein content of Bun Pals is less than one half (1/2) that of such product.
4. Bun Pals contain more fat than boneless round, boneless chuck roast and steak.

Therefore, the statements and representations as set forth in Paragraph Six hereof, were and are false, misleading and deceptive.

PAR. 8. Respondent, Lumberjack Meats, Inc., at all times mentioned herein, has been and is now in substantial competition with individuals, firms, and corporations engaged in the sale and distribution of meat, meat food products and soy concentrate products which are purchased by consumers to supply meat or a meat substitute in their diets.

PAR. 9. The use by corporate respondents of the aforesaid deceptive statements, representations and practices has had, and now has the capacity and tendency to mislead members of the purchasing public into the mistaken belief that such statements and representations are true and complete, and into the purchase of substantial quantities of corporate respondents' product by reason of such erroneous and mistaken belief. As a result thereof, substantial trade has been and is being diverted to corporate respondents from its competitors.

PAR. 10. The aforesaid acts and practices of respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair methods of competition in commerce and unfair and deceptive acts or practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint making the following jurisdictional findings, and enters the following order:

1. Respondent Lumberjack Meats, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 210-26th Ave., West, Birmingham, Ala.

Respondent Harold Abroms is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation. His principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

IT IS ORDERED, That respondents Lumberjack Meats, Inc., a corporation, its successors and assigns, and its officers, and Harold Abroms, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale or sale of the product "Bun Pals" or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or indirectly that the product "Bun Pals" or any other soy protein concentrate product is all meat or solely a meat product.
2. Representing directly or indirectly, that the protein content of the product "Bun Pals" is equal to or higher than that of boneless round, canned ham, roast beef, pork chops, chuck roast and steak, or misrepresenting in any manner the protein content of respondents' products.
3. Representing directly or indirectly that the fat content of the product "Bun Pals" is equal to or less than that of boneless round, boneless chuck roast, and steak, or misrepresenting in any manner the fat content of respondents' products.
4. Comparing the price of any given quantity of the product "Bun Pals" or any other product with that of another product unless such price comparison is expressed in equal quantities using equivalent units whether the compared product be described in generic terms or as a particular brand.

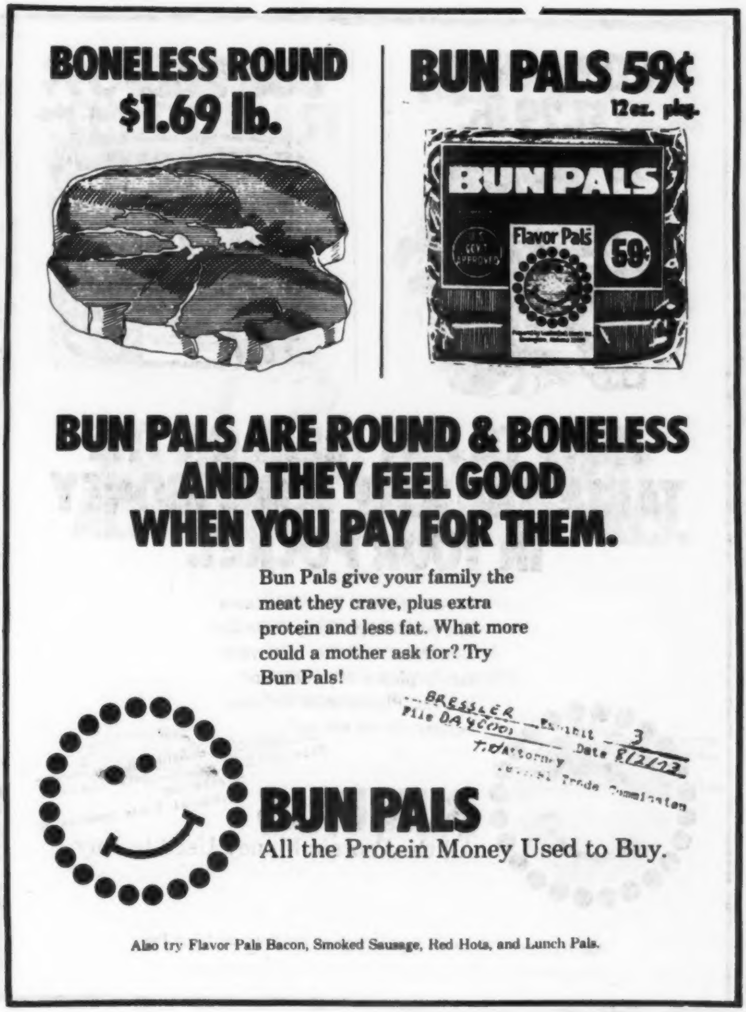
IT IS FURTHER ORDERED, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED, That the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or

employment in which he is engaged as well as a description of his duties and responsibilities.

IT IS FURTHER ORDERED, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, partnership or other business entity, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.


BUN PALS
U.S. GOV'T APPROVED
Flavor Pals
59¢

BONELESS ROUND
$1.69 lb.

BUN PALS 59¢
12 oz. pkg.

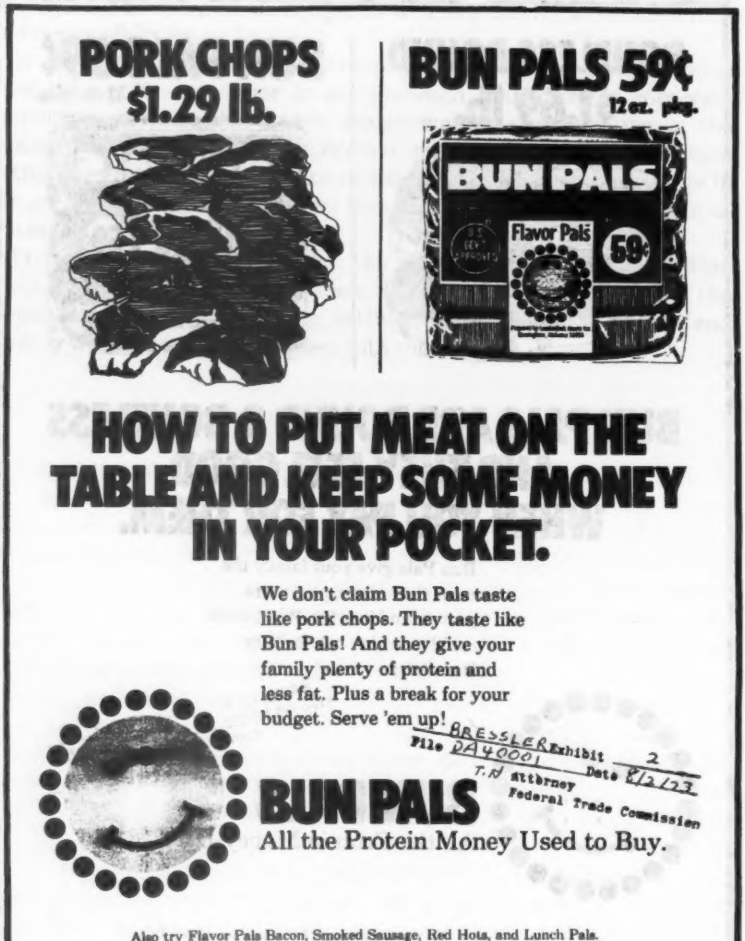
BUN PALS ARE ROUND & BONELESS AND THEY FEEL GOOD WHEN YOU PAY FOR THEM.

Bun Pals give your family the meat they crave, plus extra protein and less fat. What more could a mother ask for? Try Bun Pals!

BRESSLER Exhibit 3
File DA 4C(D) Date 8/2/73
T.D. Attorney
Federal Trade Commission

BUN PALS
All the Protein Money Used to Buy.

Also try Flavor Pals Bacon, Smoked Sausage, Red Hots, and Lunch Pals.


BUN PALS
U.S. GOV'T APPROVED
Flavor Pals
59¢

PORK CHOPS $1.29 lb.

BUN PALS 59¢
12 oz. pkg.

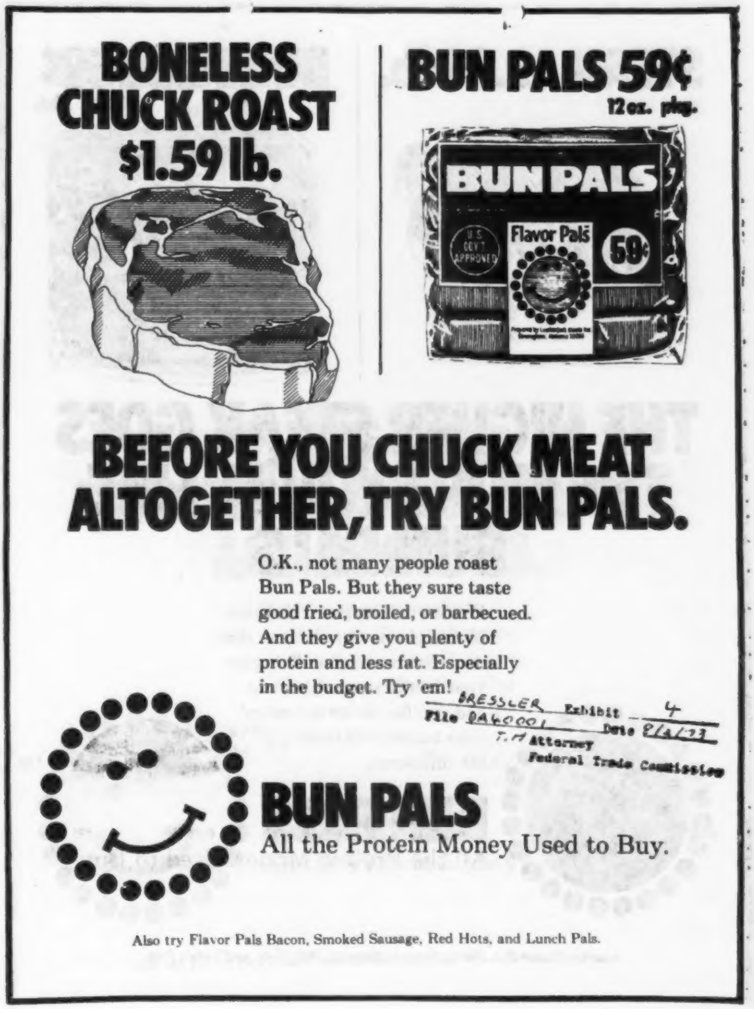
HOW TO PUT MEAT ON THE TABLE AND KEEP SOME MONEY IN YOUR POCKET.

We don't claim Bun Pals taste like pork chops. They taste like Bun Pals! And they give your family plenty of protein and less fat. Plus a break for your budget. Serve 'em up!

BRESSLER Exhibit 2
File DA40001 Date 8/2/73
T.N Attorney
Federal Trade Commission

BUN PALS
All the Protein Money Used to Buy.

Also try Flavor Pals Bacon, Smoked Sausage, Red Hots, and Lunch Pals.


BUN PALS
U.S. GOV'T APPROVED
Flavor Pals
59¢

BONELESS CHUCK ROAST $1.59 lb.

BUN PALS 59¢ 12 oz. pkg.

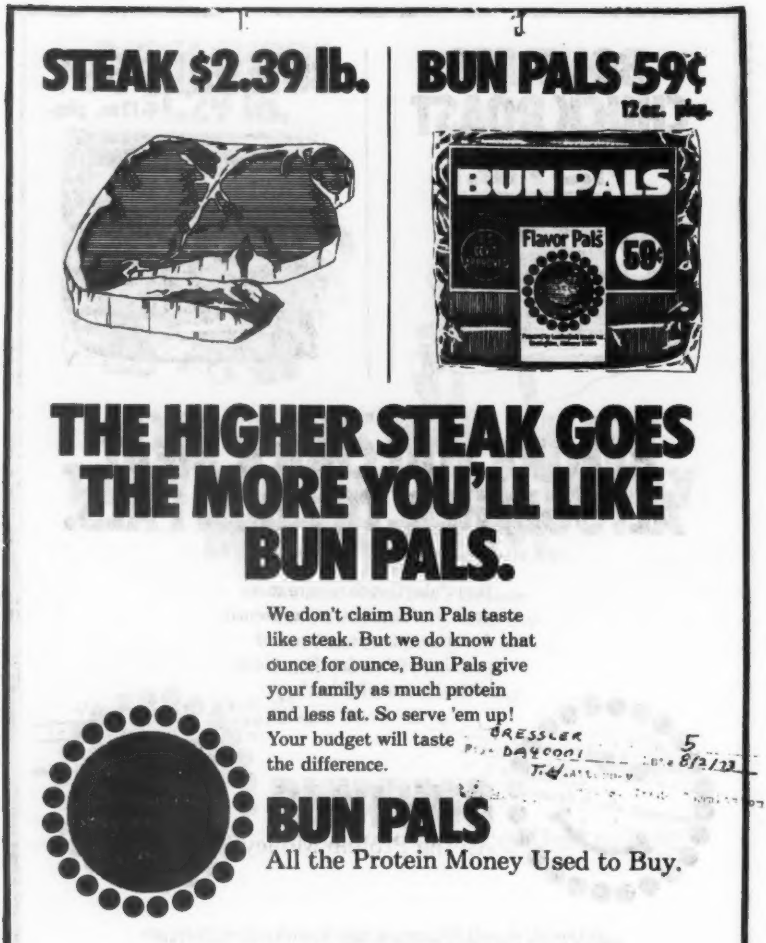
BEFORE YOU CHUCK MEAT ALTOGETHER, TRY BUN PALS.

O.K., not many people roast Bun Pals. But they sure taste good fried, broiled, or barbecued. And they give you plenty of protein and less fat. Especially in the budget. Try 'em!

BRESSLER Exhibit 4
File DA60001 Date 8/1/73
T.M. Attorney
Federal Trade Commission

BUN PALS
All the Protein Money Used to Buy.

Also try Flavor Pals Bacon, Smoked Sausage, Red Hots, and Lunch Pals.


BUN PALS
Flavor Pals
59¢

STEAK $2.39 lb.

BUN PALS 59¢
12 oz. pkg.

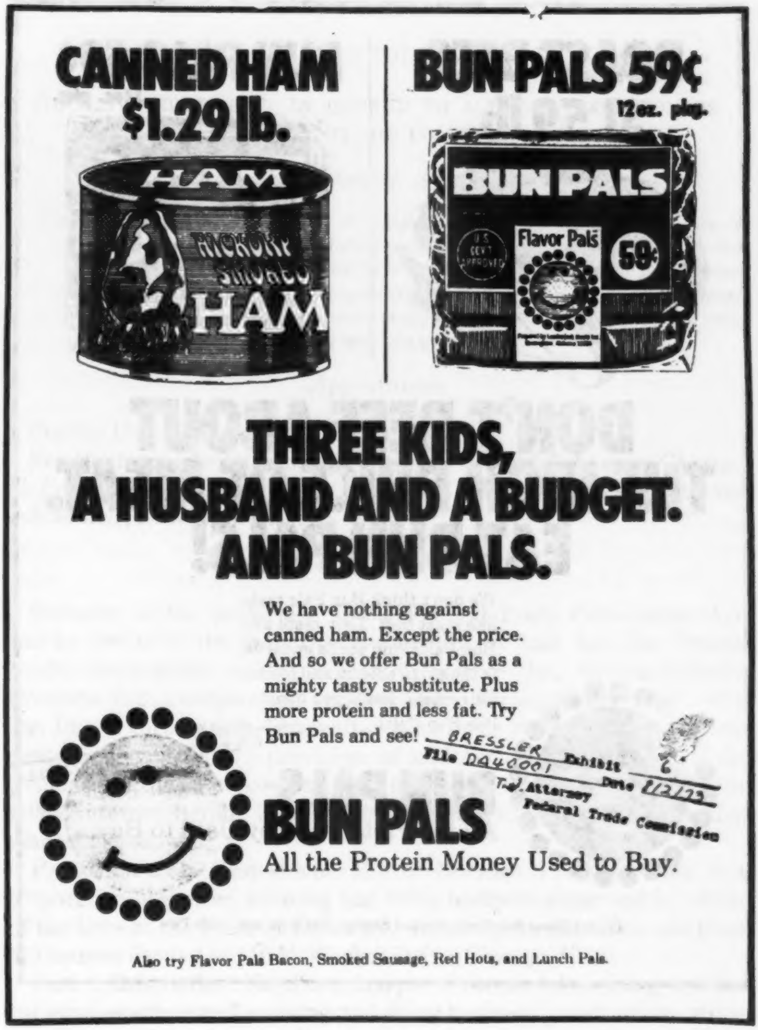
THE HIGHER STEAK GOES THE MORE YOU'LL LIKE BUN PALS.

We don't claim Bun Pals taste like steak. But we do know that ounce for ounce, Bun Pals give your family as much protein and less fat. So serve 'em up! Your budget will taste the difference.

DRESSLER
DAYCOOL
5
8/2/73

BUN PALS
All the Protein Money Used to Buy.

Also try Flavor Pals Bacon, Smoked Sausage, Red Hots, and Lunch Pals.


HAM
HICKORY SMOKED HAM
BUN PALS
U.S. GOV'T APPROVED
Flavor Pals
59¢

CANNED HAM $1.29 lb.

BUN PALS 59¢
12 oz. pkg.

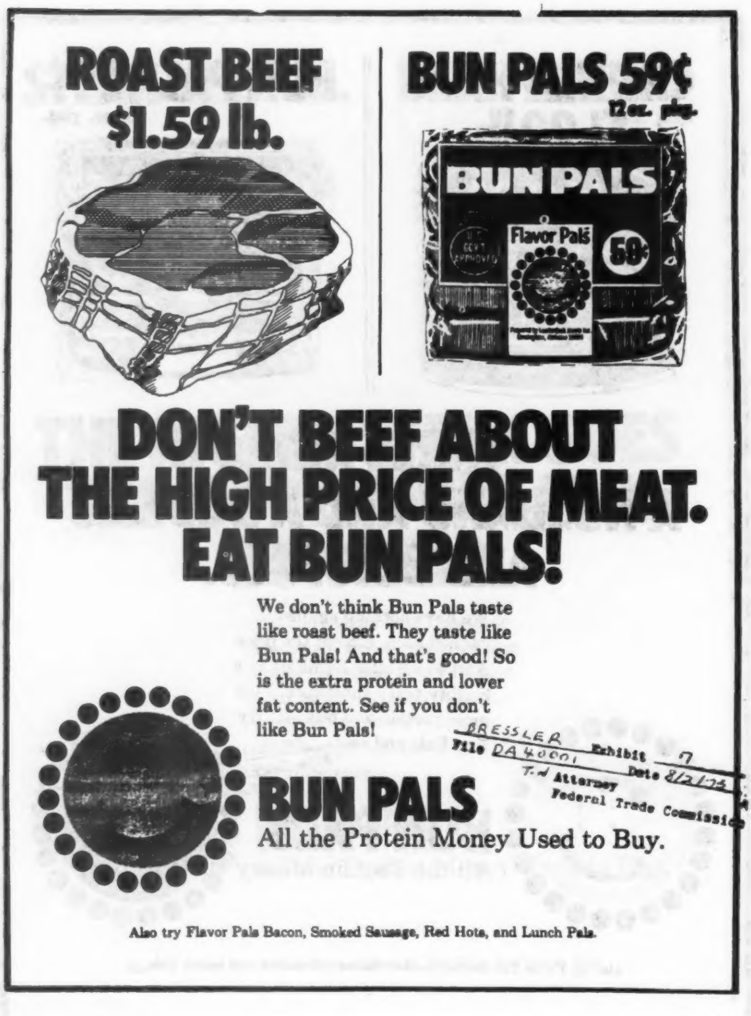
THREE KIDS, A HUSBAND AND A BUDGET. AND BUN PALS.

We have nothing against canned ham. Except the price. And so we offer Bun Pals as a mighty tasty substitute. Plus more protein and less fat. Try Bun Pals and see!

BRESSLER Exhibit 6
File DA40001 Date 8/2/73
T.J. Attorney
Federal Trade Commission

BUN PALS
All the Protein Money Used to Buy.

Also try Flavor Pals Bacon, Smoked Sausage, Red Hots, and Lunch Pals.


BUN PALS
Flavor Pals
U.S. GOV'T APPROVED
59¢

ROAST BEEF
$1.59 lb.

BUN PALS 59¢
12 oz. pkg.

DON'T BEEF ABOUT
THE HIGH PRICE OF MEAT.
EAT BUN PALS!

We don't think Bun Pals taste like roast beef. They taste like Bun Pals! And that's good! So is the extra protein and lower fat content. See if you don't like Bun Pals!

BRESSLER Exhibit 7
File DA40001 Date 8/21/75
T.W. Attorney
Federal Trade Commissi

BUN PALS
All the Protein Money Used to Buy.

Also try Flavor Pals Bacon, Smoked Sausage, Red Hots, and Lunch Pals.

IN THE MATTER OF

MORTON-NORWICH PRODUCTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2707. Complaint, July 21, 1975-Decision, July 21, 1975

Consent order requiring a Chicago, Ill., salt manufacturer and its advertising agency, among other things to cease failing to disclose in all advertisements for Morton Lite Salt that the product is not to be used by persons on sodium or potassium restricted diets, and misrepresenting that there is a connection between sodium intake and water retention or high blood pressure or that a reduction in sodium intake will promote or maintain good health.

Appearances

For the Commission: *Walter B. Fisherow.*

For the respondents: *McBride, Baker, Wienke & Schlosser*, Chicago, Ill. *Pepper, Hamilton & Scheetz*, Wash., D.C., and *Davis, Gilbert, Levine & Schwartz*, New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Morton-Norwich Products, Inc., a corporation, and Needham, Harper & Steers Advertising, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Morton-Norwich Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 110 N. Wacker Drive, Chicago, Ill.

PAR. 2. Respondent Needham, Harper & Steers Advertising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 401 N. Michigan Ave., Chicago, Ill.

PAR. 3. Respondent Morton-Norwich Products, Inc. is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of Morton Lite Salt, a food product consisting of equal parts of sodium chloride and potassium chloride.

PAR. 4. Respondent Needham, Harper & Steers Advertising, Inc. is now, and for some time last past has been an advertising agency for respondent Morton-Norwich Products, Inc. and has prepared and caused to be disseminated advertising material relating to Morton Lite Salt, including but not limited to the advertisements referred to herein.

PAR. 5. Respondent Morton-Norwich Products, Inc. causes Morton Lite Salt, when sold, to be transported from the place of its manufacture to purchasers located in various States of the United States. Respondent Morton-Norwich Products, Inc. maintains, and at all times mentioned herein has maintained, a course of trade in said product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning Morton Lite Salt by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in magazines and newspapers and by means of television broadcasts transmitted by television stations located in various States of the United States having sufficient power to carry such broadcasts across State lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product; and respondents have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Typically, such advertisements included the statement that Morton Lite Salt contains one half the amount of sodium of regular salt, and certain of such advertisements included the statement that said product was for use by persons who desire to or should reduce their intake of sodium. Such advertisements did not contain a warning that Morton Lite Salt should not be used by persons who are on a sodium or potassium restricted diet without the approval of a physician.

PAR. 8. Because Morton Lite Salt does contain a substantial amount of sodium (one half the amount of sodium that is contained in regular table salt), the product should not be used by persons on a sodium restricted diet unless such use is approved by a physician. Similarly, since Morton Lite Salt contains a substantial amount of potassium chloride, said product should not be used by persons on a potassium restricted diet unless approved by a physician. Therefore, a warning statement, to the effect that said product should not be used by persons on sodium or potassium restricted diets unless approved by a physician, should have been included in all such advertisements. Such a warning statement constituted a material statement, the omission of which made such advertisements false and misleading.

PAR. 9. At least one of such advertisements contained a representation to the effect that doctors and medical researchers have established a connection between sodium intake and high blood pressure or water retention and have established that, in effect, a reduction of the level of sodium intake will promote or maintain good health.

PAR. 10. In truth and in fact, while some medical authorities have suggested that there is data which apparently supports such a representation, it has not been established that there is a causal connection between sodium intake and high blood pressure or water retention, or that a reduction in the level of sodium intake will promote or maintain good health. Therefore, the representations set forth in Paragraph Nine are and were false and misleading.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury to the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 (b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Morton-Norwich Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 110 N. Wacker Drive, Chicago, Ill.

Respondent Needham, Harper & Steers Advertising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 401 N. Michigan Ave., Chicago, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

IT IS ORDERED, That respondent Morton-Norwich Products, Inc., a corporation, and respondent Needham, Harper & Steers Advertising, Inc., a corporation, their successors and assigns, either jointly or individually, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, of Morton Lite Salt, or any product of similar composition, do forthwith cease and desist from disseminating any advertisement which:

1. Fails to clearly and conspicuously disclose, in the following words or in words of similar import, that such product is "Not To Be Used By Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician;" or

2. makes any representation, directly or indirectly, that medical researchers or doctors have established (a) a connection between sodium intake and high blood pressure or water retention, or (b) that a reduction in the level of sodium intake will promote or maintain good health.

Nothing in this order shall be construed to prohibit respondents from disseminating any advertisement of Morton Lite Salt which:

A. Indicates that Morton Lite Salt contains one-half the sodium of regular salt; or

B. indicates that Morton Lite Salt is intended for persons (not including those on sodium or potassium restricted diets) who desire to reduce their intake of salt or sodium.

IT IS FURTHER ORDERED, That respondents shall forthwith distribute a copy of this order to each officer or employee having direct responsibility for either the marketing or advertising of Morton Lite Salt.

IT IS FURTHER ORDERED, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED, That each respondent shall, within sixty (60) days after the effective date of the order served upon it, file with the Commission a report, in writing, signed by respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist contained herein.

IN THE MATTER OF

GUTHRIE CONSTRUCTION COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2708. Complaint, July 21, 1975-Decision, July 21, 1975

Consent order requiring an Englewood, Colo., mortgage loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Guthrie Construction Company, a corporation, and Malcolm E. Guthrie, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said

Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Guthrie Construction Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 7265 E. Maplewood Pl., Englewood, Colo.

Respondent Malcolm E. Guthrie is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the abovementioned advertisements, have stated and are stating the amount of the downpayment (in dollars or as a percentage of the sale price) without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Respondents, in certain other of these advertisements, have stated and are stating the rate of interest as a simple annual rate in conjunction with the "annual percentage rate," but have printed and are printing the simple annual rate more conspicuously than the "annual percentage rate" in violation of Section 226.10(d)(1)(i) of Regulation Z.

PAR. 7. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Guthrie Construction Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 7265 E. Maplewood Place, City of Englewood, State of Colorado.

Respondent Malcolm E. Guthrie is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

IT IS ORDERED, That respondents Guthrie Construction Company, a corporation, its successors and assigns, its officers, and Malcolm E. Guthrie, individually and as an officer of said corporation, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Stating in any advertisement the simple annual rate of interest in conjunction with the "annual percentage rate" unless the "annual percentage rate" is printed as conspicuously as the simple annual rate as required by Section 226.10(d)(1)(i) of Regulation Z.

3. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

IT IS FURTHER ORDERED, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

IT IS FURTHER ORDERED, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

HALLCRAFT HOMES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2709. Complaint, July 21, 1975-Decision, July 21, 1975

Consent order requiring a Phoenix, Ariz., and a Denver, Colo., mortgage loan company, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*

For the respondents: *Charles R. Berry, Snell & Wilmer*, Phoenix, Ariz.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hallcraft Homes, Inc., a corporation, and Hallcraft Homes of Denver, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hallcraft Homes, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its principal office and place of business located at 4747 N. 22nd, Phoenix, Ariz.

Respondent Hallcraft Homes, Inc., dominates, controls and furnishes the means, instrumentalities, services and facilities for, and condones and approves the acts and practices of its wholly-owned subsidiary corporation, Hallcraft Homes of Denver, Inc., including the acts and practices hereinafter set forth.

Respondent Hallcraft Homes of Denver, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 4155 E. Jewell Ave., Suite 206, Denver, Colo.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the above-mentioned advertisements, have stated and are stating that no downpayment is required without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Respondents, in certain of these advertisements, have stated, and are stating, the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an "annual percentage rate," using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 7. Respondents, in certain other of these advertisements, have stated and are stating the rate of interest as a simple annual rate in conjunction with the "annual percentage rate," but have printed and are printing the simple annual rate more conspicuously than the "annual percentage rate" in violation of Section 226.10(d)(1)(i) of Regulation Z.

PAR. 8. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hallcraft Homes, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its principal office and place of business located at 4747 N. 22nd, Phoenix, Ariz.

Respondent Hallcraft Homes, Inc., dominates, controls and furnishes the means, instrumentalities, services and facilities for, and condones and approves the acts and practices of its wholly-owned subsidiary corporation, Hallcraft Homes of Denver, Inc., including the acts and practices hereinafter set forth.

Respondent Hallcraft Homes of Denver, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 4155 E. Jewell Ave., Suite 206, Denver, Colo.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

IT IS ORDERED, That respondents Hallcraft Homes, Inc., a corporation, and Hallcraft Homes of Denver, Inc., a corporation, their successors and assigns, their officers, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

3. Stating in any advertisement the simple annual rate of interest in conjunction with the "annual percentage rate" unless the "annual percentage rate" is printed as conspicuously as the simple annual rate as required by Section 226.10(d)(1)(i) of Regulation Z.

4. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

IT IS FURTHER ORDERED, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

IT IS FURTHER ORDERED, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ZODIAC CONSTRUCTION, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2710. Complaint, July 21, 1975-Decision, July 21, 1975

Consent order requiring an Aurora, Colo., mortgage loan company, among other things to cease violating the Truth in Lending Act by failing to disclose to

consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*

For the respondents: *Jesse N. Lipschuetz, Hobbs and Waldbaum,* Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Zodiac Construction, Ltd., a corporation, and Sol Dichter, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PAR. 1. Respondent Zodiac Construction, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 456 S. Ironton #404, Aurora, Colo.

Respondent Sol Dichter is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the abovementioned advertisements, have stated and are stating the amount of the downpayment (in dollars or as a percentage of the sale price) and the period of repayment without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Respondents, in certain of these advertisements, have stated, and are stating, the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an "annual percentage rate," using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 7. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Zodiac Construction, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 456 S. Ironton #404, City of Aurora, State of Colorado.

Respondent Sol Dichter is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

IT IS ORDERED, That respondents Zodiac Construction, Ltd., a corporation, its successors and assigns, its officers, and Sol Dichter, individually and as an officer of said corporation, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

3. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

IT IS FURTHER ORDERED, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

IT IS FURTHER ORDERED, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KENNECOTT COPPER CORPORATION

Docket 8765. Order, July 22, 1975

Denial of respondent's petition to reopen proceeding to consider the question of relief.

Appearances

For the Commission: *Fiodie P. Favarella* and *Joseph Eckhaus.*

For the respondents: *John L. Warden, Sullivan & Cromwell,* New York City. *John Bodner, Francis O'Brien, Howrey, Simon, Baker & Murchison,* Wash., D.C.

ORDER DENYING PETITION TO REOPEN PROCEEDINGS

On July 7, 1975, Kennecott Copper Corporation filed a "Petition to Reopen the Proceeding" pursuant to Section 3.72 of the Commission's Rules of Practice. The Bureau of Competition filed an "Answer in Opposition" on July 14, 1975. The arguments raised in both Petition and Answer are essentially the same as those presented before the Commission one year ago when it denied a similar petition by respondent to reopen. The Commission has again considered the arguments of petitioner and does not believe that adequate grounds have been shown to warrant reopening to consider the question of relief. The order in this matter was intended to separate Peabody from Kennecott in a way that would leave Peabody as a viable, vigorous competitor in the mining and sale of coal, as it was before its acquisition. We fully expect that Kennecott will come forth with a firm proposal as of October 1 to achieve this result, either via sale or spinoff. Accordingly,

IT IS ORDERED, That the "Petition to Reopen the Proceeding" be, and it hereby is, denied.

Commissioners Thompson and Nye dissenting.

DISSENTING STATEMENT

JULY 23, 1975

BY THOMPSON, *Commissioner.*

Respondent Kennecott has petitioned the Commission to reopen this matter for the purpose of receiving evidence on the question of whether, in view of certain alleged changes in the industry and in the economy at large since our divestiture order was entered and affirmed by the courts, reconsideration of that order might now be in the public interest. I believe this petition raises a number of serious issues that ought to be examined thoroughly by this Commission and thus would have granted it to the extent of ordering an administrative hearing on the relief question before one of our administrative law judges on an expedited basis, subject, however, to an agreement by respondent that no appeal would be taken from the decision rendered by the Commission on the basis of that supplementary record.

SEPARATE STATEMENT

SEPTEMBER 4, 1975

BY ENGMAN, *Chairman.*

In ruling on a similar petition to reopen filed by Kennecott approximately one year ago, I stated:

> Although the Commission has decided to deny the petition to reopen the Commission's order of divestiture in this matter, this action does not deny recognition of the importance of the ultimate question that will eventually confront the Commission - whether divestiture under a plan to be submitted by respondent will accomplish not only separation of Kennecott's ownership and control over Peabody, but also continuation of Peabody "as a going concern and effective competitor in the mining, production and sale of coal" as provided in the Commission's order. This question - which in my view is the crucial question underlying the issues that have been argued to us on this petition - cannot be determined now but must await completion of steps by Kennecott to develop an appropriate divestiture plan for submission to the Commission.

Nothing in the present petition causes me to believe that the situation is any different today than it was a year ago.

DISSENTING STATEMENT

SEPTEMBER 4, 1975

BY NYE, *Commissioner.*

I continue to believe these proceedings should be reopened for the purpose of assessing the changes in the structure of the coal industry which have occurred since the Commission filed its original order in this case over four years ago.

During just the last year, every government and private study of the national energy problem has concluded that the energy needs of the country can be met only by a massive increase in coal production.[1] The Federal Energy Administration has begun to order public utilities to convert their generating plants from oil and natural gas to coal.[2] More large oil companies and public utilities have entered the coal industry. The most recent production statistics indicate that 20 percent of the total industry production of coal was produced by firms which were either not involved in coal production, or only negligibly so, when the Commission entered its original order.

It thus appears indisputable that, since the Commission last examined the facts, the need for coal has increased dramatically, concentration in the coal industry has declined markedly, major companies have aggressively acquired and begun to exploit coal reserves, and the feared entrenchment of Peabody's dominance of the coal industry through Kennecott's ownership has not materialized.

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[1] *E.g.*, National Plan for Energy Research, Development and Demonstration, Prepared by the Energy Research and Development Administration, at the direction of Congress, released by the President on June 30, 1975.

[2] *Wall Street Journal*, July 2, 1975, page 3, column 2.

There is no suggestion that any customer, competitor, or potential purchaser of Peabody will be prejudiced if the Commission undertakes the requested reexamination. Therefore, I find no substantial public interest to weigh against the benefit to be derived from examining the evidence concerning current developments in the coal industry. I would grant the petition to reopen.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Order, July 25, 1975

Denial of application of respondent General Mills, Inc., for stay of commencement of complaint counsel's deposition program pending appeal.

Appearances

For the Commission: *Anthony L. Joseph.*

For the respondents: *Bierbower & Rockefeller, Howrey, Simon, Baker & Murchison* and *Clifford, Warnke, Glass, McIlwain & Finney,* Wash., D.C. *Sullivan & Cromwell* and *Cravath, Swaine & Moore,* New York City. *Chadwell, Kayser, Ruggles, McGee & Hastings* and *Barnett P. Ruthenberg,* Chicago, Ill. *C. L. Whitehill, J. J. Jenko, R. R. Heer, J. F. Finn* and *Robert J. Fulgency,* Minneapolis, Minn. *Peter J. Deluca* and *Bruce L. Bozeman,* White Plains, N.Y.

ORDER DENYING APPLICATION OF RESPONDENT GENERAL MILLS, INC., FOR STAY OF COMMENCEMENT OF COMPLAINT COUNSEL'S DEPOSITION PROGRAM PENDING APPEAL

This matter is before us on the application of respondent General Mills, Inc., for a stay of the commencement of complaint counsel's deposition program pending appeal.

The administrative law judge, by order dated July 15, 1975, denied respondents' joint motion to nullify the law judge's order of June 19, 1975, granting complaint counsel's application for the taking of depositions. On July 18, 1975, respondents filed a joint request under Section 3.23(b) of the Commission's Rules of Practice, 16 C.F.R. §3.23(b), and on the same day, the law judge denied the application of respondent General Mills for a stay of the taking of depositions pending appeal.

The administrative law judge's order denying respondents' motion to nullify his previous order granting complaint counsel's application for the taking of depositions will be subject to interlocutory review by the Commission only if the order is certified by the judge and the Commission, in its discretion, permits the appeal. Rules of Practice Section 3.23(b), 16 C.F.R. Section 3.23(b), *Missouri Portland Cement Co.*, 80 F.T.C. 1035 (1972).

Even if the order was subject to interlocutory review under Section 3.23(b), it would be reversible only if there was a clear abuse of discretion, *e.g.*, *Kellogg Co.*, Docket No. 8883, Order of May 29, 1974 Denying Applications for Review at 3, and respondent General Mills has failed to make the necessary showing.[1]

It is ordered, That the aforesaid application for a stay is denied.

IN THE MATTER OF

MARALCO ENTERPRISES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2711. Complaint, July 25, 1975-Decision, July 25, 1975

Consent order requiring four New York City corporations operating a computer programming school, among other things to cease misrepresenting the demand for its graduates, job opportunities, earnings, and using testimonials and endorsements unfairly; and violating the Truth in Lending Act in connection with the sale of its courses.

Appearances

For the Commission: *Alice Petizon* and *Matthew Gromet.*

For the respondents: *Robert L. Katzman, Blank & Katzman*, New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Maralco Enterprises, Inc., a corporation, New York School of Computer

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[1] It is, therefore, unnecessary to decide whether the Commission has inherent power to review an interlocutory order of an administrative law judge upon the kind of showing of irreparable harm and clear abuse of discretion that might warrant the granting of extraordinary relief by a court of appeals from an interlocutory order entered by a district court.

Technology, Inc., a corporation, Education Beneficial, Inc., a corporation, Tuition Payments, Inc., a corporation, and Hyman Marcus, Bartholomew Colangeli, and Fred Rosenberg, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Maralco Enterprises, Inc., New York School of Computer Technology, Inc., Education Beneficial, Inc., and Tuition Payments, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal office and place of business located at 200 W. 51st St., New York, N.Y.

Respondents Hyman Marcus, Bartholomew Colangeli, and Fred Rosenberg, are individuals and officers of the corporate respondents. They formulate, direct and control the policies, acts and practices of the corporations, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of courses of instruction in computer programming to the public.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference herein as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business, and for the purpose of inducing prospective students to enroll in their courses of instruction, respondents engage in the advertising of said courses of instruction in newspapers of interstate circulation, and the sale of said courses to consumers located in various States of the United States. In the further course and conduct of their business, respondents also cause pamphlets, brochures, checks and other documents and communications pertaining to said courses to be transmitted by the United States mails and other means in commerce. Respondents maintain, and at all times mentioned herein, have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing prospective students to enroll in their courses of instruction, respondents have made statements, both specific and implied, in advertising and promotional material, with respect to the ability, aptitude and training required to become a computer programmer or systems analyst, employment opportunities for graduates of the school, the nature and reliability of the trial period, pay levels for graduates of the school, and the method of instruction at the school. The following are typical and illustrative of the aforesaid statements and representations, but not all inclusive thereof:

(a) This is the profession of the future, offering the highest opportunities and salaries.

(b) A vital need exists for competent men and women to fill the personnel shortage created by the expanded use of computer equipment.

(c) In Government and Industry trained programmers are in demand.

(d) Individual instruction tailored to your ability.

(e) Among the computers that you will study are included: IBM 1401 - IBM 1440 - IBM 360 - COBOL - BAL - RPG - Honeywell 200 NCR 315 - RCA Spectra 70 - UNIVAC 418.

(f) Become a Computer Programmer and Systems Analyst.

(g) The NYSOCT course is one of the fastest ways to success.

(h) Trained personnel are in demand.

(i) In order to find out for yourself if you are qualified and suited for this field, we offer you a Free Trial Period of one full week* * *you will see for yourself whether you like this work and whether you have the ability to do programming.

(k) College degree not required.

In the course and conduct of their aforesaid business, and for the purpose of inducing prospective students to enroll in their courses of instruction, respondents have made statements, both specific and implied, directly to said prospective students in the oral sales presentations made by their sales persons and other representatives. The following are typical and illustrative of the aforesaid statements and representations, but not all inclusive thereof:

(a) Respondents' graduates readily find employment as computer programmers.

(b) Graduates of respondents' school who do not have a college degree can readily find employment as computer programmers.

(c) A substantial number or percentage of the recent graduates of respondents' courses of instruction earn a salary in excess of $150 per week.

(d) In respondents' courses of instruction, students will be taught a significant number of occupationally useful programming languages.

PAR. 5. By and through the use of the aforementioned statements and representations, and others of similar import and meaning but not expressly set out herein, respondents represented, directly or by implication, that:

1. The courses of instruction offered by respondents qualify graduates for employment in the field of data processing as computer programmers and systems analysts.

2. Requirements such as a college education are not necessary for

the placement of graduates of said courses in any position in the field of electronic data processing for which said students were trained.

3. There is a reasonable basis from which to conclude that there is now or will be a significant or substantial need or demand for trained people in the field of computer programming which said training is designed to meet.

4. Graduates of said courses of instruction are virtually assured of placement in positions for which they have been trained.

5. A substantial number or percentage of the recent graduates of said courses of instruction earn a salary in excess of $150 per week.

6. In said courses of instruction, students will be taught a significant number of occupationally useful programming languages.

7. In their said courses of instruction, respondents provide individual instruction adapted to the needs and ability of each student.

8. The one week free trial period offered by respondents is for the purpose of allowing the prospective student to determine his qualifications and suitability for the field of computer programming.

PAR. 6. In truth and in fact:

1. Said courses of instruction do not qualify students for employment in the field of data processing as computer programmers or systems analysts.

2. In a substantial number of instances a college degree is required to secure a position, for which training was offered, in the field of electronic data processing.

3. Respondents had no reasonable basis from which to conclude that there is now or will be an urgent need or demand for trained people in the field of computer programming which respondents' training is designed to meet. The only reasonable basis for such claims would be competent and reliable statistical evidence obtained prior to the making of such statements.

4. Respondents had no reasonable basis from which to conclude that graduates of their courses of instruction are virtually assured of placement in positions for which they have been trained.

5. Respondents had no reasonable basis from which to conclude that a substantial number or percentage of the recent graduates of said courses of instruction earn a salary in excess of $150 per week.

6. Respondents do not teach a significant number of occupationally useful programming languages. In fact, a substantial amount of said courses consist of instruction in obsolete programming languages of no occupational usefulness to graduates.

7. Respondents do not provide individual instruction adapted to the needs of each student.

8. The one week free trial period offered by respondents is not for

the purpose of allowing the prospective student to determine his qualifications and suitability for the field of computer programming, but instead serves as an extension of the sales presentation given by respondents. During this trial period respondents' instructors attempt to persuade prospective students to enroll by repeating to said prospective students representations similar to those set forth in Paragraphs Four and Five above.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were, and are, false, misleading, deceptive and unfair.

PAR. 7. In the further course and conduct of their business, and for the purpose of inducing prospective students to enroll in their said courses of instruction, respondents have posted in their place of business photographs of graduates of their school who have succeeded in securing employment as computer programmers, along with their names, addresses, places of employment and starting salaries. Such photographs and accompanying information have been shown to prospective students during the course of the initial sales presentation.

Said photographs and accompanying information have also been included in direct mail flyers sent by respondents to prospective students. On these flyers is the following statement: "The pictures in this brochure are of recent graduates of our school.* * *"

PAR. 8. By and through the use of the aforesaid photographs and accompanying information, and oral statements made directly to prospective students, respondents have represented that they have had significant success within the recent past in placing their graduates in positions as programmers, and at salaries in the range indicated in said photographs.

PAR. 9. In truth and in fact:

Respondents have, in the recent past, been unable to place a significant number of their students in positions as programmers. A significant number of the photographs used in the aforesaid advertising material are of persons who graduated from said courses of instruction in 1966, 1967 and 1968.

Therefore, the statements and representations as set forth in Paragraphs Seven and Eight hereof were, and are, false, misleading, deceptive and unfair.

PAR. 10. In the course and conduct of their aforesaid business, and for the purpose of inducing prospective students to enroll in their courses of instruction, respondents have represented directly to said prospective students in the oral sales presentations made by their sales persons and other representatives, that said courses of instruction will serve as the equivalent of practical programming experience, and that, therefore, graduates of said courses can represent to prospective employers that they are qualified and experienced programmers, thus allowing them to begin work with the status of experienced programmers and not as programmer trainees, or permitting them to obtain jobs which require programming experience.

PAR. 11. In truth and in fact:

Said courses of instruction do not serve as the equivalent of practical programming experience, and graduates of said courses cannot expect to begin work with the status of experienced programmers.

Therefore, the statements and representations as set forth in Paragraph Ten hereof, were, and are, false, misleading, deceptive and unfair.

PAR. 12. In the further course and conduct of their business, respondents have attempted to place and have placed graduates of said courses in positions as computer programmers by suggesting to these graduates that they present resumes containing false information concerning job experience to prospective employers. Respondents have provided graduates with such resumes and have aided in their preparation. Respondents advise their graduates to include in the aforesaid resumes that they have, in the past, worked as computer programmers for substantial periods of time for fictitious companies. Respondents suggest further that a telephone number be given for the firm listed, that number being the telephone number of respondents' place of business. In the event that a prospective employer attempts to verify the aforesaid information, graduates are informed that such verification will be provided by respondents. In truth and in fact, much of the information suggested by respondents is false.

The acts and practices as set forth in Paragraph Twelve hereof were, and are, false, misleading, deceptive and unfair.

PAR. 13. Respondents offered for sale courses of instruction intended to prepare graduates thereof for entry-level employment as computer operators, computer programmers or computer technicians without disclosing in advertising or through their sales representatives: (1) the percentage of recent graduates of each school for each course offered, that were able to obtain employment in the positions for which they were trained; (2) the employers that hired any such recent graduates for each course offered; (3) the initial salary any such recent graduates received for each course offered; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Knowledge of such facts would be an indication of the probability of graduating from respondents' courses and would indicate the possibility of securing future employment upon graduating and the nature of such employment. Thus, respondents have failed to disclose material facts, which if known to a consumer would be likely to affect his or her consideration of whether or not to purchase such courses of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 14. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of courses covering the same or similar subjects.

PAR. 15. The use by respondents of the aforesaid false, misleading, unfair or deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, have had, and now have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and to induce a substantial number thereof to purchase respondents' courses by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of the Truth in Lending Act, and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference herein as if fully set forth verbatim.

PAR. 17. In the ordinary course of their business as aforesaid, respondents regularly extend consumer credit and arrange for the extension of consumer credit, as "consumer credit" and "arrange for the extension of consumer credit" are defined in Section 226.2(f)(k) of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 18. Subsequent to July 1, 1969, in the ordinary course of their business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, respondents have caused and are causing their customers to enter into contracts, termed by them as "enrollment agreements," for the sale of respondents' services. On these contracts, respondents specify a particular amount as the cost of their service, which they term "tuition." The full amount of this tuition is, however, charged only to those who elect to pay on an installment basis. Students who pay the entire amount on or before a specified date are given a discount from the tuition which in most cases equals 10 percent.

On these contracts, respondents provide certain consumer credit cost disclosures. Respondents do not provide any other consumer credit information.

PAR. 19. By and through the use of these contracts, and in connection with their credit sales, respondents:

1. Offer a reduction from the cash price to those who elect to meet their obligation on or before a specified date, and fail to disclose, as required by Section 226.8(o)(i) of Regulation Z:

a. The rate of discount and the date by which or period within which the discount may be taken;

b. The amount of the discount, designated as a "finance charge," using that term;

c. The "annual percentage rate," using that term.

2. Fail to accurately disclose the "cash price," using that term, as required by Section 226.8(c)(i), computed in accordance with Section 226.8(o)(7) of Regulation Z.

3. Fail to use the term "cash downpayment" to describe the amount of the downpayment in money, as required by Section 226.8(c)(2) of Regulation Z.

4. Fail to use the term "unpaid balance of cash price," to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

5. Fail to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

6. Fail to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

7. Fail to use the term "deferred payment price" to describe the sum of the cash price and the finance charge, as required by Section 226.8(c)(8)(ii) of Regulation Z.

PAR. 20. In the ordinary course of their business as aforesaid, respondents have caused to be published advertisements of their courses of instruction, as "advertisement" is defined in Regulation Z. These advertisements aid, promote or assist, directly or indirectly, extensions of consumer credit in connection with the sale of these courses. By and through the use of the advertisements, respondents state the period of payment which can be arranged in connection with a consumer credit transaction, without also stating all of the following items in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

1. The cash price;
2. The amount of the downpayment required or that no downpayment is required as applicable;
3. The number, amount and due dates or period of payments scheduled to repay the indebtedness if credit is extended;
4. The amount of the finance charge expressed as an annual percentage rate;
5. The deferred payment price.

PAR. 21. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108(c) thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents Maralco Enterprises, Inc., New York School of Computer Technology, Inc., Education Beneficial, Inc., and Tuition Payments, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their

principal office and place of business located at 200 W. 51st St., New York, N.Y.

Respondents Hyman Marcus, Bartholomew Colangeli and Fred Rosenberg are officers of the corporate respondents. They formulate, direct and control the policies, acts and practices of the corporations, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Maralco Enterprises, Inc., New York School of Computer Technology, Inc., Education Beneficial, Inc., and Tuition Payments, Inc., corporations, their successors and assigns, and their officers, and Hyman Marcus, Bartholomew Colangeli, and Fred Rosenberg, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, or under any other name, in connection with the advertising, offering for sale, or sale of courses of instruction in electronic data processing, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to send by certified mail, return receipt requested, to each person that shall contract with respondents for the sale of any course of instruction, a notice which shall disclose the following information and none other:

(a) The title "IMPORTANT INFORMATION" printed in bold face type across the top of the form.

(b) Paragraphs containing the information set forth below, which shall be compiled and updated at least once every month. Such information shall be computed separately for each course of instruction offered by respondents at each school, location or facility.

(1) A paragraph as follows: "The information below relates to the (name of vocational school). The placement rate is the percentage of graduating students who obtained employment within three months of their graduation, in positions for which they were trained by this school."

(2) The "Placement Rate," using this term, to be determined as follows:

A. Respondents shall ascertain whether each graduate has obtained employment within three months of graduation in a position for which respondents' course has prepared him. If such employment has been obtained, respondents shall further ascertain the name of the employer, the position and the starting salary obtained by the graduate.

B. The placement rate shall be the percentage of students who have graduated within the base period (as defined in Paragraph 1(b)(2)(C) who have obtained employment as determined in 1(b)(2)A. The placement rate need not include those students exempted pursuant to subparagraph 1(b)(2)D.

C. The base period shall be the one-year period ending four months prior to the date on which the information required under 1(b) is compiled or updated.

D. At the time each student signs his enrollment contract, respondents shall have him complete the form set forth in Appendix A of this order. Students who indicate their intention not to seek employment in the computer field (by checking box number 3 on such form) need not be included in the computation of the school's placement rate.

(3) The "Salary Range" and the "Average Salary (Median)," using these terms, of the graduates who have obtained employment as determined pursuant to 1(b)(2)A.

(4) The dropout rate, using the term "Students Not Completing Course," which shall be the percentage of students who were scheduled to graduate from respondents' course during the base period who have discontinued or interrupted their studies without completing such course. *Provided, however,* The dropout rate need not include:

A. Any student who indicates in writing his desire to interrupt his course of study, provided such interruption not exceed six months; or

B. Any student whose enrollment contract, and all obligations thereunder, are expressly conditioned upon the receipt by the student of an educational loan guaranteed by a federal or state agency, if the student's application for such a loan is in fact rejected; or

C. Any student who cancels his enrollment contract pursuant to his right of cancellation set forth in Paragraph 8 of this order.

(5) A sentence which sets forth the time period upon which the data in subparagraphs (1)-(4) above are based.

Provided, however, subparagraph (b) shall be inapplicable, and no disclosures shall be made thereunder, in the case of any newly established school or course, as described in subparagraph (c), until such time as the new school or course has been in operation for 16 months.

(c) In the case of any newly established school that respondents may establish in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or to any course newly introduced by respondents, until such time as the new school or course has been in operation for 16 months, the following paragraph:

> This school (course) has not been in operation long enough to indicate, what, if any, actual employment or salary may result upon graduation from this school (course).

(d) A paragraph which states that a list is available for inspection during respondents' business hours which contains the names of employers who have hired graduates of respondents' courses. Such list shall contain the names of those firms who employed students graduating in the most recent base period as ascertained by respondent in 1(b)(2)A.

(e) An explanation of the cancellation procedure provided in this order, namely that any contract or other agreement may be cancelled for any reason within three business days after receipt by the customer of this notice, or any other cancellation procedure provided by applicable state or local laws more favorable to the customer. Respondents shall include with the notice a detachable form or post card, or other separate form as may be applicable under State or local law, which the person may use as a notice of cancellation, and which indicates the proper address for accomplishing any such cancellation.

The notice required under this paragraph shall be sent by respondents no sooner than the day after the person shall have contracted for the sale of any course of instruction. No other information or materials shall be sent with this notice except for the form or post card provided to the consumer which can be used by him as a means of cancellation. During the period provided in paragraph (e), respondents shall not initiate contact with such persons other than required by this paragraph. This shall not prohibit respondents from conducting classes for those students who have begun their classes prior to signing a contract, *Provided,* That such classes are solely instructional in nature.

2. Making any representations, orally or in writing, directly or by implication, concerning any of the following:

(a) The demand for persons completing any of the courses offered by respondents in the area of electronic data processing, or any other course in any field;

(b) The opportunities or prospects for employment, or the opportunities of any type or number, available to persons completing any of respondents' courses;

(c) The likelihood of placement in positions for which respondents' graduates have been trained; or

(d) The salaries that might be earned by graduates or potential graduates of respondents' courses; or the salaries of such graduates or potential graduates as compared to their previous or present salaries;

or the salaries of such graduates or potential graduates as compared to the salaries of any other persons or groups of persons.

Provided, however, That respondents may disclose in advertising, promotional materials or in any other manner the information otherwise disclosable pursuant to subparagraphs 1(b), 1(c) and 1(d) of this order. Such information shall be disclosed in the form and manner set forth in subparagraphs 1(b), 1(c), and 1(d), except that for the purposes of this provision, the information need only be updated once every six (6) months. If any such information is disclosed, all the information shall be disclosed.

3. Representing, by the use of photographs, testimonials or otherwise, the positions or salaries obtained by graduates of respondents' courses, or the employers who have hired such graduates. However, respondents may make such representations, Provided, That:

(a) In immediate conjunction therewith, respondents disclose the information required to be disclosed under subparagraphs 1(a), 1(b), 1(c) and 1(d) of this order. Such information shall be disclosed in the form and manner set forth in subparagraphs 1(a), 1(b), 1(c) and 1(d) except that for the purposes of this provision, the information shall be updated at least once every six (6) months. Such disclosures shall be made clearly, conspicuously and with the prominence afforded to the salary, job, and other employment representations.

(b) Any such representations are based on the experiences of persons who graduated from respondents' courses during the base period used to compute the information to be disclosed pursuant to Paragraph 3(a).

(c) The arithmetic average of the salaries disclosed is no greater than the median salary disclosed pursuant to Paragraph 3(a).

4. Representing, orally or in writing, directly or by implication that:

(a) College education, training beyond a high school diploma or job experience is not necessary or advantageous for the placement of persons in the field of electronic data processing, or otherwise representing that persons with a high school education or its equivalent will achieve employment in the electronic data processing field, unless in every such instance it is disclosed, in immediate and conspicuous conjunction therewith, that college education or job experience is highly advantageous for placement; or misrepresenting in any manner the qualifications necessary to achieve employment in any field.

(b) Any number of occupationally useful programming languages are taught in respondents' courses of instruction in excess of those actually provided; or representing in any manner the materials available to enrollees in said courses unless true; or representing that types or brands of computers are used, unless true and the designation of the computer is disclosed.

(c) Individual instruction adapted to the needs of each student is provided in respondents' courses of instruction; or misrepresenting in any manner the quality or type of instructional method used in said courses. *Provided, however,* Respondents may represent that a student can proceed at his or her own rate through the respondents' course material, if such is the fact.

5. Representing, orally or in writing, directly or by implication, that any courses of instruction are the equivalent of practical experience in the field of computer programming, or that the graduates of any such courses can represent themselves to prospective employers as experienced programmers.

6. Providing students of respondents' courses of instruction with resumes containing untrue information, suggesting to students that such resumes be prepared, or aiding in any way in the preparation of such resumes, or in any way verifing or attesting to false information included in resumes by graduates of respondents' courses of instruction.

7. Misrepresenting directly or by implication the significance or importance of any courses of instruction in qualifying any persons for employment in a particular field of endeavor, or misrepresenting in any manner the positions which graduates have obtained.

8. Contracting for any sale of any course of instruction in the form of a sales contract or other agreement which shall become binding prior to midnight of the third business day after the receipt by the customer of the form of notice provided for in Paragraph 1 above. Upon cancellation of any said sales contract or other agreement, as provided in Paragraph 1(e) above, respondents are obligated to refund within three business days to any person exercising the cancellation right all monies paid or remitted up until the notice of cancellation.

9. Making any representations of any kind whatsoever in connection with the advertising, promoting, offering for sale, sale or distribution of courses of study, training or instruction in the field of electronic data processing or any other course offered to the public in any field of commerce, for which respondents have no reasonable basis prior to the making or dissemination thereof.

II

It is further ordered, That respondents Maralco Enterprises, Inc., New York School of Computer Technology, Inc., Education Beneficial, Inc., and Tuition Payments, Inc., corporations, their successors and assigns, and their officers, and Hyman Marcus, Bartholomew Colangeli and Fred Rosenberg, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with any extension of consumer credit or in connection with any advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) and the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing, when offering a reduction from the cash price to those who elect to meet their obligation on or before a specified date, to disclose, as required by Section 226.8(o)(1) of Regulation Z:

(a) The rate of discount, and date by which or period within which the discount may be taken;

(b) The amount of the discount, designated as a "finance charge," using that term; and

(c) The "annual percentage rate," using that term.

2. Failing to accurately disclose the "cash price," using that term, as required by Section 226.8 (c)(1), computed in accordance with Section 226.8(o)(7) of Regulation Z.

3. Failing to disclose the downpayment in money, and to describe that amount as the "cash downpayment," as required by Section 226.8(c)(2) of Regulation Z.

4. Failing to disclose the difference between the cash price and the total downpayment, and to describe that amount as the "unpaid balance of cash price," as required by Section 226.8(c)(3) of Regulation Z.

5. Failing to disclose the amount of credit extended, and to describe that amount as the "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

6. Failing to disclose the sum of the payments scheduled to repay the indebtedness, and to describe that sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

7. Failing to disclose the sum of the cash price and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

8. Stating the period of payments which can be arranged in connection with a consumer credit transaction, without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(a) The cash price;

(b) The amount of the downpayment required or that no downpayment is required, as applicable;

(c) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if credit is extended;

(d) The amount of the finance charge expressed as an annual percentage rate; and

(e) The deferred payment price.

9. Failing in any consumer credit transaction or advertising to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z, at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That respondents maintain adequate records, to be furnished upon request of the staff of the Federal Trade Commission, which evidence compliance with the provisions of this order, including, but not limited to, the names, addresses and scores of all persons who take an aptitude test of any kind, copies of all contracts entered into between respondents and customers, copies of all correspondence between respondents and their customers, records showing the name and address of each student, the dates of his attendance, the date of his graduation or other termination of his studies, the names and addresses of any employers he was referred to, and his position and starting salary.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

APPENDIX A
IMPORTANT NOTICE

The (name of school), in accordance with an agreement with the Federal Trade Commission, must determine the job placement rate of its graduates. To make this determination, it is necessary to know the intention of each student with regard to his or her desire to obtain employment in the computer field.

In order to assist the school in computing the placement rate of its graduates, *please read and complete this form carefully.*

Name: ______________________________
Last First Middle

Address: ______________________________
Number and Street City State Zip

Please *check one* of the following boxes:

☐ **1. I am not presently working, and I am taking this course to help me get a job in the computer field.**

☐ **2. Although I am presently employed, I am taking this course to help me get a job in the computer field or to help me get a promotion in the computer field.**

☐ **3. I do not plan to look for a job in the computer field after I graduate.**

If you checked box number 3, please indicate why you do not plan to look for a job in the computer field. Please *circle* the appropriate letter: (Do not fill out this part if you checked 1 or 2 above.)

A. I am presently employed and I am taking this course to help me better understand my current job and better perform my duties.

B. I am taking this course solely because I am interested in computers, but I do not wish to look for a job in the computer field.

C. Other (please specify) ______________________________

____

______________________________ ______________________________
Date Signature

In the Matter of

ASSOCIATED DRY GOODS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8905. Complaint, Dec. 1, 1972-Decision, July 28, 1975.

Consent order requiring a New York City department store organization, among other things to divest itself of all stocks, assets, properties, etc., which it acquired in 1972, comprising Ayr-Way Stores, Inc.

Appearances

For the Commission: *Martin A. Rosen*, *Peter J. Brickfield*, and *David B. Loken.*

For the respondents: *W.S. Jackson, Milbank, Tweed, Hadley & McCloy* and *Theodore J. Carlson, Gould & Wilkie*, New York City. *Abe Krash, Arnold & Porter*, Wash., D. C.

Complaint

The Federal Trade Commission, having reason to believe that Associated Dry Goods Corporation has violated the provisions of Section 7 of the Clayton Act (15 U.S.C. § 18) through its acquisition of L.S. Ayres and Company, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

I. Definitions

1. For purposes of this complaint, the following definitions shall apply:

(a) "Department stores," as referred to herein, includes retail establishments normally employing 25 people or more, having sales of apparel and soft goods combined amounting to 20 percent or more of total sales and engaged in selling each of the following lines of merchandise:

(i) Furniture, home furnishings, appliances, radio and TV sets;
(ii) A general line of apparel; and
(iii) Household linens and dry goods.

For establishments classified as department stores, sales of each of the lines listed above must be less than 80 percent of total sales. However, an establishment with total sales of $5 million or more is classified as a department store even if sales of one of the merchandise lines described above exceed the maximum percent of total sales, provided that the combined sales of the other two groups is $500,000 or more.

This definition corresponds to Bureau of Census Industry Classification No. 531. Both discount department stores and conventional department stores (including, as to both categories, chain store operations) fall within such definition; the essential difference between these two types of department stores being that the discount department stores utilize mostly self service techniques and operate at a lower gross margin of profit than most conventional department stores and, as a consequence, compete primarily as to price.

(b) "GMAF stores," as used herein, refers to all retail establishments included in the following Bureau of Census Major Industry Group and Industry Classifications.

Census Number	*Descriptions*
Classification #531	Department stores
Major Industry Group #56	Other stores primarily engaged in the sale of apparel.
Classification #533	Limited price variety stores
Classification #539	General merchandise stores, dry goods stores and sewing and needlework stores.
Major Industry Group #57	Furniture, home furnishings, appliances and equipment stores.

(c) The "Louisville Standard Metropolitan Statistical Area" is comprised of Jefferson County, Kentucky and Clark and Floyd Counties, Indiana.

(d) The "Evansville Standard Metropolitan Statistical Area" is comprised of Vanderburgh and Warrick Counties, Indiana and Henderson County, Kentucky.

(e) The "Lexington Standard Metropolitan Statistical Area" is comprised of Fayette County, Kentucky.

II. Associated Dry Goods Corporation

2. Associated Dry Goods Corporation (Associated) is a corporation organized and existing under the laws of the Commonwealth of Virginia, with its principal office located at 417 Fifth Ave., New York, N.Y.

3. Associated is one of the largest department store organizations in the United States, with net sales during the fiscal year ended Jan. 29, 1972, of approximately $849 million. Prior to the instant acquisition it operated 15 store divisions, each consisting of a main store and-with

one exception-one or more branch stores, located in 17 states and the District of Columbia. Altogether, the 15 divisions operated a total of 86 stores, occupying in the aggregate approximately 16,904,600 square feet of floor area. New stores and enlargements nearing completion and expected to open in 1972 will provide an additional 878,000 square feet of floor area.

4. Each of Associated's store divisions, and their constituent stores, are major retail institutions in the markets in which they are located. Nine of the 15 store divisions are the result of a series of acquisitions of major department store operations consummated since 1955, including: J.W. Robinson Co. (Southern California), Sibley, Lindsay & Curr Co. (Upstate New York), Stix, Baer & Fuller (Missouri), The Denver Dry Goods Company (Colorado), Joseph Horne Co. (Western Pennsylvania), The H.S. Pogue Company (Southwestern Ohio), Goldwaters (Phoenix, Arizona), Erie Dry Goods Company (Erie, Pennsylvania) and The Diamond (West Virginia). A major portion of Associated's business, in terms of square footage of floor area, sales volume and geographic areas of operations, is attributable to these acquisitions.

5. Associated does business in the Louisville, Lexington and Evansville Standard Metropolitan Statistical Areas (SMSA's) through its Stewart Dry Goods Company division (Stewart's). Stewart's operates two department stores, its main store, and a branch, in the Louisville SMSA, two branch department stores in the Lexington SMSA and a single branch department store in the Evansville SMSA.

6. The two Stewart's department stores in the Louisville SMSA, combined, have 715,500 square feet of floor area and had combined sales of approximately $27 million in 1971. Stewart's is the leading department store operation in the Louisville market in terms of floor area and the second ranking department store operation and GMAF store operation in terms of sales volume.

7. The Stewart's branch department store in Evansville has 134,400 square feet of floor area and had sales of approximately $4.7 million in 1971. It is the second largest individual department store in the Evansville SMSA in terms of floor area and ranks fourth among individual department stores in sales volume. Stewart's has the fifth ranking department store operation in the Evansville SMSA, in terms of sales, and is the fifth ranked GMAF store operator in that market.

8. Associated is, and has been, engaged in "commerce" within the meaning of Section 7 of the Clayton Act.

III. L.S. Ayres and Company

9. Prior to its acquisition by Associated Dry Goods Corporation on or about Apr. 20, 1972, L.S. Ayres and Company (Ayres) had been a

corporation organized and existing under the laws of the State of Indiana, with its principal office located at 1 W. Washington St., Indianapolis, Ind.

10. Ayres was the leading independent department store organization in the State of Indiana, with net sales during the fiscal year ended Jan. 29, 1972, of approximately $213 million. It operated 30 conventional and discount department stores and 12 apparel specialty shops in various metropolitan markets in the States of Indiana, Illinois, Ohio and Kentucky, and a wholesale furniture business in Indianapolis, Ind. Ayres' department stores occupied in the aggregate approximately 3,867,000 square feet of floor area. New stores and enlargements nearing completion and expected to open in 1972 will provide an additional 271,000 square feet of floor area.

11. L.S. Ayres and Company was founded in 1872 and assumed its present name in 1874. Prior to 1958, substantially all of the company's operations were conducted in its main department store in downtown Indianapolis, Ind. Since then the company has undertaken an extensive expansion program. In 1958, it opened its first conventional department store branch, and has since opened four other such branches and acquired five additional conventional department stores. In 1961, it opened its first discount department store, and has since opened 19 additional similar stores. In 1968, it opened the first of its apparel specialty shops. Eleven additional similar shops have since been established. The substantial growth of Ayres as a department store operator and GMAF store operator has been accomplished preponderantly through internal expansion.

12. Ayres was doing business in the Louisville, Lexington and Evansville SMSA's at the time the instant acquisition was consummated. Its initial entry into these markets was accomplished through the opening of two discount department stores in Evansville in the mid 1960's. Its most recent store opening in these markets was the establishment of a specialty apparel shop in Lexington in August 1971, representing its initial entry into that market.

13. In the Louisville SMSA, Ayres was operating (and Associated now operates) two conventional department stores, two discount department stores and an apparel specialty shop. Two additional discount department stores are scheduled for opening in August 1972. The conventional stores, representing Ayres' initial entry into the Louisville market, were acquired late in 1969. The apparel specialty shop was opened in 1970 and the two existing discount department stores were opened in 1971.

14. The four department stores formerly operated by Ayres in the Louisville SMSA, combined, have approximately 328,000 square feet of

floor area and had combined sales of approximately $16 million during 1971. In terms of square footage of floor area, they made Ayres the third largest department store operation in the Louisville market. Upon the opening of the two additional discount department stores, in August 1972 Ayres would have become the second largest department store operation in Louisville in terms of floor area, exceeded only by Stewart's. With regard to sales volume, Ayres was the fifth ranking department store operator and the eighth ranking GMAF store operator in the Louisville SMSA. With the opening of additional stores, and increased consumer familiarity with and acceptance of the Ayres name, Ayres' market share and market rank as a department store operator and GMAF store operator in the Louisville SMSA and market rank could have been expected to increase appreciably.

15. The two department stores in the Evansville SMSA formerly operated by Ayres (and presently operated by Associated) have 176,000 combined square feet of floor area and had combined sales of approximately $9.5 million during 1971. Ayres had the second largest department store operation in the Evansville market in terms of floor area. With regard to sales, it was the third ranking department store operator and GMAF store operator in said market.

16. Ayres was engaged in "commerce" within the meaning of Section 7 of the Clayton Act.

IV. The Acquisition

17. On or about Apr. 20, 1972, Associated acquired the assets of L.S. Ayres and Company, consisting of all of the stock of Ayres' wholly owned operating subsidiaries, in exchange for common stock of Associated having a market value on the above date of approximately $80 million. The Associated stock was then distributed to Ayres' shareholders and Ayres was dissolved as a corporate entity.

V. Nature of Trade and Commerce

A. *Generally*

18. GMAF stores comprise the leading group of retail operations in the United States, with a sales volume approaching $100 billion in 1970. GMAF store sales represent approximately 25 percent of all retail sales in the United States.

19. Department stores are the leading component within the GMAF store group, accounting for approximately 38 percent of GMAF store sales, as of 1970. Department stores are the third most important group of retail stores in the United States, exceeded in sales volume only by grocery stores and automotive dealers. Their national sales volume of

approximately $38.5 billion in 1970 represented over 10 percent of all retail sales in the country. The percentage of all retail sales accounted for by department store sales has, moreover, been rising in recent years.

20. Department stores constitute a distinct line of commerce, recognized as such by the consuming public, the trade, and agencies and organizations which gather and disseminate information on retailing as a distinct line of commerce.

21. The department store industry has been subject to a significant and continuing merger trend in recent years, and is substantially and increasingly dominated by multi-unit organizations. A number of leading multi-unit organizations are currently subject to Federal Trade Commission consent orders in connection with previous acquisitions and mergers.

B. *Louisville, Evansville and Other Markets*

22. Department store sales in the Louisville SMSA totalled approximately $270 million in 1971, and GMAF store sales totalled approximately $520 million. Associated's 1971 sales through its two Louisville department stores were approximately $27 million. Ayres' 1971 department store sales in the Louisville SMSA were approximately $16 million. In addition, Ayres' specialty apparel shop had total 1971 sales of approximately $200 thousand in said market. These sales represent the following approximate shares of 1971 sales in the respective lines of commerce in the Louisville SMSA.

	Associated	*Ayres*	*Combined*
Department stores	*10.1%*	*5.9%*	*16.0%*
GMAF stores	*5.2%*	*3.1%*	*8.3%*

Prior to the instant acquisition, Associated ranked second in sales among department stores and among GMAF stores in said market. Following the acquisition, Associated ranks first in both lines of commerce.

With regard to existing concentration, prior to the acquisition the four leading sellers in the Louisville SMSA accounted for approximately 41.3 percent of department store sales and 22.8 percent of GMAF store sales. The eight leading sellers accounted for approximately 64.3 percent of department stores sales and 38.3 percent of GMAF store sales. Following the acquisition such figures are approximately as follows:

	Top 4	*Top 8*
Department stores	*47.3%*	*68.2%*
GMAF stores	*25.9%*	*40.7%*

23. Department store sales in the Evansville SMSA totalled approximately $80 million in 1971, while GMAF store sales totalled approximately $158 million. Associated's 1971 department store sales in said market totalled approximately $4.7 million. Ayres' 1971 total department store sales in the Evansville SMSA were approximately $9.6 million. In addition, Ayres' specialty apparel shop had total 1971 sales of approximately $180 thousand in said market. These sales represent the following approximate shares of 1971 sales in the respective lines of commerce in the Evansville SMSA.

	Associated	*Ayres*	*Combined*
Department stores	*5.9%*	*12.1%*	*18.0%*
GMAF stores	*3.0%*	*6.1%*	*9.1%*

Prior to the instant acquisition, Associated ranked fifth in sales among department stores and GMAF stores in said market. Following the acquisition, Associated ranks third in both lines of commerce.

With regard to existing concentration, prior to the acquisition the four leading sellers in the Evansville SMSA accounted for approximately 71.5% of department store sales and 38.5% of GMAF store sales. The eight leading sellers accounted for approximately 47.7% of GMAF store sales. Following the acquisition such figures are approximately as follows:

	Top 4	*Top 8*
Department stores	*77.4%*	
GMAF stores	*41.4%*	*48.8%*

24. In addition to competition between Associated and Ayres in the Louisville and Evansville SMSA's, the two companies are potential significant competitors in a number of other metropolitan areas in or near the midwestern United States, including, for example, Indianapolis, Ind., Dayton, Ohio and Lexington, Ky. Initial actual competition in the Lexington SMSA commenced in 1971, with the establishment of Ayres' specialty apparel shop. Associated's Stewart's division opened an additional branch department store in Lexington in May 1972, located in the same shopping center as Ayres' recently established apparel shop.

VI. *Effects of the Acquisition*

25. The effect of the acquisition of Ayres by Associated may be substantially to lessen competition or to tend to create a monopoly in the department store industry and/or the GMAF store industry, throughout the United States or in certain sections thereof. In particular, the effects of such violation have been and may be the following, among others:

(a) Actual and potential competition between Associated and Ayres in the department store industry and/or the GMAF store industry has been eliminated, prevented or lessened in the Louisville and Evansville SMSA's.

(b) Potential competition between Associated and Ayres in the department store industry and/or the GMAF store industry has been eliminated, prevented or lessened in other metropolitan areas in or near the midwestern United States.

(c) Associated, a significant competitive factor in the department store industry and the GMAF store industry in the Louisville and Evansville SMSA's, has eliminated Ayres as another significant competitive factor in such markets.

(d) Concentration in the department store industry and the GMAF store industry will be preserved and increased in the Louisville and Evansville SMSA's, in other metropolitan areas in or near the midwestern United States and throughout the United States.

VII. *Violation Charged*

26. The effect of Associated's acquisition of Ayres may be substantially to lessen competition or to tend to create a monopoly, in violation of Section 7 of the Clayton Act (15 U.S.C. §18), as more fully described in Paragraph 25, above.

DECISION AND ORDER

The Federal Trade Commission, having issued a complaint charging that the respondent named in the caption hereof has violated the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. §18; and

Upon joint application of the parties and certification of such application to the Commission by the administrative law judge, the Commission, by order dated Jan. 23, 1975, having withdrawn the matter from adjudication pursuant to Section 2.34(d) of the rules of practice; and

Respondent and complaint counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by respondent of all jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted it, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules;

Now, in further conformity with the procedure prescribed in Section 3.25(d) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Associated Dry Goods Corporation is a corporation, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at 417 Fifth Ave., New York, N.Y.

2. The Federal Trade Commission has jurisdiction of this proceeding and of the respondent, and this proceeding is in the public interest.

ORDER

I

Respondent shall, as soon as possible and in no event later than two years from the effective date of this order, divest all of the assets, properties, stores, good will, rights, privileges and interests of whatever nature, real, personal, tangible and intangible (subject to liabilities and to the other provisions of this order) comprising Ayr-Way Stores, Inc., a division of respondent Associated. Divestiture shall include but shall not be limited to the Ayr-Way stores and warehouse listed in the schedule attached hereto as Exhibit A and all Ayr-Way facilities opened after Dec. 1, 1974, and prior to divestiture.

Respondent may, but shall not be required to divest the names, trademarks, service names, service marks, or logos "Ayr-Way" or "Ayr-Way Stores, Inc." Nothing in this order shall be deemed to require the divestiture of respondent of the names, trademarks, service names, service marks, or logos "Associated Dry Goods Company," "Ayres," "L.S. Ayres" or "L.S. Ayres and Company, Inc.," or to require the divestiture of any other assets relating to the business of Associated Dry Goods Corporation or L.S. Ayres and Company, Inc.

Divestiture shall be in a manner which preserves the assets and business of Ayr-Way Stores, Inc. as a going concern and fully effective competitor.

In the event that respondent elects to divest itself of the assets or capital stock of Ayr-Way Stores, Inc. by a sale of such assets or capital stock other than by means of a public offering of capital stock which is registered pursuant to the Securities Act of 1933, the acquirer or acquirers shall be approved in advance by the Commission. Nothing in this order shall be deemed to preclude divestiture to a firm which is engaged in operating department stores or GMAF stores, as defined by the Complaint, if such acquirer is otherwise acceptable to the Commission. Respondent shall not knowingly sell, divest, or otherwise transfer, directly or indirectly, any assets or stock of Ayr-Way Stores, Inc. to any person (other than an underwriter or selling dealer) who is at the time of the transfer the beneficial owner of more than two (2) percent of the outstanding stock of Associated.

If divestiture has not been effected within the two-year period provided by this order, the Commission, on request submitted at least 30 days prior to the expiration of the period shall grant respondent an opportunity to file a written submission which it will consider before issuing any further order or orders which may be deemed appropriate.

II

Associated or its subsidiaries may be obligated on the effective date of this order as lessee, guarantor or otherwise with respect to leases pertaining to Ayr-Way stores, its land or buildings, and other obligations of Ayr-Way. Associated will use its good faith efforts to obtain releases of such obligations in connection with the divestiture. In the event that Associated is unable to obtain such releases, the divestiture herein provided shall be deemed to have been accomplished notwithstanding the continuance of any such obligations on the part of Associated, *Provided*, That at the time of divestiture the acquiring entity assumes responsibility for the operation of the divested facilities; and *Provided further*, That the continuance of any such obligation on the part of Associated does not give rise to any influence or control, on the part of Associated in, over or with respect to the operations by said entity of the facilities divested.

In the event of default by the acquiring entity with respect to any such lease or other obligation upon which Associated may remain obligated, Associated shall be entitled, without being deemed to have violated any provisions of this order, to take whatever action may be necessary with respect to the defaulted facility or facilities to hold itself harmless from the consequences of any such default or defaults, including the right to repossess and to reoperate any such retail facility or facilities the lease of which is in default, *Provided*, That Associated notifies the Commission within 48 hours of taking such action, and Associated shall redivest itself of any such retail facilities so repossessed within one year from the date of repossession unless a longer period is approved by the Commission, or unless the Commission approves the continued operation by Associated of any such facility.

Associated shall not utilize the names, trademarks, service names, service marks, or logos "Ayr-Way" or "Ayr-Way Stores, Inc.," in the course of any retail business operated by Associated for a period of at least two years from the date of the divestiture.

III

(1) Pending divestiture, respondent shall make every reasonable effort to maintain and preserve the assets and business of Ayr-Way Stores, Inc. in good operating condition with such replacements and additions and such effective overall organization as may be necessary to divest Ayr-Way Stores, Inc. as a viable competitive entity; *Provided, however*, That nothing contained herein shall be deemed to require respondent to continue to operate any store which has become so unprofitable that sound business judgment requires its closing or which is rendered inoperative as a result of force majeure or other event beyond the control of respondent.

(2) Whether the operation of a particular store has become so unprofitable during the pendency of divestiture that sound business judgment requires its closing shall be determined on the basis that such operation shall have yielded an aggregate operating loss during the last previous two calendar years, taken together. An "operating loss" occurs when the total operating revenues of a store fail to cover its total reasonable operating costs. "Operating costs" shall not include taxes on net income or any provision for the general and administrative overhead of L.S. Ayres and Company, Inc. or Associated Dry Goods Corporation. Other general and administrative expenses, provision for doubtful accounts and inventory adjustments shall be deemed to be reasonable if they do not exceed by more than one-third Associated Dry Goods' average for stores of similar size. Corrections to year-end statements and inventory shall be made in accordance with the methods and procedure used by Ayr-Way Stores, Inc. for the two years prior to the making of corrections.

(3) The judgment of respondent that a particular store should be closed prior to divestiture shall be communicated in writing to the Commission at least 30 days before the proposed closing, together with a full statement of (a) the reasons for such closing; (b) in case unprofitability is alleged, the store's sales and profitability history; (c) respondent's plans, if any, for the disposition of the store's assets, the consideration to be received therefor and the identity of proposed transferees so far as then known; and (d) such other information, including production of and/or access to original accounting records, as may be required for consideration of the proposed closing.

IV

It is further ordered, That respondent shall, within ninety (90) days from the date of service of this order, and every one hundred eighty (180) days thereafter until the divestiture required by this Order has been completed submit in writing to the Commission, a report setting forth its plans, actions and progress in complying with the divestiture required by this order and such other reports related to the divestiture as may, from time to time, be requested by the Commission.

EXHIBIT A

APPENDIX A

1. Ayr-Way East, 6800 Pendleton Pike Indianapolis, IN 46226.
2. Ayr-Way West, 2333 Lafayette Road Indianapolis, IN 46222.
3. Ayr-Way South, 3700 South East Street Indianapolis, IN 46227.
4. Ayr-Way Washington East, 8101 East Washington Street Indianapolis, IN 46219.
5. Ayr-Way Richmond, 4401 National Food East Richmond, IN 47374.
6. Ayr-Way Evansville East, 730 South Green River Road Evansville, IN 47715.
7. Ayr-Way Anderson, 5501 Seatterfield Road Anderson, IN 47401.
8. Ayr-Way Evansville North, 4000 First Avenue Evansville, IN 46268.
9. Ayr-Way Indianapolis N.W., 6901 North Michigan Road Indianapolis, IN 46268.
10. Ayr-Way Kokomo, 1037 South Reed Road Kokomo, IN 46901.
11. Ayr-Way Nora, 1300 East 86th Street Indianapolis, IN 46240.
12. Ayr-Way Bloomington, 601 College Mall Road Bloomington, IN 47401.
13. Ayr-Way Fort Wayne North, 3801 Coldwater Road Fort Wayne, IN 46805.
14. Ayr-Way Fort Wayne South, 7601 South Anthony Boulevard Fort Wayne, IN 46806.
15. Ayr-Way Washington West, 1225 S. High School Road Indianapolis, IN 46241.
16. Ayr-Way South Bend, McKinley Square, 3512 East Cedar South Bend, IN 46615.
17. Ayr-Way St. Matthews, 4714 West Port Road Louisville, KY 40207.
18. Ayr-Way Clarksville, 1500 Greentree Boulevard Clarksville, IN 47130.
19. Ayr-Way Columbus, 2985 N. National Road Columbus, IN 47201.
20. Ayr-Way Champaign, 2002 Glen Park Drive Champaign, IL 61820.
21. Ayr-Way Danville, 2917 N. Vermilion Danville, IL 61832.
22. Ayr-Way Bashford Manor, 2034 Bashford Manor Lane West Buechel, KY 40218.
23. Ayr-Way Middletown, 1701 University Boulevard Middletown, OH 45042.
24. Ayr-Way Preston Road, 7100 Preston Road Louisville, KY 40218.
25. Ayr-Way Lafayette, 3100 Sagamore Parkway, North Lafayette, IN 47904.
26. Ayr-Way Scottsdale, 1112 Scottsdale Mall Road South Bend, IN 46612.
27. Ayr-Way Downtown Louisville, 427-437 South 4th Street Louisville, KY 40202.
28. Ayr-Way Distribution Center, 8250 Zionville Road Indianapolis, IN 46268.

IN THE MATTER OF

SAXONY POOLS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8962. Complaint Apr. 19, 1974-Decision, July 28, 1975*

Consent order requiring a Linden, N.J., seller and distributor of swimming pools, among other things to cease using bait and switch tactics; misrepresenting prices; misrepresenting their product as "maintenance free;" furnishing false or misleading guarantees.

Appearances

For the Commission: *John A. Crowley* and *Alan F. Rubinstein.*

For the respondents: *Edward B. Dreskin*, Newark, N.J., and *Edwin S. Rockefeller, Bierbower & Rockefeller*, Wash., D.C.

COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Saxony Pools, Inc., a corporation, and Simon Sax, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1.* Respondent Saxony Pools, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 416 E. Elizabeth Ave., Linden, N.J.

Respondent Simon Sax is the president of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is 45 Hassa St., Linden, N.J.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of swimming pools and other merchandise and home improvement products.

PAR. 3. In the course and conduct of their business as aforesaid, respondents cause advertisements designed to secure leads to potential purchasers of swimming pools and other merchandise and home improvement products to be placed in various newspapers and other publications. The respondents are responsible for the content of said advertisements.

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* Reported as amended by the administrative law judge's order of Aug. 23, 1974, to reflect that there have been changes in the name and address of the corporate respondent and in the address of the individual respondent.

PAR. 4. In the further course and conduct of their business as aforesaid, respondents sell and distribute the aforementioned swimming pools and other merchandise and home improvement products by causing said swimming pools and other merchandise and home improvement products to be shipped from the places of business of their various suppliers in the United States to purchasers at retail in States other than the States from which such shipments originate.

There is now, and has been, at all times mentioned herein, a substantial and continuous course of trade in said swimming pools and other merchandise and home improvement products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made statements and representations with respect thereto in advertisements inserted in newspapers of general interstate circulation, of which the following are typical and illustrative, but not all inclusive:

> Low Low Pre-Season Priced! $499 Completely Installed
> Only $599 Completely Installed
> Unbelievably Priced from ONLY $599 Completely Installed
> NEVER NEEDS MAINTENANCE

PAR. 6. In the further course and conduct of their business as aforesaid and for the purpose of inducing the sale of their products, respondents, their representatives, agents or employees have made, and are now making oral statements and representations to the effect that respondents' products are fully guaranteed for a period of ten years and that customers will receive a lifetime filter with their pool and that one of respondents' pools has been advertised in a national magazine at a price of $5,000 and respondents' lower price for said pool is a special price and that the pools of some customers will be used as "demonstrators."

PAR. 7. By and through the use of the aforesaid statements and representations and others of similar import and meaning, but not specifically set out herein, separately and in connection with oral statements and representations of their salesmen or representatives, respondents have represented, and are now representing, directly or by implication, that:

1. The offers set out in their advertisements are bona fide offers to sell swimming pools of the kind therein described and on the terms and conditions stated.

2. Their advertised offer of a pool for $499 is a special offer made only during the "pre-season" period.

3. Respondents' pools are maintenance free or will not require periodic inspection or servicing to remain in useable condition.

4. Some of the swimming pools sold by respondents are fully guaranteed for a period of ten years.

5. The filter provided with respondents' pools is a "Lifetime Filter" without qualification as to what period is covered by the term lifetime.

6. One of respondents' pools has been advertised in a nationally distributed magazine at a price of $5,000 and, therefore, respondents' customers are being offered a bargain or special price for said pool which would effect a savings amounting to the difference between the nationally advertised price and the price at which the pool is being sold.

7. The pools of certain of respondents' customers will be used for the purpose of demonstrating respondents' pool and as a result of such use, said customers will receive a discount from the purchase price of the pool or will receive a referral fee or monetary allowance for each pool sale resulting therefrom.

PAR. 8. In truth and in fact:

1. The offers set out in respondents' advertisements are not bona fide offers to sell swimming pools of the kind therein described at the prices or on the terms and conditions stated but are made for the purpose of obtaining leads to persons interested in the purchase thereof. After obtaining such leads, individual respondent Simon Sax or respondents' salesmen or representatives call upon such persons and disparage respondents' advertised swimming pools and otherwise discourage the purchase thereof and attempt to sell and frequently do sell different and more expensive swimming pools.

2. The advertised offer of a $499 pool is not a special offer made only during the "pre-season" period. Said pool is advertised regularly at the represented price and on the terms and conditions therein stated.

3. Respondents' pools are not maintenance free. In fact, they require such maintenance as is usual and customary for swimming pools.

4. Respondents' swimming pools are not warranted in every respect without limitations or conditions for a period of ten years or any other period of time. Such warranty or guarantee as may be provided by respondents is subject to numerous terms, conditions and limitations with respect to the duration of the warranty or guarantee and fails to set forth the nature and extent of the warranty or guarantee, the identity of the warrantor or guarantor and the manner in which the warrantor or guarantor will perform thereunder.

5. The "Lifetime" filter provided with respondents' swimming pools

is not guaranteed for a period denominated as a lifetime. The filter is guaranteed by the filter manufacturer for a five year period with a pro rata share of the repair or replacement cost being borne by the purchaser after the first year.

6. Respondents have not sold their pool for $5,000, but use this price to mislead potential customers into the belief that they are receiving a special or discount price. In fact respondents do not have a regular selling price for this pool; the price for which the pool is sold is often substantially below $5,000 and varies from purchaser to purchaser depending upon the resistance of the particular customer.

7. After the installation of respondents' swimming pool is completed, the purchaser's pool will not, in a substantial number of instances, be used for demonstration or advertising purposes by respondents. As a result of allowing, or agreeing to allow their pools to be used as models, purchasers are not granted reduced prices, nor do they receive allowances, discounts, commissions or referral fees.

Therefore, the statements and representations, as set forth in Paragraphs Five, Six and Seven hereof, were, and are, false, misleading and deceptive.

PAR. 9. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in competition, in commerce, as "commerce" is defined in the Federal Trade Commission Act, with corporations, firms and individuals engaged in the sale of swimming pools and other merchandise of the same general kind and nature as sold by respondents.

PAR. 10. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices had had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements were and are true and into the purchase of substantial quantities of respondents' swimming pools and other merchandise by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of the respondents were and are to the injury and prejudice of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act and the respondents having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication for the purpose of considering settlement by the entry of a consent order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Saxony Pools, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 416 E. Elizabeth Ave., Linden, N.J.

Respondent Simon Sax is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his business address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Saxony Pools, Inc., a corporation, its successors and assigns, and its officers and Simon Sax, individually and as an officer of said corporation, and respondents' agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, distribution or installation of swimming pools or any home improvement product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using any advertising, sales plan or procedure involving the use of false, deceptive or misleading statements or representations designed to obtain leads or prospects for the sale of other merchandise.

2. Representing directly or indirectly that any products or services are offered for sale when such is not a bona fide offer to sell said products or services.

3. Disparaging any product, installation or service which is advertised or offered for sale by respondents.

4. Representing, directly or by implication, through the use of terms such as special, preseason, reduced or sale price, or words of similar import and meaning, that a swimming pool or any home improvement product has been reduced in price unless the lower price constitutes a significant reduction from the price at which such merchandise has been sold in substantial quantities by respondents in the recent regular course of business or when the price for such merchandise has not been established by respondents through offering said merchandise for sale in good faith for a substantial period of time in the recent regular course of business; or misrepresenting in any manner that respondents' purchasers or prospective purchasers will be granted reduced prices or will receive discounts, referral fees or allowances of any type.

5. Representing that the swimming pools or any home improvement products sold or offered for sale by respondents are maintenance free, or employing representations of similar meaning and import.

6. Representing directly or indirectly that any of respondents' products, installations or services are warranted or guaranteed, unless the nature and extent of the warranty or guarantee, the identity of the warrantor or guarantor and the manner in which the warrantor or guarantor will perform thereunder are clearly and conspicuously disclosed in immediate conjunction therewith; and unless respondents promptly and fully perform all of their obligations and requirements, directly or impliedly represented, under the terms of each such warranty or guarantee.

7. Representing, directly or by implication, through the use of the term "Lifetime," or through any other phrase or term, that the filter will last for the period of a lifetime or for any other period of time which is in excess of the time period covered by the filter's guarantee or warranty.

8. Representing directly or indirectly that any saving is afforded in the purchase of merchandise from the respondents' retail price unless the price at which the merchandise is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold at retail by the respondents in the recent regular course of business.

9. Misrepresenting in any manner the amount of savings available to purchasers of respondents' merchandise, or the amount by which the price of merchandise has been reduced either from the price at which it has been usually and customarily sold by respondents in the recent regular course of business, or from the price at which it has been

usually and customarily sold at retail in the trade area where the representation is made.

It is further ordered, That respondents shall maintain business records adequate to establish that the pricing claims and similar representations of the type referred to in Paragraph 4 of this order constitute a significant reduction from the prices at which such merchandise has been sold in substantial quantities or offered for sale in good faith by respondents for a substantial period of time in the recent regular course of their business.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall forthwith distribute a copy of this order to all operating personnel, agents or representatives concerned with the promotion, sale, distribution or installation of swimming pools or any home improvement product and secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

In the Matter of

SERR OF WASHINGTON, D.C., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECTIONS 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8991. Complaint, Aug. 28, 1974-Decision, July 28, 1975

Consent order requiring a Washington, D.C., promoter of a hair implant replacement system, among other things to cease misrepresenting the nature, appearance

and other related characteristics of its system; and failing to disclose that their system involves surgical procedures and continually requires special care. Further, respondents are required to devote 15 percent of all of their advertisements to warning prospective customers of the inherent dangers associated with their system of hair implant replacement.

Appearances

For the Commission: *Allen R. Caskie.*

For the respondents: *Kamerow & Kamerow* and *Sheldon B. Kamins, Deckelbaum, Wolpert & Ogens,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Serr of Washington, D.C., Inc., and Herb Mann, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Serr of Washington, D.C., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia with its principal office and place of business located at 1219 Connecticut Ave., N.W., Washington, D.C.

Respondent Herb Mann is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents promote, among other products and services, a process called "PERMA-SURG" which is an implant hair replacement system, hereinafter sometimes referred to as the "System." The system involves a surgical procedure whereby a synthetic suture (prolene) is stitched into the scalp of respondents' customers. Hairpieces are then attached to the sutures. Respondents sell, install and maintain the system, except that the surgical procedure itself is performed by a medical doctor.

PAR. 3. In the course and conduct of their business, respondents promote the system by advertising in newspapers and magazines of general circulation which are distributed across State lines. As a result of such newspaper and magazine advertising, respondents have maintained a substantial course of trade in commerce, as "commerce" is defined in Sections 5 and 12 of the Federal Trade Commission Act, and as a result of such newspaper and magazine advertising, have disseminated and caused to be disseminated false advertisements by United States mails, within the meaning of Section 12(a)(1) of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of the implant hair replacement system, respondents have made numerous statements and representations in advertisements inserted in newspapers and magazines of general circulation.

Typical of the statements and representations contained in said advertisements, but not all-inclusive thereof, are the following:

> She'll swear its your own hair* * *so will everybody else!
>
> "PERMA-SURG" is not a hair weave-not a hairpiece.
>
> A revolutionary new medical process.
>
> A licensed M.D. performs this simple cosmetic procedure painlessly and most important, effectively.
>
> Comb it, brush it, wash it in the shower. Sleep in it, swim in it * * * and it won't come off.

PAR. 5. Through the use of the above advertisements, and others of similar import and meaning but not expressly set out herein, and by oral statements and representations made by employees and agents of the respondents, respondents have represented, directly or by implication, that:

1. The system does not involve wearing a device or cosmetic which is like a hairpiece or toupee;

2. After the system has been applied, the hair applied becomes part of the anatomy like natural hair, and has the following characteristics of natural hair.

(a) The same appearance in all applications as natural hair, upon normal observation, and upon extreme close-up examination;

(b) It may be cared for like natural hair, particularly in that actions such as washing, combing, brushing and mussing may be performed on it in the same manner as might a person with natural hair.

(c) The wearer may engage in physical activity and movement with the same disregard for his hair as he would if he had natural hair.

3. After the system has been applied, the wearer can care for it himself, and will not have to seek professional or skilled assistance in maintaining the system, and that the customer will not incur maintenance costs over and above the cost of applying the system.

PAR. 6. In truth and in fact:

1. The system does involve the wearing of a hairpiece or toupee.

2. The hairpiece or toupee differs from natural hair in many respects, including, but not limited to, the following:

(a) It does not have the same appearance as natural hair in a substantial number of instances. It is often discernible as a hairpiece or toupee upon normal observation, and upon extreme close examination.

(b) It cannot be cared for like regular hair but requires special care and handling. Strong pulling on the hair, such as may be expected to occur in washing, combing, brushing and mussing, can cause pain because of the pressure exerted on the sutures in the scalp, may cause bleeding, and may cause the sutures to pull out. As a consequence, washing the hair and scalp is difficult. Because washing is difficult, foreign particles and dead skin tissue tend to accumulate beneath the implant hair application and become a significant source of irritation. The hair styles into which the hairpiece may be combed or brushed without professional treatments are limited.

(c) The wearer may not engage in physical activities with as much disregard for his hairpiece as might a person with natural hair. The wearer must at all times be careful that the hair does not pull or get pulled, or become tangled, or strained. Discomfort and pain may be caused by common actions, such as rolling the head on a pillow during sleep.

3. The wearer cannot in most instances care for the hairpiece himself; he must seek professional or skilled assistance on many occasions. The System involves a surgical procedure by which a synthetic thread is sutured into the scalp. In some instances, one or more of the sutures may become loose or may be rejected by the body. These and other medical problems associated with the surgery or the continuing presence of synthetic thread in the scalp may require subsequent visits to a medical doctor. A substantial additional charge for such service could be incurred. Respondents' applied hair is subject to bleaching in sunlight and other discoloration normally associated with hairpieces, and where the hairpiece has been color dyed, loss of dye through washing and normal wear; thus replacement hairpieces are required at intervals in order to maintain a color match with any natural hair the wearer may have.

Therefore, the statements and representations set forth in Paragraphs Four and Five were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, respondents, have represented in advertisements the asserted advantages of the system, as hereinbefore described. In many cases, respondents have represented their system to be painless and have not disclosed in such advertisements that surgical procedure is a required step in the system. In no case have respondents' advertisements disclosed that:

(a) Clients may experience discomfort and pain as a result of the surgical procedure, from the synthetic sutures themselves, and from pulling normally incident to wearing the hairpiece;

(b) Clients will be subject to the risk of irritation, infections, and skin diseases as a result of the surgical procedure and as a result of the synthetic sutures remaining in the scalp;

(c) Permanent scarring to the scalp may result from the required surgical procedures, and as a result of the synthetic sutures remaining in the scalp.

The consequences described in this paragraph have in fact occurred, and to a reasonable medical certainty can be expected to occur, and respondents knew, and had reason to know, that they could be expected to occur.

Therefore, respondents' failure to disclose such material facts was, and is, unfair, false, misleading and deceptive.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been and are in substantial competition in commerce with corporations, firms, and individuals, in the sale of cosmetics, devices and treatments for the concealment of baldness.

PAR. 9. The use by respondents of the above unfair and deceptive representations and practices and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead consumers, and to unfairly influence consumers to sign contracts for the application of the implant hair replacement system, and to make partial or full payment therefor, without being informed of the seriousness of the surgical procedure, and the possibilities of discomfort, disease or disfigurement related thereto, and related to the continual presence of the synthetic suture in the scalp.

PAR. 10. The respondents' acts and practices alleged herein are to the prejudice and injury of the purchasing public, and to respondents' competitors, and constitute unfair methods of competition, and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, and false advertisements disseminated by United States mails, and in commerce, in violation of Section 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint charging that the respondents named in the caption hereof have violated the provisions of the Federal Trade Commission Act; and

The Commission having duly determined upon motion submitted by respondents that, in the circumstances presented, the public interest would be served by a withdrawal of the matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order; and

The respondents and counsel for the Commission having executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedures described in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Serr of Washington, D.C., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at 1219 Connecticut Ave., N.W., Washington, D.C.

Respondent Herb Mann is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his business address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Serr of Washington, D.C., Inc., a corporation, its successors and assigns and its officers, and Herb Mann, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device or through franchisees or licensees, in connection with the advertising, offering for sale, sale, or distribution of the implant replacement system or other hair replacement product or process involving surgery (hereinafter sometimes referred to as the "System"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, or by the United States mails within the meaning of Section 12(a)(1) of the Federal Trade Commission Act do forthwith cease and desist from representing, directly or by implication that:

1. The system does not involve wearing a device or cosmetic which is like a hairpiece or toupee;

2. After the system has been applied, the hair applied becomes part of the anatomy like natural hair, and has the following characteristics of natural hair.

a. the same appearance in all applications as natural hair, upon normal observation, and upon extreme closeup examination;

b. it may be cared for like natural hair, particularly in that actions such as washing, combing, brushing and mussing might be performed on it in the same manner as might a person with natural hair;

c. the wearer may engage in physical activity and movement with the same disregard for his hair as he would if he had natural hair.

3. After the system has been applied, the wearer can care for it himself, and will not have to seek professional or skilled assistance in maintaining the system, and that the customer will not incur maintenance costs over and above the cost of applying the system.

It is further ordered, That respondents, in advertising, offering for sale, selling or distributing the system, disclose clearly and conspicuously that:

1. The system involves a surgical procedure resulting in the implantation of synthetic sutures in the scalp, to which hair is affixed.

2. By virtue of the surgical procedure involving implantation of synthetic sutures in the scalp, and by virtue of the synthetic suture remaining in the scalp, there is a risk of discomfort, pain, infection, scarring, and other skin disorders.

3. Continuing special care of the system is necessary to minimize the probabilities and risks referred to in subparagraph two of this paragraph, and such care may involve additional costs for medications and assistance.

4. The purchaser is advised to consult with his personal physician about the system before deciding whether to purchase it.

Respondents shall set forth the above disclosures separately and conspicuously from the balance of each advertisement or presentation used in connection with the advertising, offering for sale, sale, or distribution of the system, and shall devote no less than 15 percent of each advertisement or presentation to such disclosures. *Provided, however*, That in advertisements which consist of less than ten column inches in newspapers and periodicals, and in radio and television advertisements with a running time of one minute or less, respondents may substitute the following statement, in lieu of the above requirements:

> **Warning: This application involves surgery whereby synthetic sutures are placed in the scalp. Discomfort, pain, and medical problems may occur. Continuing care is necessary. Consult your own physician.**

No less than 15 percent of such advertisements shall be devoted to this disclosure, such disclosure shall be set forth clearly and conspicuously from the balance of each of such advertisements, and if such disclosure is in a newspaper or periodical, it shall be in at least eleven point type.

It is further ordered, That respondents, in connection with the sale of the system, provide prospective purchasers with a separate disclosure sheet containing the information required in the immediately preceding paragraph of this order, subparagraphs one (1) through four (4) thereof, and that respondents require that, prior to executing any contract to purchase said system, such prospective purchasers, sign and date the disclosure sheet after the sentence, "I have read the foregoing disclosures and understand what they mean," and that Serr of Washington, D.C., Inc. provide a copy of said disclosure sheet to the customer and retain such signed disclosure sheet for at least three years.

It is further ordered, That, in connection with the sale of the system, no contract for application of the system shall become binding on the purchaser prior to midnight of the third day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed, and that:

1. Respondents shall clearly and conspicuously disclose, orally prior to the time of sale, and in writing on any contract, promissory note or other instrument executed by the purchaser in connection with the sale of the system, that the purchaser may rescind or cancel any obligation incurred by mailing or delivering a notice of cancellation to the office responsible for the sale prior to midnight of the third day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed.
2. Respondents shall provide a separate and clearly understandable form which the purchaser may use as a notice of cancellation.
3. Respondents shall not negotiate any contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to midnight of the fifth day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed.

It is further ordered, That respondents, in connection with the advertising, offering for sale, sale, or distribution of the system, serve a copy of this order upon each present and every future licensee or franchisee, and upon each physician participating in application of respondents' system, and obtain written acknowledgment of the receipt thereof; and that respondents obtain from each present and future licensee or franchisee an agreement in writing, (1) to abide by the terms of this order, and (2) to cancellation of their license or franchise for failure to do so; and that respondents cancel the license or franchise of any licensee or franchisee that fails to abide by the terms of this order. Respondents shall retain such acknowledgments and agreements for so long as such persons or firms continue to participate in the application or sale of respondents' system.

It is further ordered, That respondents, in connection with the advertising, offering for sale, sale, or distribution of the system, forthwith distribute a copy of this order to each of their operating divisions or departments.

It is further ordered, That the corporate respondent notify the Commission at least thirty (30) days prior to any proposed change in said respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, licensees, or franchisees, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That in the event that the corporate respondent merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation or to any other person, said respondent shall require such successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; *Provided*, That if said respondent wishes to present to the Commission any reasons why said order should not apply in its present form to said successor or transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

It is further ordered, That the individual respondent Herb Mann promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

XEROX CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8909. Complaint, Jan. 16, 1973-Decision, July 29, 1975

Consent order requiring a Stamford, Conn., manufacturer and developer of office copier equipment, among other things to cease engaging in anticompetitive licensing, patent and marketing arrangements.

Appearances

For the Commission: *Charles W. Corddry III, Jonathan E. Gaines, Robert D. Jacobs, Robert T. Joseph, Richard L. Williams, David I. Wilson, Lloyd E. Oliver (Economist).*

For the respondent: *John R. Murphy, G. Emmett Smith* and *Kaye Scholer*, Stamford, Conn. *Milton Handler, Fierman, Hays & Handler*, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Xerox Corporation, hereinafter referred to as Xerox or respondent, has violated and is violating Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

I Definitions

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

(a) "Office copier" (hereinafter sometimes referred to as "copier") means a machine for the convenient reproduction of an original document. The term "office copier" includes electrostatic and thermographic process copiers and accessories physically attached to such copiers. Said term does not include either specialized use copiers, such as engineering drawing and microfilm copiers, or offset, mimeograph, or spirit duplicator machines.

(b) "Plain paper copier" means a copier which makes copies on plain, untreated paper.

(c) "Coated paper copier" means a copier which requires the use of chemically treated or coated paper.

II Respondent

PAR. 2. Xerox is a corporation organized and existing under and by virtue of the laws of the State of New York, with its executive office located at Stamford, Conn. Respondent was incorporated in 1906 as the Haloid Company, and its name was changed to Haloid Xerox Inc. in 1958 and to Xerox Corporation in 1961.

PAR. 3. In 1971, Xerox's total revenues were approximately $2 billion, net income after taxes was approximately $213 million, and total assets were approximately $2.2 billion. Xerox's after tax return on stockholder's equity averaged 21.2 percent for the period 1967 through 1971. In 1971, approximately 50 percent of Xerox's total revenues were derived from its domestic business in office copiers and supplies and approximately 25 percent of Xerox's total revenues were derived from Rank Xerox. In 1971, Xerox was approximately the 52nd largest domestic industrial firm in terms of total revenues and approximately the 17th most profitable such firm based on return on stockholder's equity.

III Other Persons

PAR. 4. The Rank Organisation, Ltd. [Rank] is a corporation organized and existing under the laws of the United Kingdom, with principal offices in London, England.

PAR. 5. Fuji Photo Film Co., Ltd. [Fuji] is a corporation organized and existing under the laws of Japan, with principal offices in Tokyo, Japan.

PAR. 6. Rank Xerox, Ltd. [Rank Xerox] is a corporation organized and existing under the laws of the United Kingdom with principal offices in London, England. It was organized by Rank and Xerox for the purpose of manufacturing and distributing office copiers throughout the world except the United States (including United States territories and possessions) and Canada. In 1964, Xerox purchased from Rank certain property rights and assets, including the right to manufacture and distribute Xerox copiers in Central and South America, for $3.3 million plus 5 percent royalties on rentals and sales in said territory. From 1956, when it was organized, until December 1969, Rank Xerox's voting stock was owned equally by Rank and Xerox. In December 1969, Xerox acquired for $12.5 million a 51 percent ownership of said voting stock. In 1971, Rank Xerox had revenues of approximately $500 million, assets of approximately $690 million, and net profits of approximately $196 million.

PAR. 7. Fuji Xerox Co., Ltd. [Fuji Xerox] is a corporation organized and existing under the laws of Japan. It was organized by Rank Xerox and Fuji for the purpose of manufacturing and distributing office copiers in Japan, Thailand, Cambodia, Laos, Philippines, Vietnam, Indonesia, Korea and Taiwan (Formosa). Fuji Xerox's voting stock is owned equally by Rank Xerox and Fuji.

IV Nature of Trade and Commerce

PAR. 8. The relevant market is the sale and lease of office copiers in the United States, hereinafter referred to as the office copier market. This market includes as a relevant submarket the sale and lease of plain paper office copiers in the United States, hereinafter referred to as the plain paper submarket. The office copier market is dominated by the plain paper submarket and Xerox dominates the plain paper submarket.

PAR. 9. (a) In 1971, revenues from the sale and lease of office copiers were approximately $1.1 billion and total revenues from the sale and lease of office copiers and supplies were approximately $1.7 billion; Xerox accounted for approximately 86 percent of the former and 60 percent of the latter. In 1971, revenues from the sale and lease of plain paper copiers and supplies were approximately $1.0 billion; Xerox accounted for approximately 95 percent of said revenues.

(b) Approximately 25 firms are presently engaged in the office copier market. Of these 23 sell or otherwise distribute coated paper copiers and three sell or otherwise distribute plain paper copiers. After Xerox, the next largest firm in the office copier market accounted for approximately 10 percent of 1971 revenues from the sale or lease of office copiers and the sale of supplies therefor.

PAR. 10. The office copier market has had and continues to have high barriers to entry and barriers to effective competition among existing competitors.

V Jurisdiction

PAR. 11. In the course and conduct of its business, Xerox has shipped or caused to be shipped office copiers to customers located throughout the United States and has also entered into licensing and distribution arrangements with foreign corporations. There is now and has been for many years a constant substantial and increasing flow of Xerox office copiers and Xerox technical information and marketing rights in "commerce" as that term is defined in the Federal Trade Commission Act. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices hereinbelow alleged in this complaint, Xerox has been and is in competition with other corporations, partnerships, individuals or firms engaged in the sale and distribution of office copiers and supplies.

VI Violations

PAR. 12. (a) Xerox has monopoly power in the relevant market and submarket.

(b) Xerox has the power to inhibit, frustrate, and hinder effective competition among firms participating in the relevant market and submarket.

PAR. 13. Xerox has engaged in marketing acts, practices and methods of competition including, but not limited to,

(a) following a lease only policy pursuant to which Xerox refuses to sell and discourages the sale of its office copiers,

(b) using package leasing plans and quantity discount rental price plans,

(c) discriminating in price among customers,

(d) maintaining a stock of depreciated copiers and planning to use or using such copiers to inhibit, frustrate, or hinder price competition,

(e) announcing new copier models and taking orders thereon before availability of such copiers in response to introduction of competing copiers by actual or potential competitors,

(f) requiring that it be the exclusive source of maintenance and repair service for leased Xerox office copiers,

(g) falsely disparaging competitive supplies,

(h) tying supplies to the lease of office copiers.

PAR. 14. Xerox has engaged in acts, practices and methods of competition relating to patents including, but not limited to,

(a) monopolizing and attempting to monopolize patents applicable to office copiers,

(b) maintaining a patent barrier to competition by attempting to recreate a patent structure which would be equivalent in scope to expired patents,

(c) developing and maintaining a patent structure of great size, complexity, and obscurity of boundaries,

(d) using its patent position to obtain access to technology owned by actual or potential competitors,

(e) entering into cross-license arrangements with actual or potential competitors,

(f) including in licenses under United States Patent Number 3,121,006 provisions having the effect of limiting licensees to the manufacture and sale of only coated paper copiers,

(g) offering patent licenses applicable to plain paper copiers with provisions which, in effect, limit the licensee to the manufacture or sale of low speed copiers,

(h) including in patent licenses provisions having the effect of precluding the licensee from utilizing Xerox patents in the office copier market,

(i) entering into and maintaining agreements with Battelle Memorial Institute, Inc. and Battelle Development Corporation, Delaware corporations with principal offices at Columbus, Ohio, hereinafter referred to collectively as Battelle, pursuant to which Battelle is required to convey to Xerox all patents, patent applications, and know-how coming into its possession relative to xerography.

(j) preventing actual and potential competitors from developing plain paper copiers while permitting them to develop coated paper copiers.

PAR. 15. (a) For many years, and at least as of 1969, Rank Xerox was a substantial, viable, separate corporation capable of competing in the office copier market and plain paper submarket.

(b) Xerox has entered into and maintained agreements with Rank and Rank Xerox which have effectively divided up the world market for plain paper copiers among Xerox, Rank Xerox and Fuji Xerox.

(c) In December 1969, Xerox acquired a 51 percent interest in Rank Xerox voting stock and continues to maintain such interest.

PAR. 16. Xerox has engaged and is engaging in acts, practices and methods of competition as hereinabove alleged, for the purpose and with effect of

(a) monopolizing the office copier market and the plain paper submarket,

(b) preserving, maintaining, and furthering a highly concentrated market structure with high barriers to entry,

(c) hindering, restraining, foreclosing and frustrating competition in the office copier market and plain paper submarket and the entry of new competitors into said markets,

(d) materially reducing the independence of Rank Xerox, the influence of Rank Xerox as a potential competitor and the probability that Rank Xerox would enter competition in the office copier market or plain paper submarket,

(e) foreclosing Rank, Fuji, Rank Xerox, and Fuji Xerox from competing with Xerox in the Western Hemisphere, including the United States, and foreclosing Xerox from competing in export trade from the United States,

(f) depriving consumers of the benefits of competition.

PAR. 17. The aforesaid acts, practices, and methods of competition in commerce are unfair and constitute violations of Section 5 (a) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint charging that the Respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45; and

Respondent and complaint counsel, by joint application filed Oct. 6, 1974, having moved to have the matter removed from adjudication for the purpose of submitting an executed agreement containing consent order, and the administrative law judge having certified such application to the Commission; and

The Commission, by order issued Oct. 10, 1974, having withdrawn this matter from adjudication pursuant to Section 2.34(d) of its rules; and

The Commission having considered and accepted said agreement and placed it in the public record for a period of sixty (60) days, having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules and the recommendations of its staff, and having withdrawn its acceptance of said agreement; and

Respondent and complaint counsel having thereafter submitted a revised agreement containing consent order dated Mar. 27, 1975, and modifications thereof dated Apr. 21, 1975 and July 14, 1975; and

The Commission having considered and accepted the agreement dated Mar. 27, 1975 and placed it on the public record for a period of sixty (60) days, having held a public hearing respecting said agreement on June 4, 1975, and having duly considered the comments filed pursuant to Sections 2.34(b) and 3.25(d) of its rules during the 60 day period and the matters presented at the public hearing; and

The executed agreement dated Mar. 27, 1975, as modified, containing the following consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated, and waivers and other provisions as required by the Commission's rules,

Now in conformity with the procedure prescribed in Section 3.25(d) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Xerox Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at High Ridge Park, Stamford, Conn.

2. The Federal Trade Commission has jurisdiction of this proceeding and of the respondent and this proceeding is in the public interest.

ORDER

I

It is ordered, That the following definitions shall apply in this order:

A. "Xerox" means respondent Xerox Corporation, its *subsidiaries* (except *Rank Xerox* and *Fuji Xerox*), successors and assigns and its directors, officers, employees, agents and representatives. "Rank Xerox" means Rank Xerox Limited, a corporation organized and existing under the laws of the United Kingdom. "Fuji Xerox" means Fuji Xerox Company Limited, a corporation organized and existing under the laws of Japan. "Rank Xerox" and "Fuji Xerox" each includes the *subsidiaries*, successors and assigns of said corporations and their directors, officers, employees, agents and representatives.

B. "Person" means any individual, partnership, firm, association, corporation or other legal or business entity [other than the Commission, *Xerox*, *Rank Xerox*, *Fuji Xerox*, The Rank Organisation Limited (so long as it is a party to a joint venture with *Xerox* relating to *office copier products*), Fuji Photo Film Co., Ltd. (so long as it is a party to a joint venture with Xerox or *Rank Xerox* relating to *office copier products*), and any foreign government (or any entity whose ownership is controlled thereby)], their *subsidiaries*, successors and assigns, and directors, officers, agents and representatives.

C. "Subsidiary" means a *person* more than fifty percent (50%) or, at the option of the *licensee* with respect to its *subsidiaries*, at least twenty percent (20%) of whose outstanding shares or stock, representing the right (other than as affected by events of default) to vote for the election of directors or other managing authority, are now or hereafter owned or controlled, directly or indirectly, by *Xerox*, *Rank Xerox*, *Fuji Xerox* or *Person*, as the case may be, but such *person* shall be deemed to be a *subsidiary* only so long as such ownership or control exists.

D. "Licensee" means any *person* licensed by *Xerox*, *Rank Xerox* and/or *Fuji Xerox* pursuant to the terms of Paragraph II of this order, including all *affiliates* of such *person*. *Affiliate* means (1) any *person* and *subsidiaries* thereof, engaged in the development, manufacture, use, lease or sale of *office copier products* at least fifty percent (50%) or, at the option of the *licensee*, at least twenty percent (20%) of whose outstanding shares or stock, representing the right (other than as affected by events of default) to vote for the election of directors or other managing authority, are now or hereafter owned or controlled, directly or indirectly, by the licensed *person;* and (2) any *person* and *subsidiaries* thereof, which now or hereafter own or control, directly or indirectly, more than fifty percent (50%) or, at the option of the *licensee,* at least twenty percent (20%) of the outstanding shares or stock, representing the right (other than as affected by events of default) to vote for the election of directors or other managing authority of the licensed *person,* but only so long as such ownership or control exists.

E. "Patent" means some, all or any portion of all patents (including utility models, design patents, certificates of addition and the like), and all patents resulting from continuations-in-part, divisions, renewals, reissues and extensions based on said patents or the applications therefor, but only insofar as it relates to an *office copier product.*

F. "Issued" means published and either issued, granted, sealed or registered.

G. "Corresponding Patents" means two or more *patents,* each of which has *issued* in a different country, is entitled to the same priority date (or could have been if timely filed) and is based upon the same conception and reduction to practice.

H. "Present Patent" means a United States or *foreign patent issued* on or before the date of issuance of this order and all *corresponding patents* regardless of the date they are *issued.*

I. "Future Patent" means a United States or *foreign patent* other than a *present patent issued* on a patent application having an effective filing date prior to three years after the date of issuance of this order or *issued* during the six years following the date of issuance of this order, and all *corresponding patents,* regardless of the date they are *issued.*

J. "Foreign Patent" means a *patent issued* by a country other than the United States.

K. "Xerox Patent" means a *patent* which is owned or controlled by *Xerox, Rank Xerox* or *Fuji Xerox* or under which one or more of them has the power to grant licenses or sublicenses to *persons. Xerox'* power to comply with this order with respect to *patents* owned or controlled by *Rank Xerox* or *Fuji Xerox,* or under which they have the power to grant licenses or sublicenses, is confirmed in the undertakings of *Rank Xerox* and *Fuji Xerox* which have been submitted to the Commission.

L. "Order Patent" means a *present* or *Future* Xerox *patent* except one licensed pursuant to paragraph X(b) of this order.

M. A "Patent of the Licensee" means a *patent* which is owned or controlled by a *licensee,* or a *patent* under which such *licensee* has the power to grant licenses or sublicenses.

N. "Improvement Patent" means a *patent* on an invention which, if practiced, would infringe a licensed *patent* and which *improvement patent* is owned or controlled by the licensee of such *patent* or is one under which such licensee has the power to grant licenses or sublicenses. Determination of what is an *improvement patent* shall be made by reference to a licensed United States *patent*, if any, or if there is no such United States *patent*, by reference to the licensed *foreign patent*.

O. "Office Copier" means a machine for the convenient reproduction of an original document and accessories physically attached to such machine. The term "Office Copier" refers to all xerographic and nonxerographic office copiers, including but not limited to polychromatic color office copiers, high speed office copiers (such as the Xerox Model 9200), hybrid offset office copiers (such as the AMCD) and office copiers adapted to receive micro input as well as hard copy input, but does not include specialized use copiers (such as engineering drawing and microfilm copiers), or offset, stencil, or spirit duplicator machines.

P. "Office Copier Product" means an *office copier* and parts, components, raw materials and consumable supplies for use therein, including but not limited to photosensitive elements, refined selenium, metal alloys for machine parts, toner, developer, paper, and containers (such as toner cartridges) for consumable supplies.

Q. "Royalty-Bearing Product" means (1) an *office copier*, (2) toner, developer, paper, and similar consumable supplies, (3) containers (such as toner cartridges) for consumable supplies and (4) photosensitive elements, any of which are covered by a licensed *patent* other than one which is royalty-free.

R. "Net Revenues" shall mean the total revenues received by the licensee from the lease or sale, as the case may be, of a *Royalty-bearing product*, or in the case of a lease of a *royalty-bearing product*, at the option of the licensee, the published selling price for such *royalty-bearing product*. Any of the following items, or any comparable items, may be deducted from the aforesaid total revenues or published selling price when they are separately stated on the invoice:

(a) Packing costs;

(b) Actual transportation and insurance costs from place of shipment to point of installation;

(c) Excise, sales, use and property taxes;

(d) Import and export duties and taxes;

(e) The fair market value of replacement parts and components; which are not covered by a licensed *patent;*

(f) The fair market value of consumable supplies which are not covered by a licensed *patent* whether or not they are in a licensed container;

(g) Actual credit to customers on account of any *royalty-bearing product* which is not accepted by the customer;

(h) Costs of servicing or repairing the *royalty-bearing product* excluding the costs of parts or components covered by a licensed *patent.*

To the extent that the amounts charged for the above items can be verified by referring to separate *bona fide* offers of such services or products, or to separate documents as in the case of taxes or duties, such amounts need not appear on the invoice.

S. "Polychromatic Color Office Copier Product" means an *office copier product* specially adapted to produce multicolor copy.

T. "Know-how" means all written materials used by Xerox Corporation in manufacturing, refurbishing, reconditioning, retrofitting and servicing its *office copier products* which Xerox Corporation is not specifically prohibited by a legally enforceable obligation from disclosing, including but not limited to blueprints, drawings, formulae, manuals, process descriptions, production methods, specifications, quality control and test standards and computer programs.

U. "Commercially available" means generally available for immediate sale or lease to consumers in an area at least as large as an area served by at least one sales branch of the seller or lessor and on publicly announced terms.

V. "IBM" means International Business Machines Corporation, a corporation organized and existing under the laws of the State of New York, and its *subsidiaries*, successors and assigns, and directors, officers, employees, agents and representatives.

W. "United States" means the United States of America, its territories or possessions, the District of Columbia, and the Commonwealth of Puerto Rico.

II

It is further ordered, That XEROX shall forthwith grant or cause to be granted to any PERSON making written application to *Xerox* at any time under this order a nonexclusive license for the full unexpired term under any, some or all *order patents* to make, have made, use or vend any, some or all of the following:

(1) *Office copiers* (including the right to have made parts, components and raw materials for use therein), (2) toner, developer, paper and similar consumable supplies, (3) toner, developer, paper and similar consumable supplies which may be used in future OFFICE COPIERS, (4) containers (such as toner cartridges) for consumable supplies, and (5) photosensitive elements. However, at *Xerox*' option exercised on a nondiscriminatory basis, the effective date of licenses pertaining to

polychromatic color office copier products may be up to three years from the date of issuance of this order for *present patents* and three years from the date the *patent* is *issued* for *future patents*. Nothing in any license granted pursuant to the terms of this order shall be deemed to prohibit a *licensee* from using a licensed *office copier* in conjunction with any other device for use in addition to the convenient reproduction of an original document.

III

Xerox, *Rank Xerox* and *Fuji Xerox* shall agree not to sue any *licensee*, or customers or suppliers of the *licensee*, for *patent* infringement or royalties with respect to any *office copier*, photosensitive element, toner, developer, paper or container (such as toner cartridges) for consumable supplies manufactured by or for the *licensee* prior to the date of issuance of this order, or to maintain any such suit.

IV

It is further ordered, That no license of an *order patent* granted pursuant to the terms of this order shall contain or be conditioned upon any restriction, except as hereinafter provided:

A. The *licensee* may, at his option, designate up to a total of three *order patents* which shall be licensed or sublicensed royalty-free; *Provided, however*, That, in each country, the *licensee* may substitute another *order patent* as royalty-free for any *order patent* previously designated as royalty-free which the *licensee* has discontinued using in that country. On *order patents* other than the three designated as royalty-free by the *licensee*, *Xerox* may, in its sole discretion, charge a royalty not to exceed 1/2 percent per PATENT up to a maximum accumulated royalty of 1 1/2 percent of the *licensee's net revenues* for each *royalty-bearing product* which is manufactured, leased or sold by or for the *licensee*. With respect to any *royalty-bearing product* of the *licensee* which the *licensee* uses or consumes himself, the royalty shall be computed on the basis of the *net revenues* that would have been received by the *licensee* in an ordinary commercial transaction. The royalty shall be computed separately for each *royalty-bearing product* on the basis of *order patents* subject to royalty which are used in such *royalty-bearing product*. In no event shall more than three royalty-free *patents* apply to any one *royalty-bearing product* at any one time irrespective of the number of licenses granted by *Xerox* with respect to such *royalty-bearing product*. For the purpose of this Paragraph IV A, a *patent* and all *Corresponding Patents* in all countries shall count as one *patent*. The *licensee* need not take a license under any *corresponding patent*.

B. *Xerox* may require that a *licensee* agree not to sue *Xerox*, *Rank Xerox* or *Fuji Xerox*, or their customers or suppliers, for PATENT infringement or royalties with respect to any *office copier*, photosensitive element, toner, developer, paper or container (such as toner cartridges) for consumable supplies manufactured by or for them prior to the date of issuance of this order, or to maintain any such suit.

C. To the extent the *licensee* has the power to grant licenses or sublicenses, *Xerox* may require the grant to *Xerox*, *Rank Xerox* and *Fuji Xerox* of a nonexclusive license for the full unexpired term under any, some or all *patents* of the *licensee* to make, have made, use or vend any, some or all of the following: (a) *office copiers* (including the right to have made parts, components, and raw materials for use therein), (b) toner, developer, paper and similar consumable supplies, (c) toner, developer, paper, and similar consumable supplies which may be used in future *office copiers*, (d) containers (such as toner cartridges) for consumable supplies, and (e) photosensitive elements, as hereinafter provided in this Paragraph IV C.

(1) *Xerox* may (at any time) require the license of one *patent of the licensee* to *Xerox*, *Rank Xerox* and *Fuji Xerox* for each *Xerox patent* licensed to the *licensee* in excess of the first three *order patents* licensed to the *licensee* but in so doing *Xerox* may not require the license of (a) a greater number of *present patents of the licensee* than the number of *Xerox present patents* licensed to the *licensee*, or (b) a greater number of *future patents* of the *licensee* than the number of *Xerox future patents* licensed to the *licensee*. Notwithstanding the foregoing, for purposes of determining how many *present patents* or *future patents of the licensee* which *Xerox*, *Rank Xerox* and *Fuji Xerox* are entitled to license, the *licensee* shall have the right, if exercised at the time of first receipt of a license from *Xerox* under Paragraph II of this order, to have the first three *order patents* licensed from *Xerox* count, at the *licensee's* option, as *Xerox present patents*, or as *Xerox future patents* or as any combination of *Xerox present patents* and *Xerox future patents*, irrespective of the actual character of such *order patents*. For the purpose of determining the number of *patents* under this Paragraph IV C(1), (a) a *patent* and all *corresponding patents* in all countries shall count as one *patent*, and (b) the substitution of a previously unlicensed *order patent* shall count as an additional *patent* unless the *patent* for which substitution is made was dedicated, revoked, disclaimed, or has expired or lapsed, or was held invalid or unenforceable. *Xerox*, *Rank Xerox* and *Fuji Xerox* need not take a license under any *corresponding patent*. A *licensee* shall have no

obligation to grant a license to *Xerox*, *Rank Xerox* or *Fuji Xerox* in any country in which, by reason of governmental action, *Xerox* has been prevented from granting or causing to be granted a *patent* license requested pursuant to this order. *Xerox* shall have no obligation to grant licenses in any country in which, by reason of governmental action, the *licensee* is prevented from granting licenses to *Xerox*, *Rank Xerox* or *Fuji Xerox* pursuant to the terms of this Paragraph IV C(1).

(2) The license of *present patents of the licensee* shall not become effective until four years after the date of issuance of this order or four years after an *office copier product* (of the *licensee* or its licensee) using an invention covered by the *patent* first becomes *commercially available*, whichever is later. The license of *future patents of the licensee* shall not become effective until four years after the date the *future patent of the licensee* is *issued* or four years after an *office copier product* (of the *licensee* or its licensee) using an invention covered by the *patent* first becomes *commercially available*, whichever is later. This Paragraph IV C(2) shall not apply to IBM, except that IBM may require that the effective date of licenses pertaining to *polychromatic color office copier products* not become effective for up to three years from the date of issuance of this order for *present patents* and three years from the date IBM's *future patents* are *issued*. With respect to *corresponding future patents* the date such *patents* are *issued* shall be the date that the first such *corresponding future patent* is *issued*.

(3) *Xerox* may (at any time) require the immediate license to *Xerox*, *Rank Xerox* and *Fuji Xerox* of any of the *present* or *future patents of the licensee* (a) which would be infringed by a *Xerox*, *Rank Xerox* or *Fuji Xerox office copier* manufactured by any of them following the date of issuance of this order if the invention covered by the *patent* is the same as that embodied in an *office copier* manufactured by any of them prior to the date of issuance of this order, or (b) which would be infringed by a *Xerox*, *Rank Xerox* or *Fuji Xerox office copier product* which any of them makes *commercially available* during the six years following the date of issuance of this order if the invention of the *patent* was embodied in a device which, as of the first publication or public use anywhere in the world of the invention covered by the *patent of the licensee* or application therefor (i) actually had been built and incorporated in an engineering model or prototype model of the *office copier* by *Xerox*, *Rank Xerox* or *Fuji Xerox* and (ii) was part of a *Xerox*, *Rank Xerox* or *Fuji Xerox* funded product program. As used in this Paragraph IV C(3), "engineering model" means the first complete assembly of all the sub-assemblies of the *office copier*; and "prototype model" means the product development stage which follows the engineering model, if any. Licenses granted pursuant to this Paragraph

IV C(3) shall not be subject to the provisions of Paragraph IV C(1) (except that they shall count for the *licensee* as *patents* licensed to *Xerox, Rank Xerox* and *Fuji Xerox* if and when they become entitled to a license pursuant to that paragraph) or Paragraph IV C(2), but shall be subject to all other provisions of this order. The burden of establishing the right to a license under this Paragraph IV C(3) shall be on *Xerox.*

(4) *Xerox* may require a *licensee* to grant to *Xerox, Rank Xerox,* and *Fuji Xerox* a nonexclusive license under all *improvement patents* on *Xerox patents* licensed to the *licensee.* Such licenses shall not be subject to the provisions of Paragraph IV C(1) (except that *improvement patents of the licensee* shall count for the *licensee* as *patents* licensed to *Xerox, Rank Xerox,* and *Fuji Xerox* if and when they become entitled to a license pursuant to that paragraph) but shall be subject to all other provisions of this order.

(5) *Xerox* shall grant to the *licensee* a nonexclusive license under all *Xerox improvement patents* on *patents* licensed to *Xerox.* Such licenses shall be subject to all the provisions of this order except that they shall not count for *Xerox* as *patents* licensed by *Xerox, Rank Xerox,* and *Fuji Xerox* for purposes of Paragraph IV C(1).

(6) The *licensee* may charge *Xerox, Rank Xerox* and *Fuji Xerox* a reasonable royalty for *patents* licensed to any or all of them pursuant to this order, computed on the basis of the *net revenues* of *Xerox, Rank Xerox,* and *Fuji Xerox* for each *royalty-bearing product* which they manufactured, leased or sold. With respect to any *royalty-bearing product* of *Xerox, Rank Xerox* and *Fuji Xerox,* which they use or consume themselves, the royalty shall be computed on the basis of the *net revenues* that would have been received in an ordinary commercial transaction. The royalty shall be computed separately for each *royalty-bearing product* on the basis of the *patents* which are used in such *royalty-bearing product.*

(7) *Xerox, Rank Xerox* and *Fuji Xerox* may require that they be permitted to sublicense any PERSON in which they own, directly or indirectly, 50 percent or less, but not less than 20 percent of the voting stock if such *person* makes its *present* and *future patents* available for licensing pursuant to Paragraph II of this order. All such *persons* shall be identified to anyone making written request, and a list of all such *persons* current as of the date of issuance of this order shall be filed on the public record of the Commission. Any changes in said list shall be filed with the Commission within 30 days after they occur.

(8) A license to *Xerox* pursuant to this Paragraph IV C shall contain the provisions specified in Paragraphs IV H and IV I of this order and

may contain the provisions specified in Paragraphs IV D, IV E, IV F, IV G, and IV J of this order.

(9) If *Xerox* grants a license under *order patents* either pursuant to the terms of Paragraph II of this order or otherwise, the license agreement shall contain the irrevocable covenant of the licensee to license such of its *patents* as are licensed to *Xerox* on reasonable terms and conditions (including the license to itself of its licensees' *patents* or *improvement patents*) to any other *person* who is entitled to a license from *Xerox* pursuant to Paragraph II of this order, Provided That such license need not be effective prior to the effective date of the licensee's license to *Xerox*. Within 60 days following execution of a license agreement subject to this Paragraph IV C (9), *Xerox* shall submit to the Commission a copy thereof *in camera*.

D. Reasonable provisions may be made for the retention of books and records and for periodic royalty reports by the licensee to the manager of patent licensing of the licensor, and for inspection of such books and records by an independent auditor or any other person reasonably acceptable to both the licensor and the licensee who shall report to said manager only the amount of the royalty due and payable. The manager of patent licensing of the licensor shall not disclose the content of said periodic royalty reports to any director, officer, employee, agent or representative of the licensor other than the members of his staff and employees necessarily involved in recording and depositing checks in a routine manner, who shall be similarly bound, unless the royalty owed is not timely paid. In the event that the licensor does not have a manager of patent licensing, a mutually agreeable employee of the licensor shall be designated in his stead.

E. Notwithstanding any other provision of this order, any party taking a sublicense under the terms of this order may be required to reimburse the sublicensor for any payments it is legally required to make and does make to the original licensor on account of activities of the sublicensee under any sublicense granted pursuant hereto.

F. Reasonable provisions may be made for cancellation of the license granted to the licensee upon failure of the licensee to make the reports, pay the royalties, or permit the inspection of his books and records as hereinbefore provided, and, upon a wrongful act of the *licensee* respecting the restrictions on use or disclosure of *know-how* contained in Paragraph VII of this order, for *Xerox* to apply to the Commission for leave to cancel said license, in which event the decision of the Commission shall be final and non-appealable by either *Xerox* or the *licensee*.

G. The license may be nontransferable.

H. The license must provide that the licensee may cancel the license in whole or as to any specified PATENTS at any time by giving 30 days notice in writing to the licensor; however, the licensor shall have the option to continue in effect any right granted to the licensor pursuant to Paragraph IV C of this order.

I. The license must provide for the arbitration specified in Paragraph VIII of this order and for suspension thereof pursuant to Paragraph VIII C of this order.

J. In granting a license pursuant to Paragraph II of this order, there shall be no discrimination by *Xerox, Rank Xerox, Fuji Xerox* or any *person* in the royalty charged as among royalty-paying *licensees* who procure the same rights under the same *patents;* but nothing herein contained shall prevent *Xerox, Rank Xerox, Fuji Xerox* or any *person* from negotiating nonexclusive licenses and cross-licenses outside the terms (except Paragraph IV C(9) of this order) of this order with anyone who so elects.

V

It is further ordered, That nothing herein shall be deemed to prevent any *licensee* or applicant for a license from attacking in any proceeding or controversy the validity, scope or enforceability of any *present* or *future patent,* nor shall this order be construed as imputing any validity, enforceability or value to any such *patent.*

VI

It is further ordered, That *Xerox* shall allow each *person* who is a licensee of a *Xerox patent* on the date of issuance of this order to obtain a license pursuant to the terms of this order; however, *Xerox, Rank Xerox* and *Fuji Xerox* shall have the right to continue in effect any industrial property rights under the terms previously granted to *Xerox, Rank Xerox* or *Fuji Xerox* by the licensee, and such licensee shall have the right to continue in effect any industrial property rights under the terms previously granted to the licensee by *Xerox, Rank Xerox* or *Fuji Xerox.*

VII

It is further ordered, That:

A. During the period ending five years after the date of issuance of this order, *Xerox* shall make available to *licensees* of United States *order patents* under a license pursuant to the terms of this order who make written application therefor all *know-how* (1) in existence on the date of issuance of this order or (2) made available to any other *United States* manufacturer (except a supplier to *Xerox*) or *United States* marketer of *office copier products* for use in connection with such PRODUCTS during the five year period. The delivery of the *know-how* requested shall begin within 30 days and shall be completed within 120 days after the initial application therefor is received by *Xerox;* the response to subsequent requests shall be completed within a reasonable period of time. Such *know-how* shall be of such a nature as to enable one skilled in manufacturing electro-mechanical office machinery and in the technologies embodied in *office copier products* or comparable technologies to manufacture, refurbish, recondition and service Xerox Corporation's *office copier products.* Upon written application, *Xerox* shall provide written clarification respecting such *know-how* where such clarification is reasonably necessary. *Xerox* may make a reasonable charge for the cost of collecting and duplicating *know-how* which it discloses and for the time spent in clarification. At the option of such *licensee*, *Xerox* shall disclose *know-how* pertaining to photosensitive elements, supplies, raw materials and particular *office copier* models and shall limit its charge to such *know-how. Xerox* may require the *licensee* to agree that all *know-how* disclosed to the *licensee* by *Xerox* shall be considered a *Xerox* trade secret and to undertake, in good faith, to use the *know-how* only in connection with the manufacture in the *United States* of *office copier products* by or for the *licensee* and not to disclose or permit the disclosure of the *know-how* to anyone other than a supplier who is or will be manufacturing in the *United States* and who enters into a similar agreement and undertaking respecting disclosure and use, unless the *licensee* can establish that such *know-how* (1) was previously known to the *licensee* prior to the disclosure by *Xerox*, or (2) is or becomes part of the public domain through no wrongful act of *licensee*, or (3) is subsequently otherwise legally acquired by *licensee*, or (4) was or is disclosed by *Xerox* to third parties on a non-confidential basis.

B. Commencing 120 days after the date of issuance of this order *Xerox* shall make available to *know-how* licensees a list of the *persons* whose *know-how Xerox* claims to be prohibited from disclosing. Such list shall be subject to the restrictions on use and disclosure of *know-how* provided in this Paragraph VII. *Xerox* need not make *know-how* available to IBM.

VIII

It is further ordered, That:

A. Upon receipt of a written application for a *patent* license or for a *patent* license and disclosure of *know-how* under the terms of this order, *Xerox* shall advise the applicant in writing of the terms of such license and/or *know-how* disclosure. If a dispute arises between *Xerox* and a *licensee* or applicant regarding their respective rights under this order (except where certain matters are specifically referable to the Commission as provided in Paragraph IV F of this order), and if the parties to the dispute are unable to resolve it within 90 days after the existence of such dispute is communicated in writing to *Xerox* or to the *licensee* or applicant, the dispute shall be determined by arbitration pursuant to this Paragraph VIII. Notwithstanding the provisions of Paragraph V of this order, no dispute between *Xerox* and a *licensee* or applicant with respect to the validity, enforceability, infringement or scope of any *patent* shall be subject to arbitration pursuant to this order.

B. Unless otherwise agreed to by the parties, arbitration shall be held at a location in the *United States* designated by the *licensee* or applicant and in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The award of the arbitrator shall be final and binding on both parties. The arbitrator shall, upon a proper showing, issue protective orders and/or receive evidence *in camera* in the same manner as an administrative law judge of the Federal Trade Commission.

C. Within 10 days after the initiation of arbitration, *Xerox* shall notify the Commission of the parties to the arbitration, the name of the arbitrator, and the nature of the dispute. *Xerox* shall notify the Commission of the dates of arbitration hearings and other arbitration proceedings, if any, as soon as possible. Copies of all papers in the nature of pleadings shall be served upon the Commission, and the Commission or its designee shall have the right to attend any arbitration proceeding. The Commission may, in its sole discretion, at any time before evidence has been submitted, suspend the provisions of this Paragraph VIII respecting arbitration and itself resolve any or all disputes subject thereto. The Commission will not assert any claim that *Xerox* has violated this order with respect to the subject matter of the arbitration where *Xerox* has complied with the award of the arbitrator.

D. Pending the completion of any negotiation, arbitration or Commission action respecting a dispute subject to this Paragraph VIII, *Xerox* and the applicant shall enter into a license, and *Xerox* shall make disclosure of *know-how*, pursuant to the terms of this order with respect to the matters not in dispute. Upon conclusion of any negotiation, arbitration or Commission action, the disputed license or *know-how* disclosure may provide for such adjustments as the parties agree to or as the arbitrator or Commission, as the case may be, deems appropriate.

IX

It is further ordered, That for the period ending six years after the date of issuance of this order, *Xerox* shall make available (a) English language translations of all *order patents* issued after the date of issuance of this order to *Xerox, Rank Xerox,* and *Fuji Xerox* by France, The Federal Republic of Germany, Japan, and The Netherlands, and (b) copies of all English language *corresponding patents* at a reasonable charge not to exceed the cost of reproduction and, if the translation is made at the instance of the requesting *person,* the cost of translation.

X

It is further ordered, That for the period ending 10 years after the date of issuance of this order, *Xerox* shall not, directly or indirectly, acquire from any *person* (including The Rank Organisation Limited and Fuji Photo Film Co., Ltd.) any exclusive rights, whether by license or otherwise to any *patents* or know-how for use in *office copier products* except those (a) resulting from the work of *Xerox, Rank Xerox* or *Fuji Xerox* employees, *Xerox, Rank Xerox* or *Fuji Xerox* consultants, or research organizations doing sponsored research for *Xerox, Rank Xerox* or *Fuji Xerox,* or (b) under which *Xerox* grants or causes to be granted to any *person* making written application a non-exclusive, royalty-free, unrestricted license to make, have made, use or vend *office copier products* under such *patent* or know-how. Any exclusive rights acquired by *Xerox* in accordance with part (a) of this Paragraph X shall be on such terms as will permit *Xerox* to comply with the licensing provisions of Paragraph II of this order. This Paragraph X shall not apply to any acquisition or exclusive license of a *foreign patent* or of the right to use the know-how in a foreign country by *Rank Xerox* or *Fuji Xerox.*

XI

It is further ordered, That *Xerox* shall not dispose or permit the disposition of any *patents* or rights thereunder so as to deprive it of the power to grant or cause to be granted the licenses required by this order.

XII

It is further ordered, That for the period ending 10 years after the date of issuance of this order *Xerox* shall not, directly or indirectly, acquire any interest in a *person* (including The Rank Organisation

Limited and Fuji Photo Film Co. Ltd.) engaged in the manufacture, sale, lease or development of *office copiers*, or toner, developer, paper or photosensitive elements used in *office copiers* or form a joint venture involving any such products with any such *person* (except The Rank Organisation Limited or Fuji Photo Film Co. Ltd. so long as either is a party to a joint venture with *Xerox* or *Rank Xerox* relating to *office copier products*). This paragraph shall not apply (1) to the acquisition by XEROX of an interest in or joint venture with any *person* in which at the time of the acquisition or joint venture it had a stock interest, other than a PERSON in which *Xerox* had such an interest by reason of an investment in employee funds such as pension or retirement plans (*Xerox* shall promptly file with the Commission a list of the *persons* in which it has a stock interest as of the date of issuance of this order and to which this exception is to apply. Said list shall be updated as part of the annual compliance reports required by Paragraph XIX of this order), or (2) to any acquisition by *Rank Xerox* or *Fuji Xerox* of a *person* not engaged in the manufacture, sale, lease or development of *office copiers* but who is engaged in the manufacture, sale, lease or development, solely outside of the *United States*, of toner, developer, paper or photosensitive elements used in *office copiers*, or to the formation of a joint venture by *Rank Xerox* or *Fuji Xerox* involving any such products with any such PERSON, or (3) to a joint venture involving new capacity for the production of paper with a *person* other than one engaged in the manufacture, sale, lease or development of *office copiers*, or toner, developer or photosensitive elements used in *office copiers*, or (4) to the acquisition by *Xerox* of an interest in any PERSON the sole purpose of which is an investment in employee funds such as pension or retirement plans. Such acquisitions, however, shall not be deemed immune or exempt from the provisions of the antitrust laws (including the Federal Trade Commission Act) by reason of anything contained in this order.

XIII

It is further ordered, That during the period ending 10 years after the date of issuance of this order, *Xerox* shall not, directly or indirectly, make contracts in the *United States* restricting employees working in its *office copier products* business from in the future working for any other *person*, provided that *Xerox* may make contracts which prohibit the use or disclosure of trade secrets and confidential information as prohibited by *Xerox*' present form of "Proprietary Information and Conflict of Interest Agreement" which has been submitted to the Commission.

XIV

It is further ordered, That during the period commencing on a date not later than nine months after the date of issuance of this order and ending five years after said commencement date, *Xerox* shall not, directly or indirectly, utilize in the *United States* any price plan for the sale or lease of an *office copier* which depends upon the customer purchasing or leasing one or more additional *office copiers* of a different model. Any minimum qualifying level for a pricing plan or price schedule respecting any *office copier* shall be based solely on volume, revenues, number of *office copiers*, or the like of the same model.

XV

It is further ordered, That:

A. During the period ending 10 years after the date of issuance of this order, *Xerox* shall, in addition to instructing its employees in the *United States* not to comment on the quality of competitive toner or developer, place a notice in a location conspicuous to the key operator on each *office copier* sold or leased by it in the *United States* stating the following: "Xerox Corporation manufactures and distributes toner and developer for use in this machine. Other suppliers may also provide toner and developer for this machine. It may be necessary to adjust the machine to accommodate toner or developer which is provided by either *Xerox* or any other supplier."

B. In the event that *Xerox* shall publish reasonable specifications for the toner and developer used in a particular machine, *Xerox* (1) may include the following additional statement in the aforementioned notice: "The toner and developer used in this machine must comply with specifications published by Xerox Corporation.," (2) shall promptly notify all suppliers of toner and developer, who request such notification, of any changes in such specifications, and shall promptly notify a supplier when his toner or developer does not comply with such specifications in a letter signed by an officer of *Xerox*, and (3) may not require suppliers of toner or developer for *Xerox' office copiers* to provide to *Xerox'* customers a certification that the toner or developer supplied by them meets such specifications.

C. *Xerox* shall promptly notify all suppliers of toner and developer, who request such notification, of changes in *Xerox office copiers* which may affect the useability of the toner and developer in such *office copiers*.

D. Nothing herein contained shall prevent *Xerox* from advising a customer, in a letter signed by an officer of *Xerox*, that a non-*Xerox* toner or developer is not useable in a particular *Xerox office copier,* provided that *Xerox* simultaneously advises the supplier of such toner or developer in a letter signed by an officer of *Xerox,* that (1) in the opinion of *Xerox,* the supplier's toner or developer is not useable in a particular *office copier* model, and (2) disputes regarding the useability of the toner and developer are subject to arbitration pursuant to this order. Disputes regarding the useability of non-*Xerox* toner and developer or the reasonableness of *Xerox* specifications shall be subject to arbitration in accordance with Paragraph VIII (b) and (c) of this order.

E. *Xerox* may not, directly or indirectly, require in the *United States* that it be the sole supplier of toner or developer for leased or sold *office copiers;* however, it may impose such a requirement with respect to a new model during the six months from the date such model first becomes *commercially available.* For purposes of this Paragraph XV, "new model" includes collectively the basic *office copier* model and all subsequent models not embodying material variations in the xerographic processor thereof.

XVI

It is further ordered, That during the period ending 10 years after the date of issuance of this order, (1) *Xerox* shall not in the *United States* take orders or announce that it will take orders for the sale or lease of an OFFICE COPIER more than three months prior to the time when it is reasonably expected to be *commercially available,* (2) *Xerox* shall not promote any new *office copier* in any area of the United States more than three months prior to the time that *Xerox* reasonably expects such new *office copier* to be first *commercially available* in that area except for national advertising which includes a statement that the model is available only in the areas where *Xerox* reasonably expects such model to be *commercially available,* and (3) at the time *Xerox* announces that it will take orders for the lease of an *office copier* in the United States, it shall also announce the selling price of such *office copier.*

XVII

It is further ordered, That within 30 days after the date of issuance of this order and annually thereafter until the expiration of all *future patents, Xerox* shall submit for publication in the Official Gazette of the United States Patent Office a notice (1) identifying by number, title, date of issue and category of subject matter (to an extent acceptable to the Commission) all United States *patents* which it is empowered to license together with all *foreign patents* based on the patent application from which each United States *patent* originates; (2) stating that *Xerox* shall grant licenses under (a) its *order patents* to make, have made, use and vend *office copier products* under the terms of this order, and (b) patents required to be licensed pursuant to the terms of Paragraph X of this order, if any; (3) stating that *Xerox* shall disclose *know-how* to a licensee of its United States *order patents* for use in connection with the manufacture of *office copier products* in the *United States* under the terms of this order; and (4) stating that a copy of this order and a list of *patents* licensed to *Xerox* which are subject to the provisions of Paragraph II and IV C(9) of this order, if any, are available from *Xerox* upon written request. Beginning 30 days following the date of issuance of this order, and until the expiration of all *Xerox future patents*, *Xerox* shall send a copy of this order and of the current edition of such notice to each person who inquires as to the availability of a license for *office copier products*, or to whom *Xerox* has offered such a license at any time after Jan. 1, 1970.

XVIII

It is further ordered, That *Xerox* notify the Commission at least 30 days prior to any proposed change in the respondent, *Rank Xerox* or *Fuji Xerox* which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other such change.

XIX

It is further ordered, That *Xerox* shall file with the Commission reports, in writing, setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this order. Said reports shall be filed 60 days and 180 days after the date of issuance of this order, and yearly thereafter on the anniversary date of the order during the period in which *Xerox* has obligations under this order, and shall contain such information and documents as are requested by the Bureau of Competition or the Commission relating to compliance with this order.

Commissioner Nye not participating.

In the Matter of

RETAIL CREDIT COMPANY

Docket 8920. Order, July 29, 1975.

Affirmation of law judge's denial of respondent's motion for a stay of further proceedings and, in the alternative, for leave to supplement the record.

Appearances

For the Commission: *William M. Sexton.*

For the respondent: *J. Wallace Adair, Howrey, Simon, Baker & Murchison,* Wash., D.C. *Kent E. Most, Hansell, Post, Brandon & Dorsey,* Atlanta, Ga.

Order Affirming Denial of Respondent's Motion to Stay Proceedings, or, in the Alternative, for Permission to Supplement the Record with Newly Discovered Evidence

This matter is before us on respondent's application for review of the administrative law judge's order, dated June 11, 1975, denying respondent's motion to stay proceedings pending the outcome of its Freedom of Information Act ("FOIA") suit against the Commission in the United States District Court for the District of Columbia or, in the alternative, for leave to supplement the record with newly discovered evidence which might be obtained by reason of the lawsuit.

By order dated June 24, 1975, the administrative law judge certified his ruling for review by the Commission pursuant to Section 3.23(b) of the Commission's Rules of Practice, 16 C.F.R. §3.23(b).

Respondent's motion offers too speculative a ground to warrant staying further proceedings since it assumes that respondent will ultimately obtain the documents and that the documents will contain information necessary to a resolution of the issues in this case. *See Encyclopaedia Britannica, Inc.* Docket 8908, order of May 22, 1975 Denying Motion to Postpone Oral Argument.

The administrative law judge's denial of respondent's motion, in the alternative, for permission to supplement the record with newly discovered evidence obtained from the Commission by reason of its FOIA request is also affirmed. The denial was without prejudice to respondent's right to renew the motion "* * * if and when respondent is in a position to move admission of specific and identified documents it may obtain under the FOIA into this record while the administrative law judge has jurisdiction of this proceeding." Such motions should be granted, at the very least, only upon a showing that the newly discovered evidence is relevant. It would, accordingly, be premature to decide whether any materials which might be obtained as a result of the FOIA litigation should be included in the record.[1]

It is ordered, That the law judge's denial of respondent's motion for a stay of further proceedings and, in the alternative, for leave to supplement the record be, and it hereby is, affirmed.

IN THE MATTER OF

AMREP CORPORATION

Docket 9018. Order, July 29, 1975

Denial of (1) respondent's motion for a stay of proceedings insofar as it invokes the administrative discretion of the Commission; and (2) respondent's request for oral argument on this matter.

Appearances

For the Commission: *Perry W. Winston.*

For the respondent: *Theodore R. Schreier* and *David I. Parkoff,* New York City.

ORDER DENYING MOTION FOR A STAY

This matter is before us on the administrative law judge's certification, pursuant to Section 3.22 of the Rules of Practice, of respondent's motion for a stay of these proceedings insofar as it invokes the administrative discretion of the Commission. The law judge rejected respondent's argument that it was entitled to such a stay as a matter of law to avoid prejudice to the rights of certain of its officers who are the subjects of a grand jury investigation now being conducted by the United States Attorney for the Southern District of New York.

For the reasons stated in the law judge's order, we conclude that none of the arguments raised in respondent's motion warrant a discretionary stay of these proceedings.* We find nothing in this matter which would warrant an oral argument as requested by respondent. Accordingly,

It is ordered, That the aforesaid motion, as certified by the law judge's order of June 30, 1975, be, and it hereby is, denied.

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[1] We reject respondent's argument that the administrative law judge lacked authority to rule on its motion for a stay. Disposition of respondent's motion involved questions relating to the timing of the taking of evidence and the completion of the evidentiary record. The questions were, accordingly, addressed to the administrative law judge's fact-finding function. *Compare Philip Morris, Inc.*, 79 F.T.C. 1023 (1971).

* Respondent has also filed a reply to complaint counsel's answer to its motion. Although the reply is not specifically authorized by the Commission's Rules of Practice, the Commission has, in its discretion, considered the arguments raised therein in reaching its decision.

It is further ordered, That respondent's request for oral argument on this matter be, and it hereby is, denied.

In the Matter of

CREDIT DATA NORTHWEST, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR CREDIT REPORTING ACTS

Docket C-2712. Complaint, July 29, 1975-Decision, July 29, 1975

Consent order requiring a Seattle, Wash., credit reporting agency and three affiliated agencies located in Washington and Canada, among other things to cease collecting, assembling, furnishing or utilizing consumer reports in violation of the Fair Credit Reporting Act.

Appearances

For the Commission: *Dennis D. McFeely* and *Sarah J. Hughes*.
For the respondents: *Short, Cressman & Cable*, Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that Credit Data Northwest, a partnership doing business as Seattle Credit Bureau; Olympia Credit Bureau, Inc., Credit Bureau of Spokane, Inc., and Retail Credit Grantors Bureau, Ltd., corporations, individually and as partners in Credit Data Northwest; Terry B. Smith, individually and as general manager of Credit Data Northwest; and Allen F. Leiter, individually and as credit reporting manager of Credit Data Northwest; hereinafter sometimes referred to as respondents, have violated the provisions of the Fair Credit Reporting Act and the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. For the purposes of this complaint and the accompanying order to cease and desist, "consumer report" and "consumer reporting agency" are defined as set forth in Sections 603(d) and (f) of the Fair Credit Reporting Act, respectively. Furthermore, "member" is defined as persons, partnerships, corporations or other entities which have contracted with respondents to receive consumer reports upon request in return for monetary dues, report fees and the obligation to report consumer credit information to respondents.

"Nonmember" is defined as persons, partnerships, corporations or other entities which apply and pay for consumer reports on a single report basis without previous contractual arrangements and for a higher fee than members.

PAR. 2. Credit Data Northwest is a partnership existing and doing business under and by virtue of the laws of the State of Washington, under the assumed name Seattle Credit Bureau, with its office and principal place of business located at 1601 Second Ave., Seattle, Wash. Said respondent is a "consumer reporting agency" and is the sole successor and assign of Seattle Credit Bureau, Inc., a dissolved Washington corporation, and as such is liable for the acts and practices which were engaged in by Seattle Credit Bureau, Inc. Reference hereinafter to acts or omissions of "respondents" shall be deemed to include reference to acts or omissions of the former Seattle Credit Bureau, Inc. Credit Data Northwest is also liable for its own acts and practices as hereinafter alleged.

Olympia Credit Bureau, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 203 E. Fifth St., Olympia, Wash. Said respondent is a partner in Credit Data Northwest and is a "consumer reporting agency."

Credit Bureau of Spokane, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at W. 521 Maxwell St., Spokane, Wash. Said respondent is a partner in Credit Data Northwest and is a "consumer reporting agency."

Retail Credit Grantors Bureau, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the province of British Columbia, Canada, with its office and principal place of business located at 400 Robson St., Vancouver, British Columbia, Canada. Said respondent is a partner in Credit Data Northwest and is a "consumer reporting agency," doing business in the United States of America.

Terry B. Smith is the general manager of Credit Data Northwest, former president of Seattle Credit Bureau, Inc., and president of Olympia Credit Bureau, Inc. His address is 1601 Second Ave., Seattle, Wash.

Allen F. Leiter is credit reporting manager of Credit Data Northwest and a former officer of Seattle Credit Bureau, Inc. His address is 1601 Second Ave., Seattle, Wash.

Terry B. Smith and Allen F. Leiter formulated, directed and controlled the acts and practices of the former Seattle Credit Bureau, Inc. when it was operating as a consumer reporting agency, and now formulate, direct and control the acts and practices of Credit Data Northwest in its operations as a consumer reporting agency.

PAR. 3. All the acts and practices alleged hereafter occurred subsequent to Apr. 25, 1971, the effective date of the Fair Credit Reporting Act, in the ordinary course of respondents' business. Allegations of respondents' present acts or practices include past acts or practices.

PAR. 4. Respondents fail to maintain reasonable procedures designed to limit the furnishing of consumer reports to the purposes listed in Section 604 of the Fair Credit Reporting Act. Typical and illustrative, but not all inclusive, of the manner in which respondents fail to maintain such reasonable procedures are the following:

A. Respondents fail in certain instances to make reasonable efforts to verify the identity of new member and nonmember consumer report applicants.

B. Respondents fail in a substantial number of instances to require nonmember consumer report applicants to certify the purpose for which the consumer report is sought and that it will be used for no other purpose.

C. Respondents give in a substantial number of instances consumer reports to applicants who have stated purposes for which the reports were sought other than those purposes listed in Section 604 of the Fair Credit Reporting Act.

D. Respondents fail to specifically inquire of prospective members concerning the particular purposes for which information will be used, to set out such purposes in writing, and to require that prospective members certify to such purposes and certify that the information will be used for no other purposes as required by Section 607(a) of the Fair Credit Reporting Act.

E. Respondents fail to require members, such as private clubs, attorneys, private investigators and such other classes of members who respondents have substantial cause to believe have reason to obtain consumer reports for impermissible purposes under the Fair Credit Reporting Act, to certify the purposes for which the consumer reports are sought at the time of their request for such reports and that the information will be used for no other purpose.

F. Respondents fail to make reasonable efforts to verify the uses certified by member and nonmember consumer report users.

Therefore, respondents are in violation of Sections 604 and 607(a) of the Fair Credit Reporting Act.

PAR. 5. Respondents fail to maintain reasonable procedures designed to avoid the inclusion in consumer reports of adverse items of information which antedate the report by more than the applicable period specified in Section 605 of the Fair Credit Reporting Act, including, but not limited to, the failure to omit from consumer reports information concerning the delinquency of accounts when such delinquencies occurred more than seven years prior to the giving of the consumer report.

Therefore, respondents are in violation of Section 607(a) of the Fair Credit Reporting Act.

PAR. 6. Respondents fail to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individuals to whom the consumer reports relate. Illustrative of the manner in which respondents fail to follow such reasonable procedures is the failure to distinguish between persons with identical or similar names with the result that consumer reports contain information on the wrong individual.

Therefore, respondents are in violation of Section 607(b) of the Fair Credit Reporting Act.

PAR. 7. When the completeness or accuracy of an item of information in his or her file is disputed by a consumer, respondents fail in certain instances to:

A. Reinvestigate within a reasonable time;

B. Reinvestigate with the original creditor when an account placed for collection is disputed;

C. Record, after reinvestigation, the current status of information disputed by the consumer;

D. Promptly delete information which is found to be inaccurate or not verifiable after reinvestigation; and

E. Inform the consumer of results of reinvestigations adverse to the position of the consumer.

Therefore, respondents are in violation of Section 611(a) of the Fair Credit Reporting Act.

PAR. 8. Respondents fail in certain instances to:

A. Clearly and conspicuously disclose to the consumer his or her right to request that notification of deletions of information, and/or consumer statement, codification, or summary thereof with respect to disputed information, be sent by respondents to persons designated by the consumer and who have received the deleted or disputed information within the previous two years for employment purposes or within the previous six months for any other purpose;

B. Furnish notification of deletions of information and the consumer statement, codification or summary thereof to any persons specifically designated by the consumer and qualified under Section 611(d) of the Fair Credit Reporting Act to receive such information.

Therefore, respondents are in violation of Section 611(d) of the Fair Credit Reporting Act.

PAR. 9. When a dispute cannot be resolved and the consumer submits a brief statement of his or her version of the nature of the dispute, respondents fail in certain instances to clearly note in subsequent consumer reports containing the information in question that it is disputed by the consumer and provide either the consumer statement or a clear and accurate codification or summary thereof.

Therefore, respondents are in violation of Section 611(c) of the Fair Credit Reporting Act.

PAR. 10. The acts and practices and omissions set forth in Paragraphs Four through Nine are in violation of the Fair Credit Reporting Act and, pursuant to Section 621(a) of that Act, respondents have thereby violated Section 5(a) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Credit Data Northwest is a partnership existing and doing business in the State of Washington under the name Seattle Credit Bureau, with its office and principal place of business located at 1601 Second Ave., Seattle, Wash.

Respondent Olympia Credit Bureau, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 203 E. Fifth St., Olympia, Wash. Olympia Credit Bureau, Inc. is a partner in Credit Data Northwest.

Respondent Credit Bureau of Spokane, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at W. 521 Maxwell St., Spokane, Wash. Credit Bureau of Spokane, Inc. is a partner in Credit Data Northwest.

Respondent Retail Credit Grantors Bureau, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the province of British Columbia, Canada, with its office and principal place of business located at 400 Robson St., Vancouver, British Columbia, Canada. Retail Credit Grantors Bureau, Ltd. is a partner in Credit Data Northwest.

Respondent Terry B. Smith is the general manager of Credit Data Northwest and president of Olympia Credit Bureau, Inc. His address is 1601 Second Ave., Seattle, Wash.

Respondent Allen F. Leiter is credit reporting manager of Credit Data Northwest. His address is 1601 Second Ave., Seattle, Wash.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Credit Data Northwest, a partnership; Olympia Credit Bureau, Inc., Credit Bureau of Spokane, Inc., and Retail Credit Grantors Bureau, Ltd., corporations, individually and as partners in Credit Data Northwest; and Terry B. Smith and Allen F. Leiter, individually, and as principal operating officials of Credit Data Northwest; and respondents' agents, representatives, employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the collecting, assembling, evaluating or furnishing of consumer reports, as "consumer report" is defined in the Fair Credit Reporting Act (15 U.S.C. §1601, *et. seq.*), do forthwith cease and desist from:

1. Failing to make reasonable efforts to verify the identity of new members and nonmember consumer report applicants who are unknown to respondents by checking references, such as the yellow pages, a city directory, business reports, on-site inspection of the business premises or other methods adequate to reasonably ensure that such entities or persons are who they represent themselves to be.

2. Failing to require nonmember consumer report applicants at the time they apply for each consumer report to certify in writing the

purposes for which the consumer report is sought and that it will be used for no other purpose.

3. Furnishing consumer reports to members and nonmember applicants who have not, through the execution of a membership contract or an application for a single report, clearly stated a purpose for the report which is listed in Section 604 of the Fair Credit Reporting Act.

4. Failing to specifically inquire of prospective members concerning the particular purposes for which information will be used, to set out such purposes in the membership contract, and to require that prospective members certify to such purposes and certify that the information will be used for no other purposes as required by Section 607(a) of the Fair Credit Reporting Act.

5. Failing to require attorneys, private investigators and private clubs, and such other classes of members who respondents have substantial cause to believe have reason to obtain consumer reports for impermissible purposes, to certify orally or in writing at the time such members seek each consumer report, the purpose for which the information is sought, and that the information will be used for no other purpose, in accordance with Section 607(a) of the Fair Credit Reporting Act. The respondents shall require such members to agree in their membership contracts with respondents that if oral certification is given such members must provide written certification of the said purpose within 5 business days of such oral certification. If certification is made orally, the respondents shall make a written record of such oral certification at the time of the request.

6. Failing to make reasonable efforts to verify the uses certified by prospective members and to make reasonable efforts to reverify the purposes certified by members in the membership agreement every three (3) years.

7. Failing to make reasonable efforts to verify the uses certified by nonmember applicants for consumer reports. Such efforts shall include (a) when consumer reports are requested for purported credit transactions, inquiry shall be made to seek verification of such transactions through contacting the other party to the transaction or other knowledgeable parties; (b) in the case of a property owner purportedly seeking a consumer report on a prospective buyer or tenant, inquiry shall be made to seek verification of the applicant's ownership of the property in question and whether it is for sale or rent; (c) in the case of a party seeking a report for purported employment purposes, inquiring whether the consumer is employed by the party or has applied for employment and, if so, verifying whether the consumer is so employed or has applied for employment; and (d) when consumer

reports are requested in connection with business transactions having a personal, family or household purpose for the consumer, inquiry shall be made to seek verification of such transactions through contacting the other party to the transaction or other knowledgeable parties.

8. Failing, prior to the dissemination of any consumer report, to separate or delete adverse items of information in the consumer's file which antedate the date of the report by more than the applicable period specified in Section 605(a) of the Fair Credit Reporting Act.

9. Making any consumer report containing any item of information prohibited by Section 605(a) of the Fair Credit Reporting Act, except as provided in Section 605(b) of that Act, including the giving of any consumer report concerning the delinquency of an account more than seven years after such delinquency.

10. Recording information in a consumer's file, unless the source of the information provides at least one type of identification for the consumer in addition to the consumer's name, such as address, social security number, employer, or name of spouse.

11. Failing, when the completeness or accuracy of information in his or her file is disputed by a consumer, to:

a. (i) Initiate reinvestigation within three business days, (ii) continue to make reasonable efforts to complete the reinvestigation and (iii) to complete the reinvestigation within thirty days of the initiation thereof or, in the alternative, delete such information. Such reinvestigations with creditors shall include, but not necessarily be limited to, requesting examination by the creditor, where relevant, of any original documentation relating to the dispute in addition to credit records; such reinvestigations concerning suits and judgments shall include making inquiry of original creditors, where relevant and possible, and making inquiry in official records to determine if the judgment has been satisfied, the suit dismissed or other relevant action taken;

b. Reinvestigate with the original creditor when an account placed for collection is disputed;

c. Record immediately after reinvestigation the current status of information disputed by the consumer;

d. Immediately delete information which is found to be inaccurate or not verifiable after reinvestigation;

e. Inform the consumer, orally or in writing by mailing the information, of the results of the reinvestigation within five business days after the completion of the reinvestigation.

12. Failing to explicitly orally disclose to the consumer his or her right to request that all deletions, notations and consumer statements with respect to disputed information be sent by respondents to persons

designated by the consumer who have received the deleted or disputed information within two years for employment purposes or within six months for any other purpose. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.

13. Failing to furnish notification of deletion of information and any consumer statement, codification or summary thereof to any person designated by the consumer and qualified under Section 611(d) of the Fair Credit Reporting Act to receive such information. Such notification shall take place within five business days after the deletion or receipt of the consumer's request that the statement, codification or summary be sent.

14. Failing, whenever a statement of dispute has been filed, unless there are reasonable grounds to believe that the statement of dispute is frivolous or irrelevant, to clearly note in any subsequent consumer report containing the information in question that it is disputed by the consumer, and to provide either the consumer's statement or a clear and accurate codification or summary thereof.

15. Failing to provide each consumer who requests disclosure of information in his or her file with an exact facsimile of Exhibit A attached hereto.

It is further ordered, That respondents shall, at all times subsequent to the effective date of this order, maintain complete business records relative to the manner and form of their compliance with this order during the immediately preceding two-year period. Such records shall include all correspondence with consumers and consumer report applicants, policy directives, completely filled out interview reports, complaints from consumers and consumer report applicants, and other pertinent documents. Such records shall be kept in chronological order separate from the consumer files and shall be made available for inspection and photocopying by any authorized representative of the Federal Trade Commission upon reasonable notice at respondents' place of business or other properly designated location.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all employees now or hereafter engaged in the collecting, assembling, evaluating or furnishing of consumer information to third parties and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty days prior to any proposed changes in the corporate respondents or in the partnership entity, such as dissolution, assignment or sale, resulting in the emergence of successor corporations or partnerships, creation or dissolution of subsidiaries, or any other changes in the legal entities which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment in the event of such discontinuance or affiliation. Such notice shall include respondents' current business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That respondents shall, within sixty days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

EXHIBIT A

KNOW YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act became law on April 25, 1971. It was passed by Congress to protect consumers against the distribution of inaccurate or obsolete information and to ensure that consumer reporting agencies, such as Seattle Credit Bureau, exercise their responsibilities in a manner that is fair and equitable to consumers.

Under this law you can take steps to protect yourself if you have been denied credit, insurance, or employment, or if you believe you have had difficulties because of a consumer report on you.

THE FAIR CREDIT REPORTING ACT GIVES YOU THE RIGHT:

1. To be told the name and address of the consumer reporting agencies responsible for preparing a consumer report that was used to deny you credit, insurance, or employment or to increase the cost of credit or insurance.
2. To be told by a consumer reporting agency the nature, substance and names of sources of the information (except medical) collected about you.
3. To take anyone of your choice with you when you visit the consumer reporting agency to check your file.
4. To obtain all information to which you are entitled, free of charge, if you request a consumer interview within thirty days after you have been denied credit, insurance or employment. Otherwise, the reporting agency is permitted to charge a reasonable fee for giving you the information.
5. To be told the names of persons or businesses who have received a consumer report on you within the preceding six months, or within the preceding two years if the report was furnished for employment purposes.
6. To have incomplete or incorrect information reinvestigated, unless the request is frivolous, and, if the information is found to be inaccurate or cannot be verified, to have such information removed from your file.
7. To have the agency notify (at no cost to you) those you specify who have previously received the incorrect or incomplete information within two years if the report was for employment purposes or within six months for any other purpose, that this information has been deleted from your file.
8. When a dispute between you and the reporting agency about information in your file cannot be resolved, you have the right to have your version of such dispute placed in the file and included in future consumer reports.

9. To request the reporting agency to send your version of the dispute (for a reasonable fee) to those you name who received reports concerning the disputed information within the past six months (two years if received for employment purposes).

10. To request the consumer reporting agency to incorporate into your file all verifiable relevant credit information supplied by you, including good credit references.

11. To sue a reporting agency for damages if it willfully or negligently violates the law and, if you are successful, you can collect attorney fees and court costs.

12. In most instances not to have adverse information reported after seven years. One major exception is bankruptcy, which may be reported for fourteen years.

THE FAIR CREDIT REPORTING ACT DOES NOT:

1. Give you the right to request a report on yourself from the consumer reporting agency.

2. Give you the right when you visit the agency to receive a copy of or physically handle your file.

3. Compel anyone to do business with an individual consumer.

4. Apply when you request commercial (as distinguished from consumer) credit or business insurance.

5. Authorize any federal agency to intervene on behalf of an individual consumer.

For more detailed information on the Fair Credit Reporting Act or to report a violation of the Act, contact the Seattle Regional Office of the Federal Trade Commission.

IN THE MATTER OF

COMMERCE DRUG COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2713. Complaint, July 29, 1975-Decision, July 29, 1975

Consent order requiring a Farmingdale, N.Y., producer of vitamins and/or mineral products, and its parent corporation, among other things to cease disseminating unsubstantiated advertisements regarding the efficacy, benefit or need to prospective purchasers of the products.

Appearances

For the Commission: *Barry E. Barnes* and *Elizabeth A. Taylor*.
For the respondents: *Raymond D. McMurray*, Wash., D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Commerce Drug Company, Inc., Del Laboratories, Inc., and Levine, Huntley & Schmidt, Inc., corporations, hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Commerce Drug Company, Inc., a subsidiary of Del Laboratories, Inc., is a Delaware corporation with its office and principal place of business located at 565 Broad Hollow Rd., Farmingdale, N.Y.

Del Laboratories, Inc. is a Delaware corporation with its office and principal place of business located at 565 Broad Hollow Rd., Farmingdale, N.Y.

PAR. 2. Levine, Huntley & Schmidt, Inc. is a New York corporation with its office and principal place of business located at Ten E. 53rd St., New York, N.Y.*

PAR. 3. Respondent Commerce Drug Company, Inc. has been engaged in the manufacturing, advertising, offering for sale, sale and distribution of a certain vitamin product named "Rev-up, Vitamins For Men," a "food" or "drug" or both, as those terms are defined in Section 15 of the Federal Trade Commission Act.

Each Rev-up capsule contains:

		*Upper Limit U.S.R.D.A.**
Vitamin B-1 (Thiamine Mononitrate)	*10.00 mgs.*	*2.25 mgs.*
Vitamin B-2 (Riboflavin)	*10.00 mgs.*	*2.60 mgs.*
Vitamin B-6 (Phridoxine Hydrochloride)	*25.00 mgs.*	*3.00 mgs.*
Vitamin B-12 (Cobalamin Conc.)	*10.00 mcgs.*	*9.00 mcgs.*
Niacinamide	*100.00 mgs.*	*30.00 mgs.*
Calcium Pantothenate	*20.00 mgs.*	*15.00 mgs.*
Folic Acid	*0.10 mgs.*	*0.40 mgs.*
Vitamin C (Ascorbic Acid)	*100.00 mgs.*	*90.00 mgs.*
Vitamin E (di-Alpha Tocopheryl Acetate) in a base containing Fructose	*100.00 I.U.*	*45.00 I.U.*

* United States Recommended Daily Allowance as established by the United States Food and Drug Administration.

PAR. 4. Respondent Del Laboratories, Inc. has been and is now engaged in the manufacturing of cosmetics, proprietary drugs and sundries. It dominates and controls or knew of and tacitly approved the acts and practices of Commerce Drug Company, Inc., as set forth herein.

PAR. 5. Respondent Levine, Huntley & Schmidt, Inc. has been and is now an advertising agency for Commerce Drug Company, Inc. and Del Laboratories, Inc. and has prepared and placed for publication, and caused the dissemination of, advertising material, including but not limited to the advertising referred to herein, to promote the sale of Rev-up vitamins, a "food" or "drug" or both, as those terms are defined in Section 15 of the Federal Trade Commission Act.

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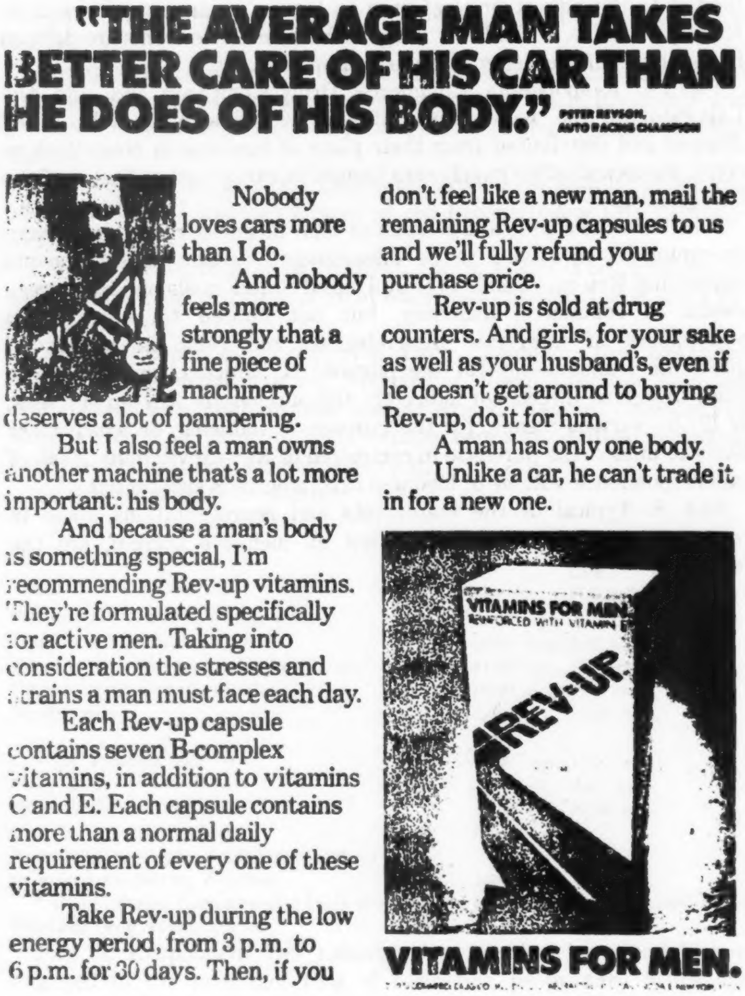
* See p. 406 herein for decision as to Levine, Huntley & Schmidt, Inc., Docket C-2718.

PAR. 6. Respondents Commerce Drug Company, Inc. and Del Laboratories, Inc. have caused Rev-up vitamins, when sold, to be shipped and distributed from their place of business in New York to retail stores and other purchasers located in various other States of the United States.

PAR. 7. In the course and conduct of their business, respondents have disseminated or caused to be disseminated certain advertisements concerning Rev-up vitamins (1) by United States mails and by various means in commerce, including, but not limited to, insertion in newspapers of interstate dissemination and radio broadcasts of interstate transmission, for the purpose of inducing, or which were likely to induce, directly or indirectly, the purchase of Rev-up vitamins, or (2) by various means, for the purpose of inducing, or which were likely to induce, the purchase in commerce of Rev-up vitamins. Each of said respondents' volume of business in commerce is substantial.

PAR. 8. Typical of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the following:



"THE AVERAGE MAN TAKES BETTER CARE OF HIS CAR THAN HE DOES OF HIS BODY."

PETER REVSON,
AUTO RACING CHAMPION

Nobody loves cars more than I do.

And nobody feels more strongly that a fine piece of machinery deserves a lot of pampering.

But I also feel a man owns another machine that's a lot more important: his body.

And because a man's body is something special, I'm recommending Rev-up vitamins. They're formulated specifically for active men. Taking into consideration the stresses and strains a man must face each day.

Each Rev-up capsule contains seven B-complex vitamins, in addition to vitamins C and E. Each capsule contains more than a normal daily requirement of every one of these vitamins.

Take Rev-up during the low energy period, from 3 p.m. to 6 p.m. for 30 days. Then, if you don't feel like a new man, mail the remaining Rev-up capsules to us and we'll fully refund your purchase price.

Rev-up is sold at drug counters. And girls, for your sake as well as your husband's, even if he doesn't get around to buying Rev-up, do it for him.

A man has only one body.

Unlike a car, he can't trade it in for a new one.

VITAMINS FOR MEN.

PAR. 9. Through the use of such advertisements and others not specifically set out herein, respondents have represented, directly or by implication, that:

A. The stresses and strains a man undergoes create a condition which will be benefited by consumption of a vitamin product like Rev-up vitamins.

B. Active men need a specially formulated vitamin product like Rev-up vitamins.

C. There is a low-energy period in men from 3 p.m. to 6 p.m. each day.

D. Rev-up vitamins will make one feel like a "new man."

PAR. 10. At the time the representations set forth in Paragraph Nine were made, respondents had no reasonable basis from which to conclude that such representations were true.

Therefore the advertisements and representations referred to in Paragraphs Eight and Nine were and are deceptive and unfair.

PAR. 11. In the course and conduct of their business, and at all times mentioned herein, respondents Commerce Drug Company, Inc. and Del Laboratories, Inc. have been and are now in substantial competition in commerce with corporations, firms and individuals selling and distributing nonprescription vitamin products.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Levine, Huntley & Schmidt, Inc. has been, and now is, in substantial competition in commerce with other advertising agencies.

PAR. 13. The use by respondents of the aforesaid deceptive and unfair advertisements has had the tendency and capacity to mislead members of the public to rely thereon and to purchase substantial quantities of Rev-up vitamins.

PAR. 14. The aforesaid acts and practices of respondents were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair or deceptive acts or practices in commerce and unfair methods of competition in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. [HD,5; Decision and Order]

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent Commerce Drug Company, Inc., a subsidiary of Del Laboratories, Inc., is a Delaware corporation with its office and principal place of business located at 565 Broad Hollow Rd., Farmingdale, N.Y.

Respondent Del Laboratories, Inc. is a Delaware corporation with its office and principal place of business located at 565 Broad Hollow Rd., Farmingdale, N.Y.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Commerce Drug Company, Inc. and Del Laboratories, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the product Rev-up vitamins or any vitamin and/or mineral product of Commerce Drug Company, Inc. or Del Laboratories, Inc. do forthwith cease and desist from:

A. Disseminating or causing to be disseminated any advertisement by United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents in writing, orally, visually or in any other manner, directly or by implication, that:

1. The stresses and strains a person undergoes create a condition which will be benefited by consumption of such product;

2. People need such a specially formulated product;

3. Such product is of special benefit to a person or particular group of persons;

4. There is a daily low-energy period in people at any particular time of day, or words of similar import or meaning;

5. Such product will make one feel like a new person, or words of similar import or meaning;

Unless, at the time the statement or representation is made, respondents have a reasonable basis for such representations consisting of competent and reliable evidence.

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement containing any representation referred to in Paragraph A above which is not supported by the aforesaid reasonable basis.

It is further ordered, That respondents maintain complete business records relative to the manner and form of their compliance with this order, and shall retain each record for three years after such record is made.

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each of their present and future operating divisions, officers, and directors, and to all present and future agents or representatives engaged in the preparation or placement of advertisements.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporations which may affect compliance obligations arising out of this order.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

LEVINE, HUNTLEY & SCHMIDT, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2718. Complaint, July 29, 1975-Decision, July 29, 1975

Consent order requiring a New York City advertising agency, in connection with the product Rev-up vitamins or any vitamin and/or mineral product of Commerce Drug Company, Inc. or Del Laboratories, Inc., among other things to cease disseminating unsubstantiated advertisements regarding the efficacy, benefit or need to prospective purchasers of the products.

Appearances

For the Commission: *Barry E. Barnes.*

For the respondents: *Stuart Lee Friedel*, Levine, Huntley & Schmidt, Inc., New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Commerce Drug Company, Inc., Del Laboratories, Inc., * and Levine, Huntley & Schmidt, Inc., corporations, hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Commerce Drug Company, Inc., a subsidiary of Del Laboratories, Inc., is a Delaware corporation with its office and principal place of business located at 565 Broad Hollow Rd., Farmingdale, N.Y.

Del Laboratories, Inc. is a Delaware corporation with its office and principal place of business located at 565 Broad Hollow Rd., Farmingdale, N.Y.

PAR. 2. Levine, Huntley & Schmidt, Inc. is a New York corporation with its office and principal place of business located at Ten E. 53rd St., N.Y., N.Y.

PAR. 3. Respondent Commerce Drug Company, Inc. has been engaged in the manufacturing, advertising, offering for sale, sale and distribution of a certain vitamin product named "Rev-up, Vitamins For Men," a "food" or "drug" or both, as those terms are defined in Section 15 of the Federal Trade Commission Act.

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* See p. 399 herein for decision as to these respondents, Docket C-2713.

Each Rev-up capsule contains:

		Upper Limit U.S.R.D.A.*
Vitamin B-1 (Thiamine Mononitrate)	10.00 mgs.	2.25 mgs.
Vitamin B-2 (Riboflavin)	10.00 mgs.	2.60 mgs.
Vitamin B-6 (Phridoxine Hydrochloride)	25.00 mgs.	3.00 mgs.
Vitamin B-12 (Cobalamin Conc.)	10.00 mgs.	9.00 mgs.
Niacinamide	100.00 mcgs.	30.00 mcgs.
Calcium Pantothenate	20.00 mgs.	15.00 mgs.
Folic Acid	0.10 mgs.	0.40 mgs.
Vitamin C (Ascorbic Acid)	100.00 mgs.	90.00 mgs.
Vitamin E (di-Alpha Tocopheryl Acetate) in a base containing Fructose	100.00 I.U.	45.00 I.U.

* United States Recommended Daily Allowance as established by the United States Food and Drug Administration.

PAR. 4. Respondent Del Laboratories, Inc. has been and is now engaged in the manufacturing of cosmetics, proprietary drugs and sundries. It dominates and controls or knew of and tacitly approved the acts and practices of Commerce Drug Company, Inc., as set forth herein.

PAR. 5. Respondent Levine, Huntley & Schmidt, Inc. has been and is now an advertising agency for Commerce Drug Company, Inc. and Del Laboratories, Inc. and has prepared and placed for publication, and caused the dissemination of, advertising material, including but not limited to the advertising referred to herein, to promote the sale of Rev-up vitamins, a "food" or "drug" or both, as those terms are defined in Section 15 of the Federal Trade Commission Act.

PAR. 6. Respondents Commerce Drug Company, Inc. and Del Laboratories, Inc. have caused Rev-up vitamins, when sold, to be shipped and distributed from their place of business in New York to retail stores and other purchasers located in various other States of the United States.

PAR. 7. In the course and conduct of their business, respondents have disseminated or caused to be disseminated certain advertisements concerning Rev-up vitamins (1) by United States mails and by various means in commerce, including, but not limited to, insertion in newspapers of interstate dissemination and radio broadcasts of interstate transmission, for the purpose of inducing, or which were likely to induce, directly or indirectly, the purchase of Rev-up vitamins, or (2) by various means, for the purpose of inducing, or which were likely to induce, the purchase in commerce of Rev-up vitamins. Each of said respondents' volume of business in commerce is substantial.

PAR. 8. Typical of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the following [see p. 402, herein]:

PAR. 9. Through the use of such advertisements and others not specifically set out herein, respondents have represented, directly or by implication, that:

A. The stresses and strains a man undergoes create a condition which will be benefited by consumption of a vitamin product like Rev-up vitamins.

B. Active men need a specially formulated vitamin product like Rev-up vitamins.

C. There is a low-energy period in men from 3 p.m. to 6 p.m. each day.

D. Rev-up vitamins will make one feel like a "new man."

PAR. 10. At the time the representations set forth in Paragraph Nine were made, respondents had no reasonable basis from which to conclude that such representations were true.

Therefore the advertisements and representations referred to in Paragraphs Eight and Nine were and are deceptive and unfair.

PAR. 11. In the course and conduct of their business, and at all times mentioned herein, respondents Commerce Drug Company, Inc. and Del Laboratories, Inc. have been and are now in substantial competition in commerce with corporations, firms and individuals selling and distributing nonprescription vitamin products.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Levine, Huntley & Schmidt, Inc. has been, and now is, in substantial competition in commerce with other advertising agencies.

PAR. 13. The use by respondents of the aforesaid deceptive and unfair advertisements has had the tendency and capacity to mislead members of the public to rely thereon and to purchase substantial quantities of Rev-up vitamins.

PAR. 14. The aforesaid acts and practices of respondents were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair or deceptive acts or practices in commerce and unfair methods of competition in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent Levine, Huntley & Schmidt, Inc. is a New York corporation with its office and principal place of business located at Ten E. 53rd St., N.Y., N.Y.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Levine, Huntley & Schmidt, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the product Rev-up vitamins or any vitamin and/or mineral product of Commerce Drug Company, Inc. or Del Laboratories, Inc. do forthwith cease and desist from:

A. Disseminating or causing to be disseminated any advertisement by United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents in writing, orally, visually or in any other manner, directly or by implication, that:

1. The stresses and strains a person undergoes create a condition which will be benefited by consumption of such product;

2. People need such a specially formulated product;

3. Such product is of special benefit to a person or particular group of persons;

4. There is a daily low-energy period in people at any particular time of day, or words of similar import or meaning;

5. Such product will make one feel like a new person, or words of similar import or meaning;

Unless, at the time the statement or representation is made, respondent has a reasonable basis for such representations consisting of competent and reliable evidence.

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement containing any representation referred to in Paragraph A above which is not supported by the aforesaid reasonable basis.

It is further ordered, That respondent maintain complete business records relative to the manner and form of their compliance with this order, and shall retain each record for three years after such record is made.

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its present and future operating divisions, officers, and directors, and to all present and future agents or representatives engaged in the preparation or placement of advertisements.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

ELKHORN MINING COMPANY T/A FREE ENTERPRISE URANIUM-RADON MINE, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2721. Complaint, Aug. 5, 1975–Decision, Aug. 5, 1975

Consent order requiring a Boulder, Mont., owner and operator of a uranium mine, among other things to cease misrepresenting the curative or physiological effect of radon gas on disease; and failing to disclose to prospective customers that radon gas has any provable physiological effect on disease, including arthritis, sinusitus, eczema and asthma.

Appearances

For the Commission: *Thomas C. Armitage.*

For the respondents: *John F. Bell, Bolkovatz & Romine*, Helena, Mont.

COMPLAINT

The Federal Trade Commission, having reason to believe that Elkhorn Mining Company, a corporation dba Free Enterprise Uranium-Radon Mine, Radon Research Foundation, a corporation, and John T. Lewis, individually and as an officer of Elkhorn Mining Company (hereinafter respondents), have violated Section 5 of the Federal Trade Commission Act, and that a proceeding would be in the public interest, hereby issues its complaint:

PARAGRAPH 1. Elkhorn Mining Company is a Montana corporation with its office located at Boulder Bank Bldg., Boulder, Mont. It does business under the name Free Enterprise Uranium-Radon Mine.

Radon Research Foundation is a Montana nonprofit corporation with its office located at Boulder Bank Bldg., Boulder, Mont. It had no receipts or disbursements in the past three years. It employed no one to do research. All expenses were paid by the Elkhorn Mining Company or its former president Wade V. Lewis personally. It distributes promotional literature for the Free Enterprise Mine and authors promotional literature distributed by the Elkhorn Mining Company. Its activities therefore inure to the monetary benefit of the Elkhorn Mining Company. It is therefore subject to Federal Trade Commission jurisdiction, 15 U.S.C. §44.

John T. Lewis is an individual and officer of Elkhorn Mining Company. He formulates, directs and controls the policies of said corporation, and his address is the same as that of said corporation.

PAR. 2. Respondents carry on the following business: The Free Enterprise Uranium-Radon Mine is a vertical shaft some eighty-five feet in depth with a horizontal shaft at the bottom some four hundred feet in length. Persons afflicted with various diseases, principally arthritis, are taken into this mine for a fee. In the mine shaft they remain for various periods of time breathing air which contains radon, a gaseous element derived from the decaying uranium surrounding the shaft. It is claimed that breathing radon will benefit these persons by curing or improving various afflictions.

PAR. 3. Respondents advertise in media of interstate dissemination and ship advertisements and brochures in commerce through the mails.

PAR. 4. Respondents' advertisements and brochures claim that the cause of arthritis is known and that cause is hormone deficiencies. Respondents claim that radon gas, derived from the ore in the mine, stimulates the production of ACTH, a hormone, which in turn stimulates the production of hydrocortisone. These hormones, it is claimed, are beneficial to and curative of arthritis, bursitis, sinusitis, asthma, eczema, skin affliction, and kindred ailments.

PAR. 5. Illustrative of respondents' advertising claims are the following quotations:

> NATURE'S RADON THERAPY and IONIZATION are now recognized as REACHING THE CAUSE OF ARTHRITIS and many kindred afflictions.
>
> NATURE reaches CAUSE OF ARTHRITIS.
>
> Visit the Free Enterprise Uranium-Radon Mine at Boulder, Montana, for arthritis, sinusitis, asthma, skin afflictions and kindred ailments.
>
> * * * radiation due to RADON GAS transmutation elements in the air of the mine workings, is of such type and amount as to stimulate the master pituitary gland in its production of ACTH, this body product thereupon acting upon the adrenal cortex to produce hydrocortisone, the great pain killer.
>
> Research through Radon Research Foundation indicates there are two basic causes of arthritis and kindred glandular connected ailments:
>
> 1. AN EXTERNAL CAUSE: Stress, strain or shock of physical, mental or emotional origin.
> 2. AN INTERNAL CAUSE: Retardation of the glands' activities, resulting in non-normal production of body hormones.
>
> Exposure to the mild radiation from breathing transmuted elements from radon, a gas * * * represents a scientific break-through, offering a remedy reaching a principal CAUSE of rheumatoid arthritis and allied glandular afflictions.
>
> It (radon gas) exerts an influence on the autonomic nervous system, improves the circulatory state, and causes removal of waste from the organism and an activation of hormone producing organs, particularly the pituitary-adrenal system.

PAR. 6. These statements and others contained in respondents' advertisements and promotional literature are false, misleading and deceptive as follows:

A. Radon gas and the Free Enterprise Uranium-Radon Mine do not have any curative or physiological effect upon any disease or bodily condition, including arthritis, sinusitus, eczema or other skin afflictions, or asthma.

B. Radon gas does not have any beneficial effect on the autonomic nervous system, the circulatory state, the removal of waste, and the utilization of oxygen by defense cells of the body.

C. There is no one cause for arthritis. There are more than sixty (60) forms of joint disease now recognized by the American Rheumatism Association, and it is unlikely that any two have the same cause. Some of these causes are well known; a number of causes are unknown.

D. The role of stress, either internal or external, in causing or aggravating arthritis is unknown.

E. Below normal production of adrenal hormones is a well-known condition named Addison's Disease. Underproduction of hormones is not related to any form of joint disease.

F. Lack of or deficiency in ACTH and hydrocortisone does not cause joint disease.

G. Radon gas does not increase production of ACTH, hydrocortisone, or any other hormone.

H. White blood cells are the most sensitive to radiation. If the radiation in respondents' mine is not great enough to affect these cells, it does not affect the body at all. If, on the other hand, the radiation is sufficient to affect white blood cells, it is dangerous and requires careful monitoring. The level of radiation in respondents' mine is in fact not dangerous to humans.

I. Even if the production of ACTH and hydrocortisone were increased by the inhalation of radon gas, the beneficial effects would be only symptomatic, failing to reach the causes of arthritis.

J. The use of radon gas does not represent a scientific breakthrough.

K. Such "cures" as are claimed by customers of respondents' mine are either of psychosomatic origin or are due to the coincidental cyclical remission of arthritis.

PAR. 7. Respondents further fail to disclose, prior to the purchase of visits to the mine by customers, a number of material facts as follows:

A. Neither radon gas nor the Free Enterprise Mine has any physiological effect on any disease or bodily condition, including arthritis, sinusitis, eczema or other skin afflictions, or asthma.

B. Any benefits claimed by visitors to the Free Enterprise Mine are psychosomatic or are due to the coincidental cyclical remission of a disease.

C. Patients should consult their doctors before and/or after going to the Free Enterprise Mine. They may be missing the benefits of known and medically approved forms of therapy. Lack of medically accepted treatment of arthritis may result in greater pain and possible permanent disability.

Knowledge of these facts may affect a customer's decision as to whether to purchase visits to respondents' mine.

PAR. 8. The above-described conduct constitutes unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its rules, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

A. Respondent Elkhorn Mining Company is a Montana corporation with its office located at Boulder Bank Bldg., Boulder, Mont. It does business under the name Free Enterprise Uranium-Radon Mine.

Respondent Radon Research Foundation is a Montana corporation with its office located at Boulder Bank Bldg., Boulder, Mont.

Respondent John T. Lewis is an individual and officer of Elkhorn Mining Company. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Elkhorn Mining Company, a corporation dba Free Enterprise Uranium-Radon Mine, Radon Research Foundation, a corporation, their successors and assigns, and their officers, and John T. Lewis, individually and as an officer of Elkhorn Mining Company, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from representing directly or by implication, that:

A. Radon gas or the Free Enterprise Uranium-Radon Mine has any curative or physiological effect upon any disease or bodily condition, including arthritis, sinusitus, eczema or other skin afflictions, or asthma.

B. Radon gas has any beneficial effect on the autonomic nervous system, the circulatory state, the removal of waste, or the utilization of oxygen by defense cells of the body.

C. There is a single cause of arthritis or that the cause or causes of arthritis are known.

D. Arthritis is caused by or has any relationship to stress, either internal or external.

E. Arthritis or any form of joint disease is caused by hormone deficiencies of any type.

F. Arthritis is caused by underproduction of ACTH or any hormone associated with the pituitary gland or the adrenal gland.

G. Radon gas increases production of ACTH, hydrocortisone, or any other hormone.

H. Exposure to any radioactive gas has any physiological effect on any disease or bodily condition.

I. ACTH or hydrocortisone, no matter how administered, results in anything but temporary symptomatic relief of arthritis.

J. The use of radon gas represents a scientific breakthrough.

K. Improvements in condition claimed to result from visits to the Free Enterprise Uranium-Radon Mine are neither psychosomatic nor the result of coincidental remission of a disease.

It is further ordered, That respondents shall clearly and conspicuously (a) include in all advertising and promotional materials for radon gas or the Free Enterprise Uranium-Radon Mine, and (b) provide by means of a separate written statement furnished to each prospective customer prior to the time he or she pays for the Free Enterprise Uranium-Radon Mine visit, the following form of notice:

NOTICE

Neither radon gas nor the Free Enterprise Uranium-Radon Mine has any provable physiological effect on any disease or bodily condition, including arthritis, sinusitus, eczema or other skin afflictions, or asthma.

You are advised to consult with your doctor before and/or after going to the Free Enterprise Uranium-Radon Mine. You may be missing the benefits of known and medically approved forms of treatment. Lack of medically accepted treatment of arthritis may result in greater pain and possible permanent disability.

This notice is made pursuant to order of the Federal Trade Commission.

In addition to the above, the separate written statement shall set forth the following language:

I have read and understand the above information.

____
Name (please print)

____
Signature

____
Address (please print)

____
Date

Respondents shall retain for their records, for a period of at least three years, copies of such written statements which have been signed and dated by the customers.

It is further ordered, That respondents shall forthwith distribute a copy of this complaint and order to each of their employees and shall continue such distribution to each new employee for a period of two years from the date this order becomes effective.

It is further ordered, That respondents shall maintain such records as will fully disclose the manner and form of their compliance with this order.

It is further ordered, That the corporate respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

IN THE MATTER OF

JAMES SLYMAN T/A SLYMAN REAL ESTATE COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2714. Complaint, Aug. 7, 1975-Decision, Aug. 7, 1975

Consent order requiring a Knoxville, Tenn., real estate broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Charles C. Murphy, Jr.*
For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing Regulation promulgated thereunder and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts; the Federal Trade Commission, having reason to believe that James Slyman, an individual trading and doing business as Slyman Real Estate Company, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent James Slyman is an individual trading and doing business as Slyman Real Estate Company, with his principal office and place of business located at 5722 Oak Ridge Hwy., Knoxville, Tenn.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale and sale of improved and unimproved, developed and undeveloped real estate to the public.

PAR. 3. In order to promote the sale of improved and unimproved, developed and undeveloped real estate, respondent has caused advertisements, as "advertisement" is defined in Section 226.2(b) of Regulation Z, to be placed in newspapers of interstate circulation. These advertisements aid, promote or assist directly or indirectly extensions of consumer credit, as "consumer credit" is defined in Section 226.2 of Regulation Z, through the offer to persons of "assumptions of obligations," as that term is used in Section 226.8(k) of Regulation Z. Certain of said advertisements which were published subsequent to July 1, 1969:

1. Stated the rate of a finance charge without stating the rate of such charge expressed as an "annual percentage rate," using that term, in violation of Section 226.10(d)(1) of Regulation Z.

2. Stated the amount of installment payments, the number of installments, and the period of repayment to be made if the credit is extended, without also stating all of the following items in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

a. The amount of the loan;

b. the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

c. the amount of the finance charge expressed as an annual percentage rate.

PAR. 4. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, and the Truth in Lending Act and the implementing Regulation promulgated thereunder; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent James Slyman is an individual trading and doing business as Slyman Real Estate Company, with his office and principal place of business located at 5722 Oak Ridge Hwy., Knoxville, Tenn.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

IT IS ORDERED, That respondent James Slyman, an individual trading and doing business as Slyman Real Estate Company, or under any other name or names, and respondent's successors, assigns, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit, or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Causing to be disseminated to the public in any manner whatsoever any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, which advertisement states:

(a) The rate of a finance charge unless the rate of such charge is expressed as an "annual percentage rate," using that term as required by Section 226.10(d)(1) of Regulation Z.

2. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any installment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) The amount of the loan;

(b) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(c) the amount of the finance charge expressed as an annual percentage rate.

3. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Section 226.4 and Section 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondent secure a signed statement acknowledging receipt of said copy of this order from each such person.

It is further ordered, That the respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

HEFTLER REALTY SALES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2715. Complaint, Aug. 13, 1975-Decision, Aug. 13, 1975

Consent order requiring a Miami, Fla., marketer of condominiums and single-family homes, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *H. Robert Ronick* and *Hong S. Dea.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation, as amended, promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Heftler Realty Sales, Inc., a corporation, and Clyde M. Taylor, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the implementing regulation, as amended, promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Heftler Realty Sales, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 9450 Sunset Dr., Miami, Fla.

Respondent Clyde M. Taylor is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of condominium units and single family homes to members of the public.

PAR. 3. In the regular course and conduct of their business as aforesaid, respondents regularly advertise the availability and cost of consumer credit and offer to extend or arrange for the extension of such credit, as "consumer credit" is defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, as amended, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, have caused, and are causing to be published, advertisements, as "advertisement" is defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of these advertisements, have stated, and are stating, the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an annual percentage rate, using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 6. Respondents, in certain of these advertisements, have stated, and are stating, the amount of the downpayment required, that no downpayment is required, or that the downpayment is a certain percentage of the stated sales price without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

a. The cash price;

b. the amount of the downpayment required or that no downpayment is required, as applicable;

c. the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

d. the amount of the finance charge expressed as an annual percentage rate.

PAR. 7. By and through the aforesaid failures to make disclosures, respondents have failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, as amended, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failure to comply with Regulation Z constitutes violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts and the implementing regulation promulgated thereunder, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Heftler Realty Sales, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 9450 Sunset Dr., Miami, Fla.

Respondent Clyde M. Taylor is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Heftler Realty Sales, Inc., a corporation, its successors and assigns, and its officers, and Clyde M. Taylor, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth and Lending Act (Pub.L. 90-321; 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to state the rate of a charge for consumer credit expressed as an "annual percentage rate," using that term, as prescribed by Section 226.10(d)(1) of Regulation Z.

2. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any installment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

a. The cash price;

b. the amount of the downpayment required or that no downpayment is required, as applicable;

c. the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

d. the amount of the finance charge expressed as an annual percentage rate.

3. Failing, in any advertisement, to make all disclosures as required by Section 226.10 of Regulation Z and in the manner prescribed therein.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation, its successors and assigns, shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

HOLLYWOOD CARPETS, INC., ET AL.

Docket 8983. Order, Aug. 14, 1975

Denial of respondents' request for leave to file an answering brief to complaint counsel's appeal from the initial decision.

Appearances

For the Commission: *Everette E. Thomas, Richard C. Donohue*, and *Thomas J. Keary*.

For the respondents: *Noble & Lorsen*, Wash., D.C.

ORDER DENYING REQUEST FOR LEAVE TO FILE ANSWERING BRIEF

Respondents herein on July 31, 1975 filed with the Commission a motion for leave to file a brief in answer to complaint counsel's appeal from the initial decision of the administrative law judge, the thirty-day period of time for the filing of said answering brief allowed by Section

3.52(c) of the Commission's Rules of Practice having expired. As grounds for the request respondents state that the work schedule of counsel, complicated by shortage of personnel in the office, prohibited the brief from being filed on time. Respondents also contend that inasmuch as oral argument has been waived, no prejudice is likely to occur with respect to any party. Annexed to said motion is respondents' "Answering Brief."

Complaint counsel have filed an answer in opposition to respondents' motion wherein they point out that respondents' answer to the complaint in this proceeding, respondents' proposed findings and respondents' notice of intention to appeal the initial decision have all been untimely filed.

The Commission has concluded that good cause has not been shown for the relief requested and is therefore of the opinion that respondents' motion should be denied and that all copies of the "Answering Brief" filed with said motion should be returned to respondents by the secretary.

Accordingly, *It is ordered*, That the aforesaid request by respondents for leave to file an answering brief be, and it hereby is, denied.

IN THE MATTER OF

SPIEGEL, INC.

OPINIONS, ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket No. 8990. Complaint, Aug. 7, 1974-Decision, Aug. 18, 1975

Order requiring a Chicago, Ill., catalog retailer, among other things to bring collection law suits only in a court in the county where the defendant resides or the debt was incurred.

Appearances

For the Commission: *Randall H. Brook* and *Barry E. Barnes.*

For the respondent: *Stein, Mitchell & Mezines*, Wash., D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Spiegel, Inc. has violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. Spiegel, Inc. is a Delaware corporation, with its office and principal place of business located at 2511 W. 23rd St., Chicago, Ill.

PAR. 2. Respondent is a catalog retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools, tires and various other articles of merchandise. Allegations below of respondent's present acts or practices include past acts or practices.

PAR. 3. In the course of its mail-order catalog business, respondent receives orders from purchasers in various States at its place of business in Illinois and causes its products when sold to be shipped from Illinois to purchasers located in various States of the United States. Thus, respondent maintains a substantial course of business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course of its business, respondent regularly extends credit (hereinafter referred to as retail credit accounts) for the purpose of facilitating consumers' purchase of respondent's products.

PAR. 5. In the course of its collection of retail credit accounts, respondent regularly sues allegedly defaulting retail mail-order purchasers who reside in States other than Illinois (hereinafter referred to as out-of-State defendants) in the Circuit Court of Cook County, Illinois. Courts located in the State and county where out-of-State defendants reside or where they signed the contracts sued upon could be used for these suits. Almost all out-of-State defendants have received respondent's catalogs or other advertising material, and executed purchase orders or contracts, in their home States. Almost all out-of-State defendants have had no pertinent contact with the State of Illinois other than their dealings with respondent.

PAR. 6. The distance, cost and inconvenience of defending such suits in Illinois place a virtually insurmountable burden on out-of-State defendants. Respondent thus effectively deprives these defendants of a reasonable opportunity to appear, answer and defend. Therefore, such use of distant or inconvenient forum is unfair.

PAR. 7. The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and constitute unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY HARRY R. HINKES, ADMINISTRATIVE LAW JUDGE

JANUARY 31, 1975

PRELIMINARY STATEMENT

In a complaint issued by the Federal Trade Commission on Aug. 7, 1974, respondent, Spiegel, Inc., was charged with unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act in suing defaulting retail mail-order purchasers who reside in States other than Illinois in the Circuit Court of Cook County, Illinois. By answer duly filed respondent admitted all of the material factual allegations of the complaint but denied any violation of law. The record was thereupon closed and the parties have submitted proposed findings and briefs. Pursuant to the admitted factual allegations of the complaint, I make the following:

FINDINGS OF FACT

1. Spiegel, Inc., is a Delaware corporation, with its office and principal place of business located at 2511 W. 23rd St., Chicago, Ill.

2. Respondent is a catalog retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools, tires and various other articles of merchandise. Allegations below of respondent's present acts or practices include past acts or practices.

3. In the course of its mail-order catalog business, respondent receives orders from purchasers in various States at its place of business in Illinois and causes its products when sold to be shipped from Illinois to purchasers located in various States of the United States. Thus, respondent maintains a substantial course of business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course of its business, respondent regularly extends credit (hereinafter referred to as retail credit accounts) for the purpose of facilitating consumers' purchase of respondent's products.

5. In the course of its collection of retail credit accounts, respondent regularly sues allegedly defaulting retail mail-order purchasers who reside in States other than Illinois (hereinafter referred to as out-of-State defendants) in the Circuit Court of Cook County, Illinois. Courts located in the State and county where out-of-State defendants reside or where they signed the contracts sued upon could be used for these suits. Almost all out-of-State defendants have received respondent's catalogs or other advertising material, and executed purchase orders or

contracts, in their home States. Almost all out-of-State defendants have had no pertinent contact with the State of Illinois other than their dealings with respondent.

6. The distance, cost and inconvenience of defending such suits in Illinois place a virtually insurmountable burden on out-of-State defendants.

COMMENT

The respondent states:

> The material factual allegation charged in the complaint is that suits filed by Spiegel in Cook County, Illinois, are inconvenient to defaulting debtors who reside in another state.

This is an oversimplification of this case. In fact, the complaint alleges that respondent Spiegel, Inc., in the course of its *mail-order catalog retailer business*, regularly sues in the courts of Illinois allegedly defaulting *retail mail-order purchasers* who reside in States other than Illinois (hereinafter referred to as out-of-State defendants) and that such acts and practices are to the prejudice and injury to the public and constitute unfair acts and practices in commerce in violation of the Federal Trade Commission Act. This distinction is important as will be explained below.

In recent years the limits of permissible *in personam* jurisdiction over out-of-State defendants have undergone great modification and expansion. Originally physical presence within the forum State was required, *Pennoyer* v. *Neff*, 95 U.S. 714 (1877), regardless of how temporary the presence may have been. This concept of jurisdiction changed in *Hess* v. *Pawloski*, 274 U.S. 352 (1927), where a Massachusetts nonresident motorist statute was upheld and in *Doherty & Co.* v. *Goodman*, 294 U.S. 623 (1935), where jurisdiction over nonresidents was recognized for claims resulting from doing business within the State. In *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), the Supreme Court laid down the constitutional requirements for the assertion of jurisdiction:

> Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

The court considered relevant both an estimate of the inconveniences to each party and an estimate of the quality and nature of the activity being conducted by the nonresident defendant within the forum.

The "minimum contacts" theory of *International Shoe* was further defined in later Supreme Court decisions. In *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957), a foreign insurance company was sued in California for payment under a life insurance policy. The company had never solicited nor done any insurance business in

California apart from this one policy which was transacted by mail. *In personam* jurisdiction of the foreign insurance company was upheld, the Court noting that the insurance contract was delivered in California, the premiums were mailed from there, the insured was a resident of the State and died there and that there was a substantial State interest in protecting residents from insurers who refused to pay. In *Hanson* v. *Denckla*, 357 U.S. 235 (1958), the Court held that a Florida court had no personal jurisdiction over a Delaware trustee corporation when the only connection between the trustees and Florida was some correspondence between the settlor and the trustees, holding that the act done or the transaction consummated in the forum must be one "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Respondent points to a number of statutes which have been enacted in a number of States conferring jurisdiction upon the courts of that State over persons transacting any business within the State whether or not such persons are resident or present in the State. Not only is such a jurisdictional statute in effect in the State of Illinois, (Smith-Hurd, Ill. Stat., Supp. 1967, c.110 Sec. 17) but more than one-half of the States have enacted such so-called long-arm statutes in one form or another (4 Wright & Miller *Fed. Practice and Procedure*, Sec. 1068). Similarly, the Commissioners on Uniform State Laws have promulgated and the American Bar Association has approved the Uniform Interstate and International Procedure Act containing a long-arm provision and Congress has enacted a long-arm statute for the District of Columbia (13 D.C. Code Sec. 423, 1973 ed.). Respondent argues, therefore, that the validity of long-arm jurisdiction is beyond question.

But that is not the issue before us. The validity of the Illinois statute is not involved. Its application to the persons specified in this proceeding is involved and a determination must be made whether such out-of-State defendants have contacts with the forum sufficient to comport with fair play. To this end respondent cites the fact that the out-of-State defendants purposefully and intentionally mailed to Illinois a purchase order for merchandise, instructing Spiegel to ship merchandise from Chicago. Respondent argues that, thus, the out-of-State defendants transacted business within Illinois and submitted themselves to the jurisdiction of the courts of Illinois as to causes of action arising from such business transactions. But respondent concedes, as it must, that such *in personam* jurisdiction over out-of-State defendants in Illinois courts is proper only if the nonresidents have contacts with the forum, Illinois, sufficient to comport with due process and where the nonresidents have committed any of the acts specifically enumerated in the long-arm statute. Stated differently, the question is whether Spiegel, a mail-order house in the State of Illinois, can sue an out-of-State retail mail-order purchaser of its merchandise in the courts of Illinois.

This practice has been decried by many commentators and assumed to be violative of due process by many courts, but, to the best of my knowledge, has never been specifically adjudicated in a litigated action. The language of some court decisions is instructive on this point.

In *In-Flight Devices Corporation* v. *Van Dusen Air Incorporated*, 466 F.2d 220, 233 (1972), it was stated:

> In our economy the seller often initiates the deal, tends to set many, if not all of the terms on which it will sell, and, of course, bears the burden of producing the goods or services, in the course of which production injuries and other incidents giving rise to litigation frequently arise. The buyer, on the other hand is frequently a relatively passive party, simply placing an order, accepting the seller's price and terms as stated in his product advertisement and agreeing only to pay a sum upon receipt of the goods or services.

The court went on to note that if the buyer vigorously negotiates terms, inspects production, travels to the forum, conducts substantial interstate business and the like, then his contacts with the forum are increased and the expectation and likelihood that he may be successfully sued in a distant forum are also correspondingly increased. See, *e.g.*, *Ziegler* v. *Houghton-Mifflin Co.*, 224 N.E. 2d. 12 (1967). It cannot be denied that here Spiegel initiated the contacts with the buyer through its mail-order catalog and advertisements and dictated the price and terms of the contract. Generally, the purchase is the only contact the buyer has had with Spiegel or Illinois.

The language of an Illinois court in *Geneva Industries Inc.* v. *Copeland Construction Co.*, 312 F.Supp. at 188 (1970), is even more specific:

> The notion that *any customer of an Illinois based mail-order house such as Sears Roebuck or Montgomery Ward* [or Spiegel?] would be subject to the jurisdiction of Illinois is obviously violative of the most minimal standard of minimum contacts and the fundamental structure of the Federal system. (Emphasis added.)

The court noted differences in an earlier Illinois case, *Gorden* v. *ITT*, 273 F.Supp. 164 (1967), where the out-of-State defendant was subjected to the jurisdiction of the Illinois court because it "regularly sent its salesmen into Illinois to solicit orders * * *" and engaged in a heavy mail-order solicitation in Illinois. See also *Koplin* v. *Thomas, Haab & Botts*, 219 N.E. 2d. 646, 652 (1966), where the court upheld *in personam* jurisdiction over a nonresident defendant which "affirmatively and voluntarily sought the benefit of our [Illinois] laws by *initiating and soliciting* the sales here." (Emphasis added.)

In *McQuay, Inc.* v. *Schlosberg, Inc.*, 321 F.Supp. 902 (1971), the court said:

> The general philosophy of long-arm statutes is to protect citizens of a state where a nonresident comes into the state directly or indirectly to sell something or solicit sales, or where, even though out-of-state, a nonresident sells a product which is brought into or comes to rest in the state. The nonresident thus receives the benefit and protection of the state laws and profits or hopes to from its adventure therein. The nonresident is the aggressor or initiator. It is appropriate that such a nonresident seller should respond to service of process in that state.

The court added that where a nonresident corporation enjoys no particular privilege or protection in purchasing products from the seller in the forum State, it would be wrong to subject the nonresident buyer to the jurisdiction of the forum State:

> The rationale behind this long time statutory precedent is that a defendant ought to be entitled to defend himself among people and in a community where he resides and is known, his witnesses generally will reside in or near the place of his residence, his counsel will be from his community, the goods he has purchased * * * likely will be situated in his home community. Such concepts have roots deep in common law traditions. It would seem that this is what the United States Supreme Court meant by "traditional notions of fair play and substantial justice" in *International Shoe, supra.*

Courts have also distinguished between out-of-State buyers and out-of-State sellers noting that generally it would be more equitable to impose *in personam* jurisdiction over out-of-State sellers than out-of-State buyers. See, for example, *Nordberg Div. of Rex Chainbelt Inc.* v. *Hudson Engineering Corp.*, 361 F.Supp. 903 (1973), where the court noted that "sellers in general have more resources to defend themselves in out-of-state litigation than do buyers." The same case also noted that individuals and small companies may be hard put to defend themselves in a foreign forum saying:

> *A customer of a mail-order house*, be it an individual or a small company engaged in a one-state operation, is also more likely to be unprepared to defend itself in a foreign forum than is a company * * * which transacts a substantial amount of interstate business. When almost all of its business is conducted in its home state, a customer of a mail-order house does not expect to be forced to travel to a distant forum. It thus lacks experience in out-of-state litigation. When its expectations are disappointed, it is caught unprepared pyschologically and, perhaps, financially. (Emphasis added.)

In *Conn* v. *Whitmore*, 342 P.2d 871 (1959), an Illinois horse fancier wrote to the defendant in Utah, offering to sell him several horses. The defendant had a friend inspect the horses in Illinois, accepted the offer by mail from Utah and sent a servant to Illinois to pick up his purchases. The Court refused to enforce an Illinois judgment against the buyer. "It was not the defendant Utah resident who took the initiative by going into Illinois to transact business, nor did he engage in any activity resulting in injury or damage there. Quite the contrary, it was the plaintiff resident of Illinois who proselyted for business in Utah." Much the same can be said of Spiegel's relationship with its out-of-State mail-order purchasers.

Thus, Spiegel's suits in Illinois courts against out-of-State retail mail-order purchasers would be deemed beyond the pale of the Illinois long-arm statute whether one considers the extent of such purchasers' activities within Illinois or whether one considers the extent of the interstate business of such purchasers or whether one considers the participation of such purchasers in the terms and conditions of the contract. In short, under the doctrine of *International Shoe, supra*, considering the inconveniences to each party and the quality and nature of the activity being conducted within the forum, the maintenance of a suit by Spiegel in Illinois against out-of-State retail mail-order purchasers could not but offend traditional notions of fair play and substantial justice. See Currie, *The Growth of the Long Arm*, 1963 U. Ill. L.F. 533, 577. Such practice is oppressive since the distance, cost and inconvenience of defending such suits in Illinois effectively deprives out-of-State defendants of a reasonable opportunity to appear, answer and defend.

Nor can it be denied that the practice causes substantial injury to such defendants since a default judgment may be entered in Illinois without defendants effectively being able to contest it, ultimately operating to their substantial economic detriment in the impairment of their credit standing if nothing else. As the court noted in *Barquis* v. *Merchants Collection Association of Oakland, Inc.*, 496 P.2nd 817 (1972):

> Knowingly filing actions in distant counties in order to gain an unconscionable advantage is not a unique or isolated practice, but instead has been continuously identified * * * as a widespread and common abuse in the debt collection field.

Respondent argues, nevertheless, that if, indeed, this practice of Spiegel is violative of due process, it cannot be acted upon without a second suit in the State of the defendant purchaser where the latter may raise the issue of due process and, if successful, prevent collection. It is unlikely, however, that such purchaser in the second suit would have an opportunity to raise any valid defenses on the merits or make counter-claims or correct the damage done to his credit rating. Moreover, such circuitous and last-ditch defense tarnishes the machinery of justice. Supreme Court Chief Justice Burger noted that there was a need to improve the machinery of justice so that the sense of confidence in the courts will not be destroyed by a belief among people "who have long been exploited" that "the courts cannot vindicate their legal rights from fraud and overreaching in the smaller daily transactions of life." 69 U.S. News & World Report 68 (No. 8, Aug. 13, 1970). It is even more incumbent upon the Federal Trade Commission which is specifically charged with protecting the public from unfair trade practices to act under these circumstances. See *Barquis, supra*, p. 828.

The injury to such mail-order purchasers subjected to suits in distant forums was pointed out not only by the courts but by others as well.

The National Commission on Consumer Finance, for example, stated in its report of December 1972:

> Many states permit a suit of money judgment to be brought in a county where either the plaintiff or defendant resides. This type of venue provision can easily be abused by plaintiffs in collection matters. For example, if the plaintiff-creditor has multiple locations or a central place of business fairly distant from the county or location where most of its customers reside, it can initiate suit in a venue (location) which, though "legally" proper, is extremely distant from or inconvenient to the debtor-defendant. The practice usually results in the entry of a default judgment and, in effect, deprives the debtor-defendant of a reasonable opportunity to defend against the underlying claim.

Similar observations are contained in the final draft of the Uniform Consumer Credit Code by the National Conference of Commissioners on Uniform State Laws (1974) and in the first final draft of the National Consumer Act (National Consumer Law Center, Boston College Law School, Brighton, Mass. (1970).

> Even if the debtor's defense was totally lacking in merit, he should not have been denied his opportunity to assert it. Even the most deadbeat debtor can perceive the perversion of justice in a procedure that allows a default judgment to be entered against him in a court at the other end of Texas, (Sampson, *Distant Forum Abuse in Consumer Transactions*, 51 Tex. L.R. 269 (1973)).

The Commission's guidelines in ascertaining fairness or unfairness were noted by the Supreme Court in *Sperry & Hutchinson* v. *Federal Trade Commission*, 405 U.S. 233, 244-45 n. 5 (1972). Where, as here, the practice has been found to offend public policy as it has been established by statutes, common law or otherwise and where it is oppressive and causes substantial injury to consumers, such practice may be found unfair and prohibited. I have found that Spiegel's practices involved in this proceeding lack due process and do not conform to the objectives of long-arm statutes. But even if they had been valid under such statutes, it would not change the outcome of this proceeding. What may have been lawful heretofore may, nevertheless, be found to have become an unfair trade practice under current community standards of fair dealing. See, *e.g. Federal Trade Commission* v. *Standard Education Society*, 86 F.2d 692, 696 (1936). I have found that Spiegel's use of the Illinois long-arm statute against out-of-State retail mail-order purchasers would not comport with fair play and would be deemed unfair. Under such circumstances, the Commission is authorized to act even in the absence of proof of actual injury to anyone. See *Spiegel, Inc.* v. *Federal Trade Commission*, 494 F.2d 59, 62 (1974).

THE REMEDY

The Commission's authority and obligation to enter an order of sufficient breadth to ensure that a respondent will not engage in future violations of the law is well established; the Commission has widest discretion to fashion suitable order provisions, not limited to the exact nature of the specific violations, to protect the public interest. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392, 394-5 (1965); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-30 (1957); *Federal Trade Commission* v. *Ruberoid Co.* 343 U.S. 470, 473 (1952); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611-13 (1946). The only limitations set by the courts are that the order provisions must be reasonably related to the unlawful practices and must be sufficiently clear and precise in defining understandable parameters of compliance and enforcement. *Colgate*, 380 U.S. at 392, 394-95; *National Lead*, 352 U.S. at 428-30; *Ruberoid*, 343 U.S. at 473; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 726 (1948).

Thus, Paragraph One of the order herein prohibits the institution of suits against a defendant other than where defendant resides or where the contract sued upon was signed. This will not preempt any rule of law which further limits choice of forum and is similar to the consent orders issued by the Commission in *Montgomery Ward & Co.*, C-2602 (Nov. 1974) [84 F.T.C. 1337] and *West Coast Credit Corp.*, C-2600 (Nov. 1974) [84 F.T.C. p. 1328].

Paragraph Two of the order herein is also akin to the consent orders in *Montgomery Ward* and *West Coast Credit, supra*. It requires Spiegel to terminate any suit instituted contrary to the provisions of Paragraph One above and vacate any default judgment entered thereunder, although a change of forum is permitted instead. Respondent opposes this paragraph as harsh and unfair. But this termination requirement is triggered only after Spiegel learns that such a suit had been instituted. Complaint counsel interprets this paragraph of the order to be prospective in effect and not disturbing existing judgments. Consequently, the burden on Spiegel should not be undue, and would insure that Spiegel did not retain the fruits of a suit and judgment improperly, but in good faith, obtained. Moreover, this paragraph permits Spiegel to seek a change of forum where permitted by State law. At the same time, defendants are to be given a reasonable opportunity to defend the new proceeding by Spiegel.

Paragraph Three of the order herein requires Spiegel to notify credit bureaus and consumer reporting agencies, as well as any others upon request of the defendant, of the termination of suits improperly filed and the vacation of default judgments obtained thereunder. This is necessary to overcome the harm done to the defendant's credit reputation by the filing of an improper suit even though the suit may have been terminated later.

Paragraph Four of the order herein concerns recordkeeping. It requires Spiegel to prepare and maintain a summary of consumer law suits filed for two years following the commencement of this order. This will enable the Commission to monitor compliance and should not constitute an undue burden to Spiegel which can comply with relatively slight clerical operations at the scene of such activity. It would be much more burdensome for the Commission to undertake such monitoring considering Spiegel's far-flung operations. This paragraph also requires Spiegel to prepare such a summary for the year preceding the issuance of the complaint herein, Aug. 7, 1974. This will enable the Commission to gauge the effectiveness of the order and is consistent with the Commission's powers. See, *e.g.*, *National Dynamics Corp.* v. *Federal Trade Commission*, 492 F.2d 1333 (1974); *Tashof* v. *Federal Trade Commission* 437 F.2d 707, 715 (1970); *Arthur Murray Studio of Washington, Inc.*, 78 F.T.C. 401, 436 (1971).

Paragraphs Five, Six and Seven of the order herein are standard provisions.

ORDER

It is ordered, That respondent Spiegel, Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, including any collection agency, in connection with the collection of retail credit accounts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Instituting suits except in the county where defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions involving real property or fixtures attached to real property, that suit be instituted in a particular county.

It is further ordered, That, where respondent learns subsequent to institution of a suit that the preceding paragraph has not been complied with, it shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of such termination, respondent may effect a change of forum to a county permitted by the preceding paragraph, provided that respondent gives defendant notice of such action and opportunity to defend equivalent to that which defendant would receive if a new suit were being instituted. In all cases respondent shall provide defendants with a clear explanation of the action taken and of defendants' rights to appear, answer and defend in the new forum.

It is further ordered, That where respondent terminates a suit or vacates a judgment pursuant to the preceding paragraph, it shall give notice of such termination or vacation to each "consumer reporting agency," as such term is defined in the Fair Credit Reporting Act (15 U.S.C. §603), which it has been informed or has reason to know has recorded the suit or judgment in its files. Additionally, respondent shall furnish such notice to any other person or organization upon request of the defendant.

It is further ordered, That respondent prepare and maintain a summary of suits instituted, pending, terminated, or acted upon subsequent to judgment. This summary shall contain each defendant's name, address, and county of residence; county where the contract was signed by the defendant, if the suit was not instituted in the residence county; county where served; date served; date filed; docket number; name and location of court in which filed; name of plaintiff (if a collection agency suing in its own name); amount claimed; and disposition (including garnishment or execution, if any). Where a suit has been instituted in a county other than where defendant resides or signed the contract, the reason for this choice of forum shall be explained. This summary shall cover three years, including Aug. 1, 1973 to Aug. 1, 1974, and two years immediately following effective date of this order. A copy of this summary shall be submitted to the Federal Trade Commission on a quarterly basis except that the summary of activity for the first year shall be submitted within sixty days after the effective date of this order.

It is further ordered, That respondent shall forthwith deliver a copy of this order to each of its subsidiaries and operating divisions, to each collection agency currently collecting any of respondent's retail credit accounts, and to any other collection agency prior to referral to it of any of respondent's retail credit accounts. Respondent shall obtain and preserve signed and dated statements from each collection agency, acknowledging receipt of the order and willingness to comply with it.

It is further ordered, That respondent notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty days and at the end of six months after the effective date of the order served upon them, file with the Commission a report, in writing, signed by respondent setting forth in detail the manner and form of its compliance with the order to cease and desist.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

Complaint in this matter was issued on Aug. 7, 1974, charging that respondent's use of an inconvenient forum in which to sue certain of its customers constituted an unfair act or practice, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45. Proceedings before the administrative law judge were brief. Respondent admitted all the factual allegations of the complaint but argued they did not warrant a finding of illegality, or, at least, the imposition of an order. The administrative law judge disagreed, sustained the complaint, and entered an order. Respondent has appealed.

The facts are readily summarized. Respondent is a catalog retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools, tires and various other articles of merchandise (I.D. 2).[1] Respondent's principal place of business is in Chicago, Ill. (I.D. 1). In the course of its mail-order catalog business it receives orders in Illinois from purchasers domiciled throughout the country, and ships products to them in their home States (I.D. 3). Respondent regularly extends credit to consumers to facilitate their purchase of its products (I.D. 4), and in the course of collecting overdue accounts, it regularly sues purchasers who reside in States outside of Illinois (hereinafter "out-of-State" defendants) in the Circuit Court of Cook County, Ill. Almost all out-of-State defendants have received respondent's catalogs or other advertising material, and executed purchase orders or contracts in their home States. Almost all of these defendants have had no pertinent contact with the State of Illinois other than their dealings with respondent (I.D. 5). The distance, cost, and inconvenience of defending such suits in Illinois place a virtually insurmountable burden on out-of-State defendants who might wish to defend the charges against them (I.D. 6).

I.

It is perhaps to respondent's credit that on appeal it has made less effort to defend the justness of its own prior conduct than to challenge the propriety of Commission action to change it. We agree with the administrative law judge that respondent's activities do fall squarely within Section 5's proscription of unfair acts and practices, and that remedial action is warranted. The Commission has previously described factors it will consider in determining whether a practice is "unfair" within the statutory meaning:

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[1] The following abbreviations are used herein:

I.D. - Initial Decision (Finding No.)
I.D. p. - Initial Decision (Page No.)
RB - Respondent's Appeal Brief to the Commission (Page No.)
RPF - Respondent's Proposed Findings of Fact and Law
CB - Complaint Counsel's Reply Brief to the Commission (Page No.)

> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness;
>
> (2) whether it is immoral, unethical, oppressive, or unscrupulous;
>
> (3) whether it causes substantial injury to consumers.***[2]

In seeking the source of public policy with respect to questions of jurisdiction and the proper use of judicial fora for debt collection, we must begin with the guarantees of due process as they have been articulated by courts. We think there can be little question that Spiegel's use of an Illinois situs to sue its out-of-State debtors offends traditional notions of due process and denies consumers the meaningful opportunity to answer and defend charges against them which it is the purpose of the law to provide.

Spiegel contends that it has merely made proper use of the Illinois "Long Arm Statute,"[3] which confers jurisdiction over parties who are, *inter alia*, "doing business" in Illinois, to the extent a suit concerns such business. The statute has been construed to confer jurisdiction as broad as that permitted by the Constitution *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N.E. 2d 673, 679 (1957). Complaint counsel reply (and the administrative law judge so found) that suit against out-of-State debtors in the circumstances defined by the complaint denies due process, and, thus, could not come within the grant conferred by the Illinois statute (I.D. p. 8 [pp. 431, 432, herein]).[4]

The Supreme Court has set forth the general standard for permissible *in personam* jurisdiction:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945).

Subsequent decisions have made clear that a defendant need not have entered a State or have had extensive contacts with it in order to satisfy the constitutional test *Travelers Health Association* v. *Virginia*, 339 U.S. 643 (1950); *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

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[2] "Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking," 29 Fed. Reg. 8355 (1964), cited in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972).

[3] Ill. Rev. Stat., Supp. Ch. 110 §176, 1967.

[4] Respondent's argument that the Commission in this proceeding is challenging the validity of the Illinois statute itself is patently incorrect. To the extent the Illinois statute is relevant, the question is whether its narrow and particular *use* by Spiegel is consistent with federal law. Respondent has pointed out no opinion by an Illinois court or any other holding that Spiegel's particular use of the long arm statute is a proper one.

While extending the reach of *in personam* jurisdiction, courts have continued to recognize the impropriety and fundamental unfairness of assuming jurisdiction over defendants whose connection with the forum State is tenuous at best, who have made no attempt to avail themselves of the benefits and protections of the laws of the forum State (*e.g.*, *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958)), and who have no means or expectation of defending suit in a distant locale. Compare *McQuay, Inc.* v. *Samuel Schlosberg, Inc.*, 321 F. Supp. 902 (D. Minn. 1971) in which the court said:

> The general philosophy of long arm statutes is to protect citizens of a state where a nonresident comes into the State directly or indirectly to sell something or solicit sales, or where, even though out of state, a nonresident sells a product which is brought into or comes to rest in the State. The nonresident thus receives the benefit and protection of the state's laws and profits or hopes to from its adventure therein. The nonresident is the aggressor or initiator. It is appropriate that such a nonresident seller should respond to service of process in that state. (At 906.)

With *Nordberg Div. of Rex Chainbelt Inc.* v. *Hudson Engineering Corp.*, 361 F. Supp. 903 (E.D. Wisc. 1973) in which the court reviewed underlying policy considerations militating against assertion of jurisdiction over a nonresident mail order purchaser:

> A customer of a mail-order house, be it an individual or a small company engaged in a one-state operation, is also more likely to be unprepared to defend itself in a foreign forum than is a company which transacts a substantial amount of interstate business. When almost all of its business is conducted in its home state, a customer of a mail order house does not expect to be forced to travel to a distant forum * * *. When its expectations are disappointed, it is caught unprepared psychologically and, perhaps, financially. (At 907.)

It is perhaps an oversimplification to say that the courts have drawn a firm jurisdictional line between buyers and sellers, but those categories are clearly of relevance to the extent they are used "as a short-hand means of expressing the differences between passive and active involvement in a transaction." *In Flight Devices Corporation* v. *Van-Dusen Air, Inc.*, 466 F.2d 220, 233 (6th Cir. 1972). Jurisdiction over an out-of-State purchaser may be appropriate, but only where the buyer has taken an active role in negotiation or performance of the contract, or has had other significant contacts with the forum State. Thus, in finding that a large corporate purchaser could be sued in the vendor's home State, the First Circuit distinguished its role from that of the usual long distance customer:

> On this background the extent of United's participation in the economic life of Massachusetts seems clearly to rise above that of a purchaser who simply places an order and sits by until the goods are delivered * * *. *Whittaker Corporation* v. *United Aircraft Corporation*, 482 F.2d 1079, 1084 (1973).

It is clear, however, that Spiegel's retail credit customers are the quintessential passive buyers, who do sit by until the goods are delivered. They have purchased in response to respondent's advertising or mailing of its catalog. They have had no contact with the State of Illinois other than to mail in a standardized contract signed in their home State. They have not sought the benefit and protection of Illinois laws, and they most certainly have no expectation of being required to travel to Illinois to engage in litigation should a dispute develop concerning the merchandise. Nor, undoubtedly, do most have the means to launch a cross-country defense on procedural or substantive grounds.

While neither side has cited a holding precisely on point, there appear to be numerous instances in which courts, in the course of resolving related problems, have considered situations virtually the same as that involved here, and concluded that jurisdiction over an out-of-State mail order customer would contravene due process. Indeed, one reason that this narrow point has never been the subject of a litigated holding may be that sellers' counsel have considered it too obvious to withstand scrutiny and have backed off if faced with a contest.[5] As the Illinois District Court commented in *Geneva Industries, Inc.* v. *Copeland Construction Co.:*

> The notion that any customer of an Illinois based mail order house such as Sears Roebuck or Montgomery Ward would be subject to the jurisdiction of Illinois courts is obviously violative of the most minimal standard of minimum contacts and the fundamental structure of the federal system. 312 F. Supp. 186, 188 (1970).

In *McQuay, Inc.* v. *Samuel Schlosberg, Inc., supra*, a New York-based contractor was solicited by a Minnesota corporation's New York agent. It placed an order and failed to pay. In denying jurisdiction under Minnesota's long-arm statute, substantially identical to that of Illinois, the court reasoned that:

> If plaintiff's position is sound, then it or any other Minnesota manufacturer can sue all of its customers wherever they may be located in the United States who for good or bad reasons have failed to pay their bills or the purchase price of goods.* * * This concept almost completely obliterates state lines.* * * (At 906.)

In *Conn* v. *Witmore*, 9 Utah 2d 250, 342 P. 2d 871 (1959), the court denied enforcement of a default judgment rendered in Illinois against a Utah purchaser who had sent his servant to Illinois to inspect and pick up the merchandise, and remitted payment by mail to the Illinois vendor. The court reasoned that:

> Brief reflection will bring to mind difficulties to be encountered if the ordering of merchandise in a foreign state by mail and taking delivery through a designated carrier * * * is to be deemed "doing business" in a foreign state which will draw one into the orbit of the jurisdiction of its courts.* * * Mail order houses, for example, accept and fill orders from all over the country. If they could sue on their own accounts in their own state where it would be highly inconvenient for out-of-state customers to defend, n forward the judgments to the jurisdictions where the customers live, demanding full faith and credit for them, this would effectively prevent the customers from presenting a meritorious defense where one existed. The ultimate result would be to dissuade

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[5] See RPF, Appendix A, p. 2.

> customers from doing business across state lines by mail. Thus what may seem a temporary advantage to such businesses, in all likelihood would be detrimental to them and to business generally in the long run. (At 342 p. 2d 874-75.)

More recently, an Illinois District Court denied jurisdiction in a suit brought by an Illinois corporation against a Michigan corporation which had leased railroad cars from plaintiff, having been solicited by the vendor's agents in Michigan. The court concluded that:

> The interpretation by state and federal courts that the Illinois Long-Arm Statute does not extend Illinois jurisdiction to such cases as the instant action rests on logic and hard fact. To grant jurisdiction in such cases would have an adverse effect on commerce because such a decision would subject any customer of an Illinois business, manufacturer, or mail order house to Illinois jurisdiction in the event of suit arising solely out of the acceptance by mail of an Illinois resident's offer. The ultimate result would be to dissuade customers in foreign states from doing business by mail or even telephone with Illinois businessmen. *United States Railway Equipment Co.* v. *Port Huron and Detroit Railroad Co.*, 58 FRD 588 (N.D. Ill. 1973).

To the same effect are numerous other reported cases, *e.g., In-Flight Devices Corp.* v. *Van Dusen Air, Inc.*, 466 F.2d 220, 232-33 (6th Cir. 1972); *Nordberg Div. of Rex Chainbelt Inc.* v. *Hudson Engineering Corp.*, 361 F. Supp. 903, 906-07 (E.D. Wisc. 1973); *Fourth Northwestern Nat. Bank* v. *Hilson Industries, Inc.*, 264 Minn. 110, 117 N.W. 2d 732 (1962); *"Automatic" Sprinkler Corp.* v. *Seneca Foods Corp.*, 280 N.E. 2d 423, 425 (Mass. 1972); *Marshall Egg Transport Co.* v. *Bender-Goodman Co., Inc.*, 275 Minn. 534, 148 N.W. 2d 161 (1967); *Tiffany Records Inc.* v. *M.B. Krupp Distributors, Inc.*, 81 Cal. Rptr. 320, 327, 276 Cal. App. 2d 610 (1969); *Belmont Industries, Inc.* v. *Superior Ct. of Stanislaus County*, 107 Cal. Rptr. 237, 31 Cal. App. 3d 281 (1973).[6]

From the foregoing we conclude that Spiegel's practice of suing its out-of-State mail order customers in Illinois courts is patently offensive to clearly articulated public policy, intended to guarantee all citizens a meaningful opportunity to defend themselves in court.

We also find that Spiegel's practices are oppressive, and injurious to consumers. The burdens imposed on a consumer-debtor by the creditor's use of an inconvenient forum have been highlighted in a *Staff Report on Debt Collection Hearings* compiled by the Commission's New York Regional Office, and cited by complaint counsel:

> The plaintiff, having selected a forum convenient to himself, may have at the same

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[6] Respondent has made no effort to distinguish the extensive case law cited by complaint counsel in support of their position. We have carefully reviewed the decisions cited by respondent at pages 32-36 of its Appeal Brief, involving construction of the Illinois long-arm statute, *e.g., Ziegler* v. *Houghton-Mifflin Co.*, 80 Ill. App. 210, 224 N.E. 2d 12 (App. Ct. 2d Dist. (1967); *Koplin* v. *Thomas, Haab, and Botts*, 73 Ill. App. 2d 242, 219 N.E. 2d 646 (App. Ct. 1st Dist. 1966); *O'Hare International Bank* v. *Hampton*, 437 F.2d 1173 (7th Cir. 1971). None of these matters involved, nor did the courts therein discuss, the type of situation at issue here, and of concern to courts in cases cited by complaint counsel, *i.e.*, a passive consumer mail order buyer and a large vendor who initiates and sets the terms of the transaction. Respondent's reliance on *McGee* v. *International Life Insurance*, *supra*, is similarly misplaced, in light of the wide difference of involvement in the transaction between the defendant vendor in that case and the defendant consumers in this, and in view of the Court's heavy reliance in that case on the state's interest in providing its citizens with an effective means of suing insurers who refuse to pay their claims 355 U.S. 223-24.

> time imposed a hardship upon the defendant as far as travel and expenses are concerned. The defendant may have to lose a day's salary which he can ill afford. In addition, the defendant who has retained a private attorney, may have to pay additional expenses to have the attorney travel to defend. Or, if the debtor desires to be represented by a legal services agency, he may find that the local legal services office may have to refer him to the legal services office in the county of suit because the local office is not physically equipped to handle the defense properly. This, in turn, imposes other hardships; it becomes more difficult and more expensive to prepare a defense.
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> It may be possible for the defendant to make a motion for a change of venue * * *, but where the defendant is without counsel, he would probably be unaware of this and, in any event, technicalities of motions practice may make it too difficult for the consumer-debtor to accomplish on his own. Thus, while the plaintiff may bring the action in a forum inconvenient for the consumer with respect to venue, unless the defendant moves for a change of venue, the action may still proceed there (at pages 123-24; April 1973).[7]

It is not surprising that all of the cases cited by counsel in their briefs have involved well-heeled defendants and substantial sums of money, which made it economically worthwhile for the defendants to retain counsel to contest the issue of jurisdiction. If lawyers worked for free, and there were no limit to their numbers, Spiegel's practices would cause us less concern. In fact, however, it is probable that for many of Spiegel's defaulting customers, like most consumers who are sued for small debts, the only meaningful and economically viable opportunity they have to defend a suit against them is to appear in court *pro se* and argue their case. This opportunity is totally foreclosed by respondent's use of the Cook County forum, which forces the consumer who wishes to defend to appear in a courtroom hundreds or thousands of miles from home, at a cost in travel alone which may exceed the amount in controversy. The option of hiring a lawyer who would be able to file a motion contesting jurisdiction is likely to be equally unviable. Nor do we think it lessens the damage done to argue that judgments unfairly obtained by Spiegel would be rejected if it attempted to collect on them. Affirmative efforts to defend a collection suit can also impose costly and unaccustomed burdens on the consumer, and in any event there are many injurious uses which can be made of improper judgments short of execution, such as sullying credit records cf. *Riverside & Dan River Mills* v. *Menefee*, 237 U.S. 189, 195-97 (1915).

Spiegel has suggested that it confined its Illinois collection suits to those involving "undisputed balances" in which the debtor "could not be persuaded to pay."[8] It is clearly not for Spiegel, however, to decide which of its debtors have defenses so unmeritorious that they do not deserve a reasonable opportunity to defend themselves in judicial proceedings brought against them. In a society which prizes the right of everyone to a day in court, there can be little doubt that substantial injury is done whenever the meaningful opportunity to defend is foreclosed, no matter what the outcome would have been absent the foreclosure. As the Supreme Court noted more than a half century ago in *Coe* v. *Armour Fertilizer Works:*

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[7] This passage discusses the effect of use of inconvenient venue within the debtor's home State. Spiegel's suits in an inconvenient venue outside the debtor's State can hardly be less oppressive. See also, *Consumer Credit in the United States, Report of the National Commission on Consumer Finance*, pages 41-42 (Dec. 1972).

[8] RPF, Appendix A, page 2.

> To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits. 237 U.S. 413, 424 (1915).

Because Spiegel's practice of suing its out-of-State mail order customers in Illinois is contrary to clearly established public policy favoring a meaningful opportunity for all citizens to defend suits brought against them, and because this conduct is oppressive and injurious to consumers in denying them valuable rights which our society holds dear, we conclude that Spiegel has engaged in an unfair practice within the meaning of Section 5 of the Federal Trade Commission Act.

II

Counsel for respondent has raised a number of objections to the entry of an order, which we believe are without merit. Counsel suggests that the Commission should proceed by rulemaking rather than "singling it out" for imposition of sanctions. While rulemaking would not necessarily be inappropriate in this circumstance, it is well settled that the Commission may proceed by adjudication against an offender without simultaneously pursuing all others. *Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411 (1958), *cert. denied* 356 U.S. 905 (1958); *Ger-Ro-Mar, Inc., et al.* v. *Federal Trade Commission,* No. 74-2343 (2d Cir., June 16, 1975). In addition, at the same time that suit was brought against Spiegel, three other firms, including Montgomery Ward, were cited for practices involving suit in inconvenient fora, and those three all consented to orders imposing the same limitations on choice of forum as are contained in the order of the administrative law judge.[9] In light of its holding in this matter the Commission will certainly view with care the allegedly identical practices of others which may come to its attention (though respondent has not suggested whom it has in mind), but we do not believe that imposition of an order on respondent amounts, by any standard, to an abuse of discretion *Federal Trade Commission* v. *Universal-Rundle Corp.,* 387 U.S. 244 (1967).

A related contention on Spiegel's part is that the Commission should stay its hand because of the "novelty" of the legal position asserted in the complaint. Spiegel proposes that if the Commission will not proceed by rulemaking it should issue a declaratory judgment in this proceeding, stating that the practice is unlawful but omitting a binding order. We cannot agree with Spiegel's suggestion that somehow its practice has been lawful until now. We think it is more accurate to say that Spiegel has in the past gotten away with something that its counsel ought to have recognized, in light of the numerous decisions cited hereinbefore (some of which were a matter of public record before Spiegel contends it began its practice), was at best a highly dubious activity.[10] There may be instances in which it would be inequitable to impose a harsh order on a respondent based upon a novel interpretation of the law. This is nowhere near such a case. The order imposed is not harsh, and not particularly difficult of compliance. And the Commission's "novel interpretation" of law has been foreshadowed, indeed dictated, by substantial prior precedent. We do not believe that whenever the Commission resolves a point of law for the first time in an adjudication it must omit an order against the violator. Acceptance of Spiegel's argument would require no less.

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[9] *Montgomery Ward & Co.,* C-2602 (Nov. 1974); *West Coast Credit Corp.,* C-2600 (Nov. 1974); *Commercial Service Co., Inc.,* File No. 732-3434 (consent order accepted and placed on public record for comment).

Spiegel also contends that the Commission may not "pre-empt" the laws of Illinois by limiting the reach of the Illinois long-arm statute. Relatedly, Spiegel argues that a sufficient remedy is afforded injured debtors by the courts of Illinois, which can determine on a case-by-case basis whether or not jurisdiction lies therein.

With respect to the pre-emption argument, the Commission does not believe that its decision in this matter is in any way inconsistent with the law of Illinois, which has necessarily been construed by the courts of that State to afford all defendants due process *Nelson* v. *Miller*, *supra*. As noted earlier, Spiegel has cited no precedent from Illinois or elsewhere to suggest that an Illinois court could find its use of the long-arm statute to be proper. To the contrary, more than one Illinois federal district court judge, upon considering the precise issue before us, has expressed the view that Illinois law would not favor Spiegel's behavior, *e.g.*, *United States Railway Equipment Co.* v. *Port Huron and Detroit Railroad Co.*, *supra; Geneva Industries* v. *Copeland Construction Co.*, *supra*.

It may be argued that the baseline courts in Cook County have tacitly sanctioned Spiegel's construction of the long-arm statute by entering default judgments in its favor. It is questionable, however, whether these courts have ever really had occasion to consider the legal issues involved here. While there is authority to suggest that a court should consider on its own initiative whether it has subject matter jurisdiction before entering a judgment, there is little authority to suggest that a court, when faced with valid proof of service of process, a petition by plaintiff, and no answer by defendant, is obliged before entering a default judgment to look behind the pleadings to determine *sua sponte* whether it possesses *in personam* jurisdiction.[11] Particularly since Spiegel, by its own admission, has withdrawn its suit in the rare case when a defendant had the legal resources or legal acumen to challenge jurisdiction, the failure of the Cook County Circuit Court to put a spontaneous stop to respondent's practice appears to us to be of slight precedential value as a guide to the proper construction of the Illinois long-arm statute.

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[10] In this regard it may not be irrelevant to note that in Appendix A of respondent's "Proposed Findings of Fact and Conclusions of Law" before the administrative law judge, respondent's vice-president/secretary states that Spiegel instituted its experimental program of suing out-of-State debtors in Cook County "to determine what the collection results would be without recourse to execution or garnishment on the judgments obtained against delinquent debtors." In the same affidavit it is stated that in those rare instances when a consumer objected to the Illinois venue, the suit was dropped. We wonder why, with an "undisputed balance" at stake, Spiegel should desist from proceeding in a forum it assertedly believed to be entirely proper.

Moreover, assuming *arguendo*, and contrary to what appears to be the fact, that Illinois law could somehow be read to condone Spiegel's conduct, such conduct must nevertheless fall in the final analysis before clear Federal policy which condemns it. Respondent does not challenge the proposition that where State and Federal laws conflict, Federal policy governs *Free* v. *Bland*, 369 U.S. 663 (1962). While courts will endeavor to avoid reading a pre-emptive intention into Federal law, they will not hesitate to find pre-emption where a clear conflict exists *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963). Moreover, any conflict which exists here is minimal. This is not a situation in which State and Federal law compel two different and inconsistent courses of conduct. Rather, at most, Spiegel can argue that State law permits that which Federal policy forbids. Under these circumstances there can be no reason why clear Federal standards should be bent or ignored.[12]

With respect to the alleged remedy already available to individuals sued in Cook County courts, we think it is evident that such a remedy has proven illusory in the majority of cases. We strongly suspect that the tribunals of Illinois would not have hesitated to throw Spiegel out of court were there ever a case in which a defendant chose to mount a defense on the jurisdictional question, while Spiegel stayed with its suit. In fact, however, few defendants are likely to know how to challenge Spiegel's abuse of the long-arm statute by themselves, and few are likely to pay for a lawyer to mount a cross-country contest when the cost of so doing may well exceed the amount at issue. Faced with the typical default situation, the courts of Illinois have not in the past provided an adequate remedy on a case-by-case basis, and that is precisely the reason that action by the Commission is needed to protect consumers, and is in the public interest cf. *Barquis* v. *Merchants Collection Association of Oakland, Inc.*, 7 C. 3rd 94, 101 Cal. Rptr. 745, 496 P. 2d 817 (1972).

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[11] Neglect of uncontroverted jurisdictional issues occurs in administrative proceedings as well. As complaint counsel have pointed out in their brief (CB 22-23), the administrative law judge did not enter a conclusion of law in his initial decision stating that the Commission has jurisdiction in this case. Spiegel has not challenged the Commission's jurisdiction, and we hereby do conclude that the Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding.

[12] We similarly do not believe that the Tenth Amendment forbids Commission action (RB 40-42). Even if the Commission's action is viewed as imposing a limitation on State authority to authorize suits, rather than as imposing a limitation on Spiegel's ability to abuse the judicial process, it is nonetheless well-established that the Tenth Amendment does not mean that State-authorized activity may stand in the face of duly authorized Federal requirements *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); *United States* v. *Darby*, 312 U.S. 100, 123-24 (1941).

In the concluding paragraph of its brief (RB 42) respondent suggests that it has abandoned the challenged practices, and for that reason an order is not required. It is well established, of course, that discontinuance of an offending practice, particularly after initiation of governmental investigation, and in circumstances where resumption is possible, does not obviate the need for, or propriety of, an order *Libby-Owens-Ford Glass Co.* v. *Federal Trade Commission*, 352 F.2d 415 (6th Cir. 1965); *Cotherman* v. *Federal Trade Commission*, 417 F.2d 587 (5th Cir. 1969); *Coro, Inc.* v. *Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). Moreover, we have reviewed the "Assurance of Voluntary Compliance" appended by respondent to its proposed findings of fact before the administrative law judge, and we do not believe that the promises contained therein, if adhered to, would be sufficient to eliminate the offending conduct. For example, the assurance would not prevent Spiegel from assigning its cases to collection agencies who could sue on Spiegel's behalf in objectionable fora, and the assurance would not prevent Spiegel from suing a consumer in counties other than those of residence or signing of the contract, a remedial standard we think is necessary to eliminate the unfairness which has occurred here.

III

Respondent has objected to portions of the order proposed by the administrative law judge, which is essentially the same as the notice order. Respondent does not quarrel with the first substantive paragraph of the order[13] which establishes a "fair venue" standard for suits by respondent, requiring that it sue its consumer debtors in the county of their residence or the county in which they signed the contract sued upon.

The second substantive paragraph (III) requires that if respondent violates the preceding paragraph by suing in a distant locale, it must take steps to terminate the suit, vacate any default judgment entered as a result, or, in the alternative, transfer the proceeding to a suitable forum and provide the defendant with an opportunity to defend. The following paragraph (IV) requires that if respondent brings a suit in an unfair forum it must take steps to notify credit bureaus of the fact that the suit has been terminated or a default judgment vacated. We believe that these two paragraphs are necessary to satisfy the objective of this proceeding, which is to protect consumers from the unfair practice in which respondent has engaged. Even should Spiegel proceed, as we trust it will, with the greatest diligence and attention to the obligations imposed by Paragraph II, there is always the possibility that through an inadvertence of one sort or another the prohibited practice will be repeated. Paragraphs III and IV are intended to ensure that should such a situation occur, and the consumer be again sued in distant forum, an adequate mechanism exists to remedy the harm done thereby. If no violations of Paragraph II occur, Paragraphs III and IV will prove to be mere surplussage; if a violation of Paragraph II does occur, we are at a loss to see how respondent could quarrel with the objectives of Paragraphs III and IV.

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[13] Paragraph II of the Commission's revised order. References hereinafter are to the revised order entered by the Commission, which generally tracks the notice order.

Respondent worries that the obligations imposed by Paragraphs II-IV are retroactive, and protests. There is no need for us to rule here with regard to the Commission's authority to require respondent to vacate existing judgments obtained prior to the order, in violation of Section 5. We think that Paragraphs II-IV on their face quite clearly apply only to suits brought after the effective date of the order, and respondent's concerns on that score are unwarranted.

Respondent takes most strenuous exception to those portions of the order which require recordkeeping. The order proposed by the administrative law judge would require that respondent provide the Commission with a summary of collection suits it has brought for a two-year period following the effective date of the order, and for a one-year period prior to the effective date of the order. The summary of suits shall contain each defendant's name, address, county of residence, county in which the defendant signed the contract (if the suit is not instituted in the residence county), county where service was made, date of service, date of filing, docket number of case, name and location of the court in which the action was filed, name of plaintiff (if a collection agency suing in its own name), amount sued for, and disposition of the case. Where a suit has been instituted in a county other than where defendant resides or has signed the contract, the reason for the choice of forum shall be explained.

Respondent objects that the reporting requirement is unduly "burdensome." With respect to the case summaries for the period following the effective date of the order, the information required is the minimum necessary to permit the Commission to monitor compliance and, therefore, the order is warranted, even though it may impose some burden *National Dynamics Corporation* v. *Federal Trade Commission*, 492 F.2d 1333 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3280 (Nov. 12, 1974); *Tashof* v. *Federal Trade Commission*, 437 F.2d 707, 715 (D.C. Cir. 1970). In addition, we do not believe the order imposes a significant burden, and beyond its barebones assertion respondent has given no indication of the extent of the burden or how the order could be modified (as opposed to omitted) to alleviate the alleged difficulties.

The necessity for the required information as a means of checking compliance during an initial post-order period is clear. Respondent suggests that the Commission can evaluate compliance any time it wishes simply by scanning the docket of the Cook County courts to determine whether Spiegel has sued any customers from out-of-State. Even assuming that it were feasible for Commission investigators to check each entry on the Cook County docket to make sure that it was not Spiegel suing in a prohibited forum, respondent ignores the fact that under this procedure it could sue anywhere else, regardless of the distance of such a forum from a consumer's residence or location of contract signing, without detection. Obviously the Commission cannot feasibly search every docket in the country to determine that respondent, or its collection agencies, is not suing in a locale prohibited by the order.[14] Only respondent itself can readily provide the information needed to determine whether or not it is in compliance. Moreover, the particular details required seem to us to be the fewest necessary to determine whether suit has been filed in a forum forbidden by the order.

With respect to the issue of burdensomeness, in the absence of any detailed substantiation by respondent we can only observe that it would astonish us to find that respondent does not have readily available all the information required to be reported by the order. The only possible "burden" of which we can conceive is that of transcribing or copying this information for submission in a compliance report. The fact that respondent has made no effort to estimate the cost of such transcription makes if difficult for us to take seriously its claim that it would prove costly.[15]

The Commission has determined that the requirement that respondent provide a litigation summary for cases brought during the year

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[14] Indeed, a mere docket check in most counties would be insufficient to reveal instances in which a collection agency had sued on a Spiegel account in the agency's name.

[15] This is particularly so in view of the fact that three other respondents, sued at the same time as Spiegel, were willing to consent to reporting requirements identical to those involved here see n. 9, *supra*.

prior to the effective date of an order is unnecessary to determine compliance with the order subsequent to its effective date, and this provision will, therefore, be deleted. Respondent argues it is unnecessary, and complaint counsel have presented no convincing reason for its retention.

We have also modified the order slightly, to reflect the Commission's authority to enjoin practices "affecting" commerce, and to make clear (Par. I) what was implicit in the order proposed by the administrative law judge, that all provisions of the order apply to practices which Spiegel may undertake through the auspices of a collection agency or other third party.

An appropriate order is appended.

CONCURRING STATEMENT OF COMMISSIONER NYE

The Commission bases its determination that respondent has violated Section 5 of the Federal Trade Commission Act in part upon a conclusion that respondent has obtained judgments against out-of-State mail-order consumers under circumstances which fall short of the due process guarantees of the Fourteenth Amendment to the Constitution. I believe this conclusion is unnecessary and reliance upon it unwise.

It is an important principle of our jurisprudence that constitutional questions should be avoided in a case which can be resolved on statutory or common law grounds.[1] That principle should apply with special force to an administrative agency, which has no particular competence to address issues of constitutional dimension.

There appears to me no occasion to address constitutional issues in this case. While the Fourteenth Amendment imposes on the States certain minimal standards of justice and decency, Section 5 of the Federal Trade Commission Act requires the Commission "to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop"[2] and to enforce adherence to those standards in consumer transactions. The semantic kinship between the "fundamental fairness" standard adopted in the due process cases[3] and the "unfairness" yardstick mandated by Section 5 is not at all indicative of a legal equivalence. Although in particular cases the two standards may often coalesce, it would not be remarkable if a constitutional limitation on the activities of States were to diverge from a statutory limitation on the conduct of businessmen.

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[1] *See, e.g.*, Frankfurter, *Law and Politics* 25 (1939).

[2] *FTC* v. *Standard Education Society*, 86 F.2d 692, 696 (2d. Cir. 1936) (per L. Hand, J.), *rev'd on other grounds*, 302 U.S. 112 (1937).

[3] *See, e.g.*, *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) ("traditional notions of fair play").

The Commission, quite appropriately, refers to a number of judicial decisions which express doubt about the constitutionality of a State's assertion of *in personam* jurisdiction over out-of-State mail order consumers.[4] These decisions, together with others which do not involve the due process clause,[5] sufficiently establish that public policy disfavors the institution of collection lawsuits against consumers in courts unreasonably remote from the consumers' place of residence. That established public policy judgment, coupled with the substantial consumer injury disclosed by the record in this case, is enough to persuade me that the litigation practices of Spiegel which were challenged in this case amount to an unfair practice within the meaning of Section 5 of the Federal Trade Commission Act.

This reasoning also disposes of respondent's argument to the effect that the Commission cannot interfere with respondent's use of the Illinois long-arm statute unless the resulting judgments against out-of-State consumers were entered unconstitutionally. Again, while the Commission's opinion seems to answer this contention by concluding that the judgments *were* entered unconstitutionally, it is not necessary to decide that question. Leaving aside the fact that no Illinois court has ever held use of the long-arm statute in the manner adopted by respondent to be proper, I am perfectly content to assume *arguendo* that respondent's long-arm litigation does not involve the Cook County courts in a violation of due process, and that the judgments respondent obtains are entitled to full faith and credit in other States. The Federal Trade Commission Act, however, is not infrequently interpreted to prohibit unfair or deceptive acts or practices regardless of whether those acts or practices are authorized by the law of the State in which they are committed. *See, e.g., FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239 n. 4 (1972); *Chamber of Commerce of Minneapolis* v. *FTC*, 13 F.2d 673, 684 (8th Cir. 1926); *Peerless Products, Inc.* v. *FTC*, 384 F.2d 825, 827 (7th Cir. 1960), *cert. denied* 365 U.S. 844 (1961).

This case appears to illustrate the wisdom of the rule that constitutional issues should not be decided unless necessary to the result. When the Commission issued its proposed complaint in this matter on Mar. 4, 1974, it announced simultaneously its intention to institute three similar cases: *Montgomery Ward & Co., Inc.*, File No. 742 3102 [Dkt. C-2602, 84 F.T.C. 1337]; *West Coast Credit Corp.*, File

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[4] No court, however, has expressly held such an application of a long-arm statute unconstitutional.

[5] *See, e.g., Barquis* v. *Merchants Collection Association of Oakland, Inc.*, 7 C.3d 94, 101 Cal. Rptr. 745, 496 P.2d 817 (1972); *All-State Credit Corporation* v. *Defendants Listed in 669 Default Judgments*, 61 Misc. 2d 677, 306 N.Y.S. 2d 596 (Sup. Ct. App. Term 1970).

No. 732 3110 [84 F.T.C. 1328] and *Commercial Service Co., Inc.*, File No. 732 3404 [p. 467, herein].[6] In those three proposed complaints, the Commission stated it had reason to believe that the practice of suing a consumer in a remote location within the consumer's own State was unfair. At issue were alleged disregard of State venue provisions (*Commercial Service*), contractual waiver of State venue provisions (*West Coast Credit*), and, apparently, reliance on State venue provisions which the Commission had reason to believe did not in the particular circumstances come up to the standards of fairness embodied in Section 5 (*Montgomery Ward*). Of all the cases, only *Spiegel* raised putative constitutional issues. Taken together, the four cases signaled the Commission's intention to decide whether it is fair to force consumers to defend collection suits in distant courts, regardless of whether those courts are outside the State of the consumer's residence and, further, regardless of whether State venue rules are followed. *Spiegel* is the only one of these cases to be reviewed by the Commission after full administrative proceedings. The forum involved happens to be out-of-State, but that was certainly not deemed critical when the case was filed.[7] To the extent the Commission's opinion suggests otherwise, I believe it confuses the relevant assessment of public policy.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying opinion, having denied the appeal in principal part:

It is ordered, That the initial decision of the administrative law judge be, and it hereby is, adopted as the findings of fact and conclusions of law of the Commission, to the extent not inconsistent with the accompanying opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

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[6] Respondents in all three cases have since agreed to the entry of consent orders.

[7] Nor can it be critical to the relief ordered herein. Although the specific practice held unfair in this case was suing out-of-State mail-order consumers in Cook County, Ill., it is significant that the Commission's cease and desist order prohibits Spiegel from suing a consumer anywhere other than in his county of residence or the county where he signed the contract sued upon.

ORDER

I

For purposes of this order, the term "respondent" means "Spiegel, Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, acting directly or through any corporation, subsidiary, division, or other device, including any collection agency."

II

It is ordered, That respondent, in connection with the collection of retail credit accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from instituting suits except in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions involving real property or fixtures attached to real property, that suit be instituted in a particular county.

III

It is further ordered, That, where respondent learns subsequent to institution of a suit that the preceding Paragraph (II) has not been complied with, it shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of such termination, respondent may effect a change of forum to a county permitted by the preceding paragraph, *Provided*; That respondent gives defendant notice of such action and opportunity to defend equivalent to that which defendant would receive if a new suit were being instituted. In all cases respondent shall provide defendants with a clear explanation of the action taken and of the defendants' right to appear, answer and defend in the new forum.

IV

It is further ordered, That where respondent terminates a suit or vacates a judgment pursuant to the preceding Paragraph (III) it shall give notice of such termination or vacation to each "consumer reporting agency," as such term is defined in the Fair Credit Reporting Act (15 U.S.C. §603), which it has been informed or has reason to know has recorded the suit or judgment in its files. Additionally, respondent shall furnish such notice to any other person or organization upon request of the defendant.

V

It is further ordered, That respondent prepare and maintain a summary of suits instituted, pending, terminated, or acted upon subsequent to judgment, involving the collection of retail credit accounts by respondent. This summary shall contain each defendant's name, address, and county of residence; county where the contract was signed by the defendant, if the suit was not instituted in the residence county; county where served; date served; date filed; docket number; name and location of court in which filed; name of plaintiff (if a collection agency suing in its own name); amount claimed; and disposition (including garnishment or execution, if any). Where a suit has been instituted in a county other than where defendant resides or signed the contract sued upon, the reason for this choice of forum shall be explained. This summary shall cover the two years immediately following effective date of this order. A copy of this summary shall be submitted to the Federal Trade Commission on a quarterly basis.

VI

It is further ordered, That Spiegel, Inc., shall forthwith deliver a copy of this order to each of its subsidiaries and operating divisions, to each collection agency currently collecting any of Spiegel's retail credit accounts, and to any other collection agency prior to referral to it of any of Spiegel's retail credit accounts. Spiegel, Inc., shall obtain and preserve signed and dated statements from each collection agency, acknowledging receipt of the order and willingness to comply with it.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty days and at the end of six months after the effective date of the order served upon it, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

IN THE MATTER OF

BORG-WARNER CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-2716. Complaint, Aug. 20, 1975-Decision, Aug. 20, 1975

Consent order requiring a Chicago, Ill., automotive parts manufacturer, among other things to divest itself, within 18 months, of all assets acquired as a result of its acquisition with Unit Parts Company, reestablishing Unit Parts as a competitor. Further, respondent is required to obtain Commission approval before acquisition of any automative parts rebuilder for a period of 10 years.

Appearances

For the Commission: *K. Keith Thurman*, *Roger J. McClure* and *Anne R. Schenof.*

For the respondent: *Charles W. Houchins*, Chicago, Ill.

COMPLAINT

The Federal Trade Commission having reason to believe that Borg-Warner Corporation, (hereinafter "B-W"), a corporation subject to the jurisdiction of the Commission, has acquired Unit Parts Company, (hereinafter "U-P"), a corporation,-in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45), and that a proceeding in respect thereof would be in the public interest hereby issues this complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. §21) and Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) stating its charges in that respect as follows:

I. Definitions

1. For the purpose of this complaint, the following definitions shall apply:

(a) "Automotive" refers to parts used on all self-propelled land vehicles, including automobiles, trucks, buses, tractors, self-propelled agricultural equipment and construction equipment, but excluding motorcycles.

(b) "Clutches" are clutch discs, clutch cover plates, and complete clutch assemblies.

(c) "Carburetor parts" are individual parts and kits containing such parts used to repair carburetors.

(d) "rebuilt parts" are automotive parts, exclusive of engines, crankshafts and automatic transmissions, remanufactured for resale on a production line basis.

(e) "Independent aftermarket" includes all sales by manufacturers or reboxers of automotive parts directly to wholesalers or retailers for replacement use. It excludes sales by vehicle manufacturers or engine manufacturers directly to vehicle dealers.

(f) "Reboxer" refers to a manufacturer of one or more lines of automotive parts who purchases for resale under its own brand, individual items which it does not manufacture. A reboxer competes at the manufacturers' functional level.

(g) "Automotive aftermarket" includes all sales by manufacturers of automotive parts for replacement use.

(h) "Market" includes all shipments of the relevant products manufactured in the United States or imported into the United States.

II. Borg-Warner Corporation

2. Respondent Borg-Warner Corporation is now, and was at all times relevant herein, a corporation, and its present principal office and place of business is located at 200 S. Michigan Ave., Chicago, Ill.

3. As a result of its acquisitions described below and its internal growth, B-W by 1971 had become the 110th largest industrial corporation in the nation. In 1971, B-W had sales of $1.148 billion and assets of $932 million. In that year, B-W had five sales divisions which accounted for the following percentages of its total sales:

(a) Air conditioning and building products (22 percent);
(b) Chemicals and plastics (14 percent);
(c) Industrial and steel products (30 percent); and
(d) Transportation equipment (34 percent).

4. B-W was formed in 1928 through the merger of four leading automotive parts producers. These companies were Borg and Beck Company, Marvel Carburetor Co., Warner Gear Co. and Mechanics Universal Joint Co. Borg and Beck Company was a leading manufacturer of clutches. Marvel Carburetor Co. manufactured carburetors and parts therefor. Warner Gear Co. was a leading producer of gears for automotive manual transmissions. Mechanics Universal Joint Co. manufactured automotive universal joints.

5. By adherence to a plan of continued acquisitions and resulting internal expansion, B-W has enlarged and has plans to continue to enlarge its position as a producer and/or supplier of various types of automotive parts.

6. B-W has made a succession of acquisitions and has plans to continue to acquire manufacturers and/or sellers of various types of

automotive parts which it already sold prior to such acquisitions, including among others:

(a) Century Gas Equipment Company, a California corporation located in Paramount, California, acquired in 1957 and a leading producer of LPG carburetors and parts therefore;

(b) Shurhit Products, Inc., an Illinois corporation, located in Dixon, Ill. acquired in 1963, and a supplier of replacement ignition and carburetor parts;

(c) Precision Automotive Components Company, a Missouri corporation, located in Baldwin, Mo. acquired in 1965, and a large supplier of replacement carburetor parts;

(d) Tillotson Manufacturing Co., an Ohio corporation, located in Toledo, Ohio, acquired in 1969, and a manufacturer of small engine and industrial carburetors and parts therefor; and

(e) The Warneford group, a group of Australian limited liability proprietary businesses, acquired in 1974.

At all times relevant herein, each of the above-named United States corporations was engaged in commerce as commerce is defined in the Federal Trade Commission Act.

7. Since its inception, B-W has significantly expanded its position in the clutch market, both by acquisition and internal development. In the year following its inception, B-W had clutch sales of $4.139 million from its Borg and Beck plant.

8. In 1929, B-W acquired Long Manufacturing Co., (hereinafter "Long"), a leading manufacturer of clutches. At the time of its acquisition, Long was a corporation organized and existing under the laws of the State of Michigan, with its principal place of business located in Detroit, Mich.

9. In 1929, Long's sales of clutches were $3.098 million.

10. At all times relevant herein, Long sold and shipped its products in many States of the United States and was engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

11. In 1929, B-W acquired Rockford Drilling Machine Co., (hereinafter "Rockford"), a significant manufacturer of clutches. At the time of its acquisition, Rockford was a corporation organized and existing under the laws of the State of Illinois, with its principal place of business located in Rockford, Ill.

12. In 1928, Rockford's total sales were $1.071 million and consisted of clutch sales of about $752,400.

13. At all times relevant herein, Rockford sold and shipped its products in many States of the United States and was engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

14. In 1970, B-W completed integration of all its clutch rebuilding operations into a plant located in Ottawa, Illinois. This plant took over the clutch rebuilding operations which B-W had conducted at its Borg & Beck, Rockford and Long plants.

15. In 1972, B-W acquired U-P, one of the nation's four largest full-line rebuilders. At the time of its acquisition, U-P was one of the four largest rebuilders of clutches and a significant supplier of replacement clutches.

16. In its 1972 fiscal year, U-P's sales of $26.704 million consisted of sales of $4.41 million of rebuilt clutches.

17. In 1971, B-W was a significant seller of original equipment clutches, automotive transmissions, torque convertors, drive line assemblies, spin resistant differentials, axles, brake controls, carburetors, radiators, seals and automotive replacement parts. B-W's total sales of transportation equipment in 1971 were $387.3 million of which $84.7 million were to the independent aftermarket.

18. In 1971, B-W had warehouses located throughout the United States. Through these warehouses and its sales force, B-W distributed its products directly to over 1705 wholesalers of which 1306 were warehouse distributors.

19. B-W has achieved a dominant position in the sale of clutches in the nation due in part to its numerous acquisitions. In 1971, B-W was the nation's leading seller of clutches for use in the assembly of new vehicles, and of clutches for replacement use, as well as the nation's largest clutch rebuilder.

20. In 1971, B-W's shipments of replacement clutches were $166 million. B-W accounted for 21 percent of the total shipments of clutches for replacement use in that year.

21. In 1967, B-W had shipments of about $2.943 million of rebuilt clutches. In 1967, B-W accounted for 10 percent of total rebuilt clutch shipments.

22. In 1971, B-W's rebuilt clutch shipments were $6.733 million, accounting for about 17 percent of such shipments.

23. In 1967 and 1971, B-W sold new water pumps to the independent aftermarket. In 1967, B-W sold $.846 million of water pumps to the independent aftermarket and accounted for 3 percent of the sales to that market.

24. B-W has a corporate policy to consolidate and enchance its market power in the sale of replacement automotive parts, through merger or acquisition, particularly of parts sold to the independent aftermarket of those product lines with which it competes or is one of the most likely entrants.

25. At all times relevant herein, B-W sold and shipped its products

throughout the United States and was engaged in "commerce" as commerce is defined in the Clayton Act, as amended, and in the Federal Trade Commission Act.

III. Unit Parts Company

26. On or about Sept. 29, 1972, B-W acquired U-P by merger of U-P into B-W through an exchange of 305,313 shares of B-W stock for the assets of U-P. At the time of the acquisition the B-W stock exchanged for U-P was valued at approximately $10 million.

27. Prior to its merger into B-W, U-P was an Oklahoma corporation with its principal office and place of business located at 4600 S.E. 59th St., Oklahoma City, Okla.

28. In 1971, U-P was engaged in the production and sale of a full line of rebuilt automotive parts including clutches, water pumps, ignition parts, brake shoes, disc brake pads, and fuel pumps. Since 1970, U-P had sold rebuilt automotive air conditioning compressors. Prior to its acquisition, all of U-P's sales were to the independent aftermarket.

29. In its fiscal year ending June 30, 1972, U-P had four lines of automotive parts which accounted for the following percentages of its total sales: (1) clutches (17.7 percent), (2) engine components and air conditioning parts (24.4 percent), (3) ignition parts (43.3 percent) and (4) brake system parts (14.6 percent).

30. In 1972, U-P was one of the two largest domestic rebuilders of automotive parts. In its fiscal year ending June 30, 1972, it had sales of $26.704 million and assets of $7.8 million.

31. Immediately prior to its acquisition, U-P was one of the largest domestic rebuilders of clutches. In its fiscal year ending June 30, 1972, U-P's sales of clutches were $4.41 million. U-P's sales of rebuilt clutches in that year represented approximately 10 percent of total domestic sales of rebuilt clutches in 1971.

32. U-P was a significant rebuilder of water pumps. In its fiscal year ending June 30, 1972, U-P's sales of rebuilt water pumps were $4.51 million. U-P's sales of rebuilt water pumps in that year represented approximately 13 percent of the total domestic sales of rebuilt water pumps in 1971.

33. At all times relevant herein, U-P sold and shipped its products throughout the United States and was engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and in the Federal Trade Commission Act.

IV. Trade and Commerce

34. The relevant geographic market is the United States as a whole. The relevant product markets are:

(a) Manufacture and sale of replacement clutches;

(b) Manufacture and sale of rebuilt clutches; and

(c) Manufacture and sale of water pumps to the independent aftermarket.

A. *Replacement Clutches*

35. Clutches represent a unique product which enables the engine and transmission of a vehicle to engage or disengage the drive-line of a vehicle at the command of the driver. Clutches are subject to wear and must be periodically replaced.

36. Generally, a supplier of replacement clutches must have a distribution system designed to reach the numerous outlets which replace worn or damaged clutches. An OEM-installation seller of clutches need only sell to one or a very few customers. A seller of replacement clutches must offer clutches having application on a range of models and fitting vehicles made in different years. In general, a replacement clutch supplier offers clutches having application on all vehicles which have more than minimal usage. In stark contrast, an OEM-installation clutch supplier need only supply clutches to vehicles in current production and often does not sell clutches for a wide range of model applications. Because of the need of replacement suppliers to cover more years and models of automotive vehicles as compared to OEM-installation suppliers, the production and sale of replacement clutches differs from OEM-installation clutch production. Replacement clutches generally are produced in far shorter production runs than are used to produce OEM-installation clutches.

37. Most clutch producers serve only the replacement clutch market.

38. Replacement clutches command a price considerably in excess of similiar units sold to the OEM-installation market.

39. The demand for replacement clutches is somewhat predictable as it is based primarily on the number and make of vehicles in use which have clutches and the usage or age of those vehicles. In contrast, the OEM-installation clutch demand fluctuates considerably from year to year and is dependent upon the level of vehicle sales.

40. Most replacement clutches are sold individually packaged whereas OEM-installation clutches are sold in bulk.

41. In 1971 the total shipments of replacement clutches were about $80.7 million. Such shipments have been increasing, in recent years, going from $53.8 million in 1967 to about $90 million in 1972.

42. Concentration is high in the replacement clutch market. In 1971, the four largest firms accounted for 43 percent of replacement clutch shipments and the eight largest 62 percent.

43. The barriers to entry into the replacement clutch market are high. Replacement clutches are precision machined metal and friction material products produced to close tolerances. Their production requires specialized machinery and testing equipment. A clutch plant is expensive to erect and equip.

44. The number of producers of replacement clutches has been declining. In part this decrease is due to acquisitions, including several acquisitions by the largest producers of other replacement clutch remanufacturers.

45. The production of replacement clutches is highly profitable, with a leading producer experiencing a before tax return on investment in excess of 35 percent.

46. In 1971, U-P had total sales of replacement clutches of $4.410 million, accounted for about 5 percent of sales in that market and ranked 5th among suppliers to that market. In that same year, B-W had total sales of replacement clutches of $16.632 million, accounted for 21 percent of sales in that market and was the largest supplier to that market. The combined sales of B-W and U-P in 1971 accounted for 26 percent of the sales of replacement clutches and the combination would have been by far the largest supplier of replacement clutches.

B. *Rebuilt Clutches*

47. Rebuilt clutches have different primary uses from new clutches. All rebuilt clutches are produced for replacement use, primarily on vehicles over two years of age. In contrast, most new clutches are produced for use in new vehicle assembly. New clutches produced for replacement use are generally installed on late model vehicles, generally vehicles two or less years old.

48. Rebuilt clutches are sold to different customers than are new clutches. Rebuilt clutches are generally sold direct to dealers or wholesalers. New clutches are sold or transferred to vehicle manufacturers for incorporation in new vehicles or for resale as replacement parts on late model vehicles.

49. The rebuilding of clutches requires several extra steps not performed in producing and distributing new clutches. The raw materials for producing a new clutch consist of new component parts. A new clutch manufacturer either purchases or produces new component parts, assembles these parts into a clutch unit and ships the completed clutch unit to his customer. In contrast, a clutch rebuilder relies on used clutches and their components as his primary raw material. The clutch rebuilder secures these used clutches from his customers or from a

used parts supplier and disassembles the used units into their component parts. The clutch rebuilder then cleans the components, inspects the components to determine which are salvageable, sorts the salvageable components into lots to be used in reassembling the units, procures new component parts in those instances in which insufficient salvageable parts are available, and reassembles the units from a combination of new and used component parts. The clutch rebuilder ships finished units to his customers and receives in exchange from his customers worn out units replaced by the newly rebuilt units.

50. Different firms, in general, produce new clutches compared to rebuilt clutches. There were many firms in the United States in 1972 who produced *only* rebuilt clutches.

51. The price of rebuilt clutches is significally lower than the price of new clutches sold to the aftermarket. On the average, a rebuilt clutch for a given application sells for 25 to 50 percent less than a new replacement clutch fitting that same application.

52. Rebuilt parts in general and rebuilt clutches in particular are recognized as a separate market from new parts or clutches. There is an industry trade association, Automotive Parts Rebuilding Association (APRA), whose membership is limited to rebuilders and their suppliers. For many years, the Bureau of the Census has separately reported shipments of rebuilt parts. In the last two *Census of Manufactures*, the Bureau of the Census has separately reported shipments of rebuilt and new clutches.

53. In 1971, the total shipments of rebuilt clutches were about $41 million. Such shipments have been increasing in recent years, going from $29.4 million in 1967 to about $43.5 million in 1972.

54. Concentration is high in the rebuilding of clutches. In 1971, the four largest firms accounted for 50 percent and the eight largest firms accounted for 74 percent of total rebuilt clutch shipments.

55. It is difficult to enter into the rebuilding of clutches. One of the principal barriers to entry is the difficulty of securing customers. Most rebuilders sell to a number of customers and utilize an extensive sales organization to reach customers. Any new supplier must possess an extensive sales organization or incur the time and expense necessary to secure such an organization. The prime customers of clutch rebuilders are extremely reluctant to shift suppliers, expecially to take on a new supplier whose product quality and ability to provide the necessary sales support are unknown.

56. The number of producers of rebuilt clutches has been declining. This decrease is due to acquisitions, including several horizontal acquisitions by the largest rebuilt clutch producers of other clutch rebuilders.

57. The production of rebuilt clutches is highly profitable, with a leading producer earning a return on investment of 62 percent.

58. In 1971, U-P had total sales of rebuilt clutches of $4.410 million, accounted for 10 percent of sales in that market, and ranked 3rd among suppliers to that market. In that same year, B-W had total sales of rebuilt clutches of $6.733 million, accounted for 17 percent of sales in that market and was the largest supplier to that market. The combined sales of B-W and U-P in 1971 accounted for 27 percent of sales of clutches and would have accounted for by far the largest single supply of rebuilt clutches.

C. *Water Pumps*

59. Water pumps are an unique product which assures the circulation of coolant on water cooled vehicles. Water pumps are subject to wear and damage and must be periodically replaced.

60. A supplier of water pumps to the independent aftermarket must possess an extensive distribution network designed to reach numerous wholesalers or retailers. In contrast, a supplier of water pumps to the OEM-installation or OEM-service markets need only have a minimal distribution organization since the number of his customers is very small. Water pumps are sold individually boxed to the independent aftermarket. Water pumps can be, and generally are, sold in bulk to the OEM-installation and service markets. A supplier to the independent aftermarket must offer water pumps having application on most vehicles in use, whereas a supplier to the OEM-installation and service markets can offer a much more limited line of products. Brand identity is important in the sale of water pumps to the independent aftermarket. Brand identity is of limited importance in the sale of water pumps to the OEM-installation and OEM-service markets.

61. In 1967, the total shipments of water pumps to the independent aftermarket were $24.634 million.

62. Concentration is high in the sale of water pumps to the independent aftermarket. In 1967, the four largest firms accounted for about 52 percent of shipments to that market and the eight largest firms 78 percent.

63. Barriers to entry into the sale of water pumps to the independent aftermarket are high. An extensive distribution system is necessary to reach the customers in this market. A reputation for supplying defect-free products is important and becoming more important as water pump design has become more complex, the tolerances have been reduced and the stress to which the product is subjected has become more intense. Likewise, a supplier must be able to supply numerous different part numbers on demand, a problem that

has been magnified greatly in recent years as more and more different part numbers have been introduced.

64. Despite a rapidly growing market, the number of sellers of water pumps to the independent aftermarket has fallen. A few firms have entered this market, but many have exited, some due to acquisitions by leading suppliers of other suppliers to the independent aftermarket.

65. In 1967, U-P had total sales of water pumps to the independent aftermarket of $1.681 million, accounted for 7 percent of sales in that market, and ranked about 5th among suppliers to that market. In that year, B-W had total sales of water pumps to the independent aftermarket of $.846 million, accounted for 3 percent of sales in that market and ranked 9th among suppliers to that market. The combined sales of B-W and U-P in 1967 accounted pro forma for 10 percent of sales of water pumps to the independent aftermarket and would have ranked 4th among suppliers to that market. In 1971, U-P had sales of $4.510 million of water pumps and accounted for 7 percent of the shipments of water pumps to the independent aftermarket.

V. Effects of the Acquisitions

66. The effects of the acquisition of U-P by B-W may be to substantially lessen competition or tend to create a monopoly in the sale of replacement clutches, rebuilt clutches, and water pumps throughout the United States in violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

(a) Substantial actual competition between B-W, U-P and other firms in the sale of clutches to the replacement market has been eliminated.

(b) Substantial actual competition between B-W, U-P other firms in the sale of rebuilt clutches has been eliminated.

(c) Substantial actual competition between B-W, U-P and other firms in the sale of water pumps to the independent aftermarket has been eliminated.

VI. The Violations Charged

67. The acquisition of U-P by B-W constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18) and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45).

DECISION AND ORDER

The Commission having therefore issued its complaint charging the proposed respondent named in the caption hereto with violation of

Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the proposed respondent having being served with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The proposed respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the proposed respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and did not constitute an admission by proposed respondent that the law has been violated as alleged in such complaint, and waivers and other positions as required by the Commission's rules; and

The Commission having considered and accepted the agreement containing consent order and it having been placed on the public record for a period of sixty (60) days now and further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

(1) B-W is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 200 S. Michigan Ave., Chicago, Ill.

(2) The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of B-W, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Borg-Warner Corporation, (hereinafter "B-W") within a period not exceeding eighteen (18) months from the effective date of this order, shall divest, by sale, or by public offering or spinoff of the stock of a new corporation formed for such purpose, subject to prior approval of the Federal Trade Commission, all assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, machinery, inventory, customer lists, trade names, trademarks and good will, acquired by B-W as a result of its acquisition of Unit Parts Company (hereinafter "U-P") together with all additions and improvements to such assets and properties.

In the event that a new corporation is established as provided herein, B-W shall make available to such new corporation adequate administrative, sales and service personnel to carry on the business to be transferred to the new corporation.

II

It is further ordered, That none of the assets, properties, rights or privileges to be divested, as described in Part I of this order, shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, B-W or any of B-W's subsidiary or affiliate corporations, or anyone who owns or controls, directly or indirectly, more than 1 percent of the outstanding shares of common stock of B-W, or to anyone who is not approved in advance by the Federal Trade Commission.

III

It is further ordered, That if B-W divests the assets, properties, rights and privileges, described in Part I of this order, to a new corporation or corporations, the stock of each of which is wholly owned by B-W, and if B-W then distributes all the stock, in said corporation or corporations to the stockholders of B-W, in proportion to their holdings of B-W stock, Part II of this order shall be inapplicable, and the following Parts IV and V shall take force and effect in its stead.

IV

It is further ordered, That no person who is an officer, director, or executive employee of B-W, or who owns or controls, directly or indirectly, more than 1 percent of the stock of B-W, shall contemporaneously therewith be an officer, director, or executive employee of any new corporation or corporations described in Part III, or shall contemporaneously therewith own or control, directly or indirectly, more than 1 percent of the stock of any new corporation or corporations described in Part III.

V

It is further ordered, That any person who must sell or dispose of a stock interest in B-W or the new corporation or corporations, described in Part III, in order to comply with Part IV of this order may do so within six (6) months after the date on which distribution of the stock of the said corporation or corporations is made to stockholders of B-W.

VI

It is further ordered, That, pending divestiture, B-W shall not make or permit any deterioration in any of the plants, machinery, buildings, equipment or other property or assets of the company to be divested which may impair its present capacity or market value.

VII

It is further ordered, That, pending divestiture, and for ten (10) years from the date this order becomes final as provided in Part I of this order, B-W shall not acquire, directly or indirectly, without the prior approval of the Commission, the share capital or assets (other than products acquired for use or resale in the ordinary course of B-W's business, or other than the acquisition by B-W of the share capital or assets of any corporation not organized in the United States of which B-W owns more than 50 percent of the issued and outstanding share capital as of the effective date of this order) of any rebuilder of automotive parts having direct sales of rebuilt parts in the United States.

Direct sales shall include all sales to purchasers for those purchasers' subsequent use in the United States or those purchasers' subsequent resale in the United States.

No acquisition made by B-W shall be deemed immune or exempt from the antitrust laws by reason of anything contained in this order.

VIII

It is further ordered, That, pending divestiture, and for ten (10) years from the date this order becomes final as provided in Part I of this order, B-W shall notify the Commission at least sixty (60) days in advance of any acquisition, directly or indirectly of the share capital or assets (other than products acquired for use or resale in the ordinary course of B-W's business, or other than the acquisition by B-W of the share capital or assets of any corporation not organized in the United States of which B-W owns more than 50 percent of the issued and outstanding share capital as of the effective date of this order) of any manufacturer of automotive parts having direct sales of such automotive parts in the United States for which prior Commission approval is not required.

Direct sales shall include all sales to purchasers for those purchasers' subsequent use in the United States or those purchasers' subsequent resale in the United States.

IX

It is further ordered, That B-W shall, within six (6) months after the effective date of this order, and every six (6) months thereafter, until B-W has fully complied with Part I of this order, submit to the Federal

Trade Commission a detailed written report of its actions, plans and progess in complying with the provisions of Part I of the order.

With respect to Parts VII and VIII of this order, B-W shall, on the first anniversary date of the divestiture provided for in Part I of this order and on each anniversary date thereafter, to and including the tenth anniversary date, submit a report, in writing, setting forth in detail the manner and form in which B-W intends to comply, is complying and has complied with Parts VII and VIII of this order.

X

It is further ordered, That B-W notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in B-W which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or the creation or dissolution of subsidiaries.

IN THE MATTER OF

COMMERCIAL SERVICE COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2717. Complaint, Aug. 20, 1975-Decision, Aug. 20, 1975

Consent order requiring a Seattle, Wash., debt collection agency and an affiliated firm, among other things to cease filing suits in courts located in counties other than those in which defendants reside or signed the contract sued upon; failing to disclose clear explanations of what their summones mean and how a defendant should respond to avoid a default judgment; and misrepresenting that letters and forms come from an attorney when such is not the case.

Appearances

For the Commission: *Randall H. Brooks.*

For the respondents: *Warren A. Doolittle, Schwepp, Doolittle, Krug, Tausend, Beezer & Beierle,* Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that Commercial Service Company, Inc., a corporation, and Commercial Collectors, a partnership, and Glen B. Faulk and Richard R. Swaffield, individually, as copartners doing business as Commercial Collectors, and as officers of said corporation, and Vincent A. Retacco, an individual, hereinafter referred to as respondents, have violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. Commercial Service Company, Inc., (CSC) is a Washington corporation with its office and principal place of business located at 811 First Ave., Seattle, Wash.

Commercial Collectors (CC) is a Washington partnership with its office and principal place of business located at 811 First Ave., Seattle, Wash. Its activities are closely interrelated with, or indistinguishable from, those of CSC.

Glen B. Faulk and Richard R. Swaffield are co-partners in CC and officers of CSC. They formulate, direct and control the policies, acts and practices of said corporation and partnership, including those hereinafter set forth. Their addresses are the same as that of CSC.

Vincent A. Retacco is an attorney admitted to practice in the State of Washington. He formulates, directs and controls, in cooperation with the other individual respondents, policies, acts and practices of CSC and CC related to legal actions, real or threatened, including the acts and practices set forth below. His principal office and place of business is located at 30640 Pacific Hwy. S., Federal Way, Wash.

PAR. 2. Respondents are engaged in the business of pursuing collection activities against individuals for various retail installment and other creditors, acting as agents or assignees of such creditors. Allegations below of respondents' present acts or practices include past acts or practices.

PAR. 3. In the course of their business, respondents solicit and accept accounts from creditors located in various States. Respondents act as agents or assignees of various out-of-Washington creditors. Respondents' collection accounts include debts incurred outside of Washington and involve debtors resident outside of Washington. Thus respondents maintain a course of business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents regularly resort to use of judicial process in cases not resolved by private settlement. The defendant debtors in such cases are predominantly low-income or middle-income persons not represented by counsel. Respondents usually obtain default judgments. CSC sues in its own name as assignee of various creditors.

PAR. 5. Excepting most cases against defendants resident in Seattle, respondents commence almost all their collection lawsuits in the Superior Court of King County, Wash. In many such suits defendants reside, and have incurred the underlying obligations, outside of King County, in places up to 300 or more miles from the court. Courts located in the county where defendants reside or where they incurred the underlying obligations could be used for these suits. Through the use of distant or inconvenient forum, respondents effectively deprive defendants of a reasonable opportunity to appear, answer and defend the lawsuits. Therefore, such use of distant or inconvenient forum is unfair.

PAR. 6. For their superior court lawsuits, respondents use confusingly worded summonses which give defendants inadequate or misleading directions as to the proper procedure for responding. These summonses have the tendency to mislead defendants into defaulting. Thus, respondents effectively deprive defendants of a reasonable opportunity to appear, answer and defend the lawsuits. Therefore, such use of confusingly worded summons is unfair and deceptive.

PAR. 7. In the course of their business, respondents cause to be sent from their place of business, letters or forms to alleged debtors representing that their account has been referred to an attorney to institute suit or take other action. Many of these letters and forms have been previously signed in blank by Mr. Retacco, and then placed in the control and custody of employees of CSC. Typical, but not all inclusive, of such letters or forms is CSC's so-called "Attorney Assign" form letter which contains the following statements:

> Dear (Alleged Debtor):
>
> The above account has been handed to me * * * with instructions to institute immediate suit and attachment against you * * * *
>
> I have delayed doing this with the hope * * * Also, it is my policy to withhold suit * * * *
>
> * * * * *
>
> I am returning my file on this matter * * * and am requesting on your behalf, an extension . . . .
>
> If you should fail to [pay], I will of course be compelled to follow the instructions of my client and begin suit against you. Hoping this will not be necessary, I remain
>
> Sincerely,
> (Attorney's signature)

Through the use of the foregoing statements or representations, respondents have represented, directly or by implication, that the account has been referred to an attorney, that the letter or form was sent by an attorney, that files have been transmitted to an attorney, or that an attorney is actively involved in collecting or reviewing that account in preparation for institution of suit.

In truth and in fact no referral has been made, no letter has been sent by an attorney, no files have been transmitted, and no attorney is actively involved, at this stage of collection activity. Therefore, the statements, representations and practices described in this Paragraph were and are false, misleading and deceptive.

PAR. 8. The use of the false, misleading and deceptive statements and representations described in Paragraph Seven has the tendency and capacity to mislead and deceive alleged debtors and to coerce and intimidate such debtors into paying claimed amounts under the erroneous and mistaken belief that the statements and representations are true.

PAR. 9. The acts and practices alleged above are all to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Commercial Service Company, Inc. (CSC) is a Washington corporation with its office and principal place of business located at 811 First Ave., Seattle, Wash.

Respondent Commercial Collectors (CC) is a Washington partnership with its office and principal place of business located at 811 First Ave., Seattle, Wash. Its activities are closely interrelated with, or indistinguishable from, those of CSC.

Respondents Glen B. Faulk and Richard R. Swaffield are co-partners in CC and officers of CSC. They formulate, direct and control the policies, acts and practices of said corporation and partnership. Their addresses are the same as that of CSC.

Respondent Vincent A. Retacco is an attorney admitted to practice in the State of Washington. He formulates, directs and controls, in cooperation with the other individual respondents, policies, acts and practices of CSC and CC related to legal actions, real or threatened. His principal office and place of business is located at 30640 Pacific Hwy. S., Federal Way, Wash.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Commercial Service Company, Inc. (CSC), a corporation, its successors and assigns, and its officers, and Commercial Collectors, a partnership, and Glen B. Faulk and Richard R. Swaffield, individually, as co-partners doing business as Commercial Collectors, or under any name(s), and their successors and assigns, and as officers of CSC, and respondents' agents, representatives and employees, hereinafter collectively "respondents," directly or through any corporation, subsidiary, division or other device, in connection with the collection of credit obligations of individuals, excluding individual obligations for corporate debts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Instituting suits except in the county where defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions involving real property or fixtures attached to real property, that suit be instituted in a particular county.

It is further ordered, That where respondents learn subsequent to institution of suit that the preceding paragraph has not been complied with, they shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of such termination, respondents may effect a change of forum to a county permitted by the preceding paragraph, provided that respondents give defendants notice of such action and opportunity to defend equivalent to that which defendants would receive if a new suit were being instituted. In all cases respondents shall provide defendants with a clear explanation of the action taken and of defendants' rights to appear, answer and defend in the new forum.

It is further ordered, That, where respondents terminate a suit or vacate a judgment pursuant to the preceding paragraph, they shall give notice of such termination or vacation to each "consumer reporting agency," as such term is defined in the Fair Credit Reporting Act (15 U.S.C. §603), which respondents have been informed or have reason to know has recorded the suit or judgment in its files. Additionally, respondents shall furnish such notice to any other such person or organization upon request of the defendant.

It is further ordered, That when respondents institute suit in any superior court in Washington State, they shall attach, to any summons served upon defendants, a notice which gives defendants adequate directions as to the proper procedure for responding to the suit and avoiding default. The notice shall use clear and unconfusing language, and appear clearly, conspicuously, and in type at least as large as typewriter pica type. Should superior court rules or procedures change respondents shall forthwith modify the notice accordingly. The initial form and adequacy of the notice has been approved, and any modifications thereof shall be subject to approval, by authorized representatives of the Federal Trade Commission.

It is further ordered, That respondents prepare and maintain a summary of superior court suits instituted, pending or terminated, in which CSC is a plaintiff. This summary shall contain each defendant's name, address and county of residence; county where the contract sued upon was signed by the defendant, if the suit was not instituted in the residence county; county where served; date served; date filed; docket number; name and location of court in which filed; name of original creditor; amount claimed; and whether or not a default judgment has been entered. Where a suit has been instituted in a county other than where defendant resides or signed the contract, the reason for this choice of forum shall be explained. This summary shall cover a continuous two-year period commencing with service upon respondents of this order. A copy of this summary shall be submitted to the Federal Trade Commission on a quarterly basis.

In subsequent paragraphs "respondents" shall include the above-named respondents and Vincent A. Retacco, an individual, and his agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device.

It is further ordered, that respondents do forthwith cease and desist from representing in writing, orally, visually or in any other manner, directly or by implication, that:

1. An account has been referred to an attorney until and unless such representation is true.

2. Communications to an alleged debtor are from an attorney when such is in fact not true.

3. That any files have been removed, transferred, or reviewed, or directions issued, or other action requested, authorized or directed, to or by an attorney, when such is in fact not true.

It is further ordered, That respondents shall forthwith deliver a copy of this order to each of their subsidiaries, operating divisions and employees.

It is further ordered, That respondents notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment, in the event of such discontinuance or affiliation. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MELMAR INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2719. Complaint, Aug. 22, 1975-Decision, Aug. 22, 1975

Consent order requiring four affiliated swimming pool firms located in Cherry Hill, N.J., and Philadelphia, Pa., among other things to cease using bait and switch tactics, misleading pricing claims and other deceptive selling practices; and to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *John A. Crowley* and *Phyllis L. Kaye.*

For the respondents: *Joseph H. Weiss, Fell, Spalding, Goff & Rubin*, Philadelphia, Pa. and *Timothy J. Waters, Peabody, Rivlin, Lambert & Dennison*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Truth in Lending Act, and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Melmar Industries, Inc., a New Jersey corporation, Melmar Industries, Inc., a Pennsylvania corporation, Prestige Industries Incorporated, a corporation, Gold Bond Industries, Inc., a corporation, and Marc Wolf, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Melmar Industries, Inc., a New Jersey corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 1 Martin Ave., Cherry Hill, N.J.

Respondent Melmar Industries, Inc., a Pennsylvania corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 2555 Welsh Rd., Philadelphia, Pa.

Respondent Prestige Industries Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with an office at 396 Rodi Rd., Pittsburgh, Pa. and its general office at 1 Martin Ave., Cherry Hill, N.J.

Respondent Gold Bond Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with an office at 1 Uam Square, Springdale, Pa. and its main office and principal place of business located at 1 Martin Ave., Cherry Hill, N.J.

Respondent Marc Wolf, 1216 Cardinal Lake Dr., Cherry Hill, N.J., is an individual and is the president of Melmar Industries, Inc., a New Jersey corporation; is the secretary-treasurer of Melmar Industries, Inc., a Pennsylvania corporation; is the president of Prestige Industries Incorporated, a corporation; and is vice president of Gold Bond Industries, Inc., a corporation. Respondent Marc Wolf is responsible for formulating, controlling and directing the policies, acts and practices of the corporate respondents.

PAR. 2. Respondents are now and have been, for some time last past, engaged in the advertising, offering for sale, sale and distribution of swimming pools and other merchandise and home improvement products. In the course and conduct of their business as aforesaid, respondents negotiate to third parties conditional sales contracts, promissory notes or other instruments of indebtedness executed in connection with credit purchase agreements.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two above are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents cause advertisements designed to secure leads to potential purchasers of swimming pools and other merchandise and home improvement products to be placed in various newspapers and other publications. The respondents are responsible for the content of said advertisements.

PAR. 4. In the further course and conduct of their business as aforesaid, respondents sell and distribute the aforementioned swimming pools and other merchandise and home improvement products by causing said swimming pools and other merchandise and home improvement products to be shipped from the places of business of their various suppliers in the United States to purchasers at retail in States other than the States from which such shipments originate.

There is now, and has been, at all times mentioned herein, a substantial and continuous course of trade in said swimming pools and other merchandise and home improvement products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made statements and representations with respect thereto in advertisements inserted in newspapers of general interstate circulation, of which the following are typical and illustrative, but not all inclusive:

INTRODUCTORY
OFFER!
ALUMINUM POOLS
CONVENIENT CREDIT TERMS ARRANGED

21' x 21' OUTSIDE DIMENSION 16' x 16' SWIM AREA 4' CONSTANT	COMPLETELY INSTALLED $499 WOOD POOL SAME AS ABOVE $444
29' x 21' OUTSIDE DIMENSION	COMPLETELY INSTALLED $699

24' x 16' SWIM AREA
4' CONSTANT

Pre Season Offer

Swimming Pools!

WOOD POOL SAME
AS ABOVE $644

3
days
Only
Sun. - Mon.
Tuesday

DeLuxe Aluminum Family Pool
All Pools Include:
- Filter and Pump
- Pool Ladder
- Steel Bracing
- Sun Decks
- Vacuum Cleaner
- Set-In Vinyl Liner
- Safety Fence and Stairs

Huge Family Size
29' x 21' Outside Dimensions
24' x 16' x 4'
Swim Area

NO MONEY DOWN

Low Budget
Terms Arranged

Your Choice
$400
No Extras - Delivered and Completely Installed

Pick a Pool
Huge Family Size

Pick a Prize
29' x 21' Outside Dimensions

DeLuxe Wood Family Pool

Free Portable TV

Yours Free With Your Purchase

No Money Down

Low, Low Terms

Completely Installed $400

DeLuxe Aluminum Family Pool Free Huge 21" Cabana Deck With Your Purchase

No Money Down Low, Low Terms Completely Installed $400

New DuPont Tedlar Family Pool Free Complete Stock of Summer Furniture

No Money Down Low, Low Terms Completely Installed $400

Guaranteed! Not Just A Word, But Our Way Of Doing Business

Guaranteed 72-hour delivery upon office receipt of your order

Wanted!

5 Residential Home Sites to display Our New Advanced Swimming Pool

Giant Family Size
27' x 16' x 6' Outside Dimensions
21' x 15' x 4' Swim Area
$666
Completely Installed

PAR. 6. By and through the use of the aforesaid statements and representations and others of similar import and meaning, but not specifically set out herein, separately and in connection with oral statements and representations of their salesmen or representatives, respondents have represented, and are now representing, directly or by implication, that:

1. The offers set out in their advertisements are bona fide offers to sell swimming pools of the kind therein described and on the terms and conditions stated.

2. A prospective customer is able to obtain a "free" portable television set, or a "free" set of summer furniture with the purchase of an advertised pool.

3. The prices shown in advertisements are "Introductory" or "Pre-Season" prices and that said prices are offered only on an introductory or pre-season basis or are effective during a limited period of time and said reduced prices will be returned to respondents' pre-sale bona fide offering price or to some other substantially higher amount immediately after the sale has terminated.

4. The advertised pools are unconditionally "Guaranteed."

5. The advertised pool will be delivered within 72 hours of receipt of the customer's order.

6. Pools are sold with "No Money Down."

7. After the installation of respondents' swimming pools is completed, the purchasers' pools will be used for demonstration and advertising purposes by respondents, and, as a result of allowing or agreeing to allow their pools to be used as models, purchasers will be granted reduced prices or will receive allowances, discounts, commissions or referral fees.

PAR. 7. In truth and in fact:

1. The offers set out in respondents' advertisements are not bona fide offers to sell swimming pools of the kind therein described at the prices or on the terms and conditions stated but are made for the purpose of obtaining leads to persons interested in the purchase thereof. After obtaining such leads, the individually named respondent or respondents' salesmen or representatives call upon such persons but make no effort to sell the advertised products at the advertised prices but instead disparage the advertised products in such a manner as to discourage their purchase and attempt to sell and frequently do sell different and more expensive swimming pool products.

2. A prospective purchaser is unable, in a substantial number of instances, to obtain a "free" portable television set, a "free" cabana deck, or a "free" set of summer furniture since the receipt of the aforesaid "free" item is conditioned on the purchase of an advertised

pool which the prospective purchaser is generally unable to purchase for the aforesaid reasons. Additionally, where the advertisement offers a "free" item conditioned on the purchase of any pool without further specification, said "free" item is not, in a substantial number of instances, provided to said purchaser.

3. Respondents' advertised offers of swimming pools at the prices stated are not made only for a limited period of time. Said products are advertised regularly at the represented price and on the terms and conditions therein stated. Also, the swimming pools advertised and sold are not being offered for sale at special or reduced prices, and savings are not thereby afforded to their purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices, but the prices at which respondents' products are sold vary from purchaser to purchaser depending upon the resistance of the particular purchaser.

4. Respondents' swimming pools are not warranted in every respect without conditions or limitations for a period of ten years or any other period of time. Such warranty or guarantee as may be provided by respondents is subject to numerous terms, conditions and limitations with respect to the duration of the warranty or guarantee and fails to set forth the nature and extent of the warranty or guarantee, the identity of the warrantor or guarantor and the manner in which the warrantor or guarantor will perform thereunder.

5. In a substantial number of instances, the advertised pools are not delivered to the customer within 72 hours of receipt of the customer's order.

6. In a substantial number of instances, the advertised pools are not sold on a "No Money Down" basis.

7. After the installation of respondents' swimming pools are completed, the pools of respondents' purchasers will not, in a substantial number of instances, be used for demonstration or advertising purposes by respondents and as a result of allowing, or agreeing to allow their pools to be used as models, purchasers are not granted reduced prices, nor do they receive allowances, discounts, commission or referral fees.

Therefore, the statements and representations, as set forth in Paragraphs Five and Six hereof, were, and are false, misleading and deceptive.

PAR. 8. In the further course and conduct of their business, and in furtherance of a sales program to induce the purchase of their swimming pools and other merchandise and home improvement products, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Five through Seven, above, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

PAR. 9. In many instances, in the usual course of their business, respondents sell and transfer said customers' contracts, procured by the aforesaid false, misleading and deceptive means, to various third parties including banks. In any subsequent action to collect monies from said customers pursuant to said contracts, certain valid legal defenses and claims which said customers may have against respondents upon said contracts are unavailable as against said third parties.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, with corporations, firms and individuals engaged in the sale of swimming pools and other merchandise and home improvement products of the same general kind and nature as sold by respondents.

PAR. 11. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements were and are true and into the purchase of substantial quantities of respondents' swimming pools and other merchandise and home improvement products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of the respondents were and are to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 13. In the course and conduct of their business as aforesaid respondents have caused, and are now causing, advertisements, as "advertisement" is defined in Section 226.2(b) of Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System, to be placed in various media for the purposes of aiding, promoting or assisting, directly or indirectly, in the credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, of respondents' swimming pools and other merchandise and home improvement products. Said advertisements make use of terms such as "No Money Down, Low, Low Terms" without stating all of the following items, prescribed under Section 226.8 of Regulation Z, in the manner and form required by Section 226.10(d)(2) thereof:

1. The cash price or the amount of the loan, as applicable;
2. The amount of the downpayment required or that no downpayment is required, as applicable;
3. The number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
4. The amount of the finance charge expressed as an annual percentage rate; and
5. The deferred payment price.

PAR. 14. In the further course of their business as aforesaid and in order to facilitate the sale of their swimming pools and other merchandise and home improvement products, respondents, or any of them, regularly extend, and for some time last past have regularly extended consumer credit as "consumer credit" is defined in Section 226.2(k) of Regulation Z.

PAR. 15. Subsequent to July 1, 1969, in the ordinary course of their business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, respondents have caused and are causing their customers to enter into retail installment contracts, hereinafter referred to as the contract. On the contract respondents provide certain consumer credit cost information. Respondents do not provide any other consumer credit information.

PAR. 16. By and through the use of the contract referred to in Paragraph Fifteen, respondents:

1. In some instances fail to employ the term "annual percentage rate" as required by Section 226.8(b)(2) of Regulation Z.
2. Fail to disclose the terms "annual percentage rate" and "finance charge" more conspicuously than other required terminology, as required by Section 226.6(a) of Regulation Z.
3. Include the amount of the finance charge in the computation of the amount financed contrary to the requirements of Section 226.8(c)(7) of Regulation Z.

4. In making the charge for credit life insurance optional to the customer, fail to include such charge in the amount financed, as required by Sections 226.4(a)(5) and 226.8(c)(4) of Regulation Z.

5. Fail to disclose the annual percentage rate with an accuracy to the nearest quarter of one percent, as required by Section 226.5(b)(1) of Regulation Z.

6. Fail to use the term "cash down payment" when the down payment is in money, as required by Section 226.8(c)(2) of Regulation Z.

7. Fail to use the term "unpaid balance of cash price" to describe the difference between the cash price and the cash down payment, as required by Section 226.8(c)(3) of Regulation Z.

8. Fail to identify the property in which a security interest is obtained and held, as required by Section 226.8(b)(5) of Regulation Z.

9. Fail to notify the buyer of said buyer's right to rescind the contract, as provided for by Section 226.9(a) of Regulation Z.

10. Fail to provide each buyer who has the right to rescind with two copies of the notice prescribed by Section 226.9(b) of Regulation Z, as required by that Section.

PAR. 17. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failure to comply with the provisions of Regulation Z constitutes a violation of that Act, and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Melmar Industries, Inc., a New Jersey corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 1 Martin Ave., Cherry Hill, N.J.

Respondent Melmar Industries, Inc., a Pennsylvania corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 2555 Welsh Rd., Philadelphia, Pa.

Respondent Prestige Industries Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with an office at 396 Rodi Rd., Pittsburgh, Pa. and its general office at 1 Martin Ave., Cherry Hill, N.J.

Respondent Gold Bond Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with an office at 1 Uam Square, Springdale, Pa. and its main office and principal place of business located at 1 Martin Ave., Cherry Hill, N.J.

Respondent Marc Wolf, 1216 Cardinal Lake Dr., Cherry Hill, N.J., is an individual and is the president of Melmar Industries, Inc., a New Jersey corporation; is the secretary-treasurer of Melmar Industries, Inc., a Pennsylvania corporation; is the president of Prestige Industries Incorporated, a corporation; and is vice president of Gold Bond Industries, Inc., a corporation. Respondent Marc Wolf is responsible for formulating, controlling and directing the policies, acts and practices of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Melmar Industries, Inc., a New Jersey corporation, Melmar Industries, Inc., a Pennsylvania corporation, Prestige Industries Incorporated, a corporation, Gold Bond Industries, Inc., a corporation, their successors and assigns, and their officers, and Marc Wolf, individually and as an officer of the aforesaid corporations, and any subsidiary or affiliated company, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale or distribution of swimming pools, swimming pool accessories or any other home improvement products, at retail, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the purchase of swimming pools, swimming pool accessories or any other home improvement products at retail from respondents or any of them.

2. Making representations purporting to offer swimming pools, swimming pool accessories or any other home improvement products for sale at retail when the purpose of the representation is not to sell the advertised products but to obtain leads or prospects for the sale of other such products at higher prices.

3. Disparaging in any manner, or refusing to sell any swimming pool, swimming pool accessory or any other home improvement product which is offered for sale at retail.

4. Representing, directly or by implication, that any swimming pool, swimming pool accessory or any other home improvement product is offered for sale when such offer is not a bona fide offer to sell such product at retail.

5. Representing, directly or by implication, that the price for any swimming pool, swimming pool accessory or any other home improvement product sold by respondents at retail is a special or sale price, when such price does not constitute a significant reduction from an established selling price at which such product has been sold in substantial quantities by respondents in the recent, regular course of their retail business.

6(a) Representing that by purchasing any of said swimming pools, swimming pool accessories or other home improvement products, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such swimming pools, swimming pool accessories or other home improvement products have been sold or offered for sale at retail in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of business.

(b) Representing that by purchasing any of said swimming pools, swimming pool accessories or other home improvement products, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said swimming pools, swimming pool accessories or other home improvement products at retail in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said swimming pools, swimming pool accessories or other home improvement products at the compared price or some higher price.

(c) Representing that by purchasing any of said swimming pools, swimming pool accessories or other home improvement products, at retail, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable products unless substantial sales of such products of like grade and quality are being made at retail in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained representative samples of prices in their trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with swimming pools, swimming pool accessories or other home improvement products of like grade and quality.

7. Misrepresenting, in any manner, the amount of savings available to purchasers or prospective purchasers of swimming pools, swimming pool accessories or any other home improvement products sold at retail by respondents.

8. Failing to maintain adequate records (a) which disclose the facts upon which any savings claim, including former pricing claims and comparative value claims and similar representations of the type described in Paragraphs 5, 6(a)-(c) and 7 of this order are based, and (b) from which the validity of any savings claim, including former pricing claims and comparative value claims and similar representations of the type described in paragraphs 5, 6(a)-(c) and 7 of this order may be determined.

9. Representing, directly or by implication, that a purchaser of products sold by respondents at retail will receive a "free" television set, pool furniture or any other prize or award unless all conditions, obligations or other prerequisites to the receipt of such television set, pool furniture or other prize or award are clearly and conspicuously disclosed.

10. Representing, directly or by implication, that any swimming pool, swimming pool accessory or any other home improvement product is guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

11. Failing to incorporate the following statement on the face of all sales contracts, all notes or other instruments of indebtedness executed by or on behalf of respondents' customers with such conspicuousness and clarity as is likely to be read and understood by the purchaser:

NOTICE

If you are obtaining credit in connection with this purchase, you will be required to sign a promissory note, a sales contract or other instrument of indebtedness which may be purchased from the seller by a bank, finance company or any other third party. If such is the case, you will be required to make your payments to someone other than the seller. You should be aware that if this happens you may have to pay the note, contract or other instrument of indebtedness in full to its new owner even if your purchase contract is not fulfilled.

12. Misrepresenting, directly or indirectly, that the swimming pools of any of respondents' purchasers or prospective purchasers will be used for any type of advertising or demonstration purpose or as a model pool or that as a result of such use, respondents' purchasers will be granted reduced prices or will receive discounts, referral fees or allowances of any type.

13. Contracting for any retail sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise, which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

14. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION form for an explanation of this right.

15. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

(enter date of transaction)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY

YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION.

IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE OR SEND A TELEGRAM, TO *(Name of seller)*, AT *(address of seller's place of business)*, NOT LATER THAN MIDNIGHT OF *(Date)*.

I HEREBY CANCEL THIS TRANSACTION.

____
(Date)

____
(Buyer's signature)

Provided, however, That the "Notice of Cancellation" required by this paragraph need not be furnished in those transactions in which respondents have timely furnished the buyer with the notice of the right of rescission required by Paragraph 11 of Part II of this order.

16. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

17. Including in any sales contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

18. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

19. Misrepresenting in any manner the buyer's right to cancel.

20. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any

goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

21. Negotiating, transferring, selling or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

22. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or abandon any shipped or delivered goods.

Provided, however, That nothing contained in this order shall relieve respondents of any additional obligations respecting contracts required by federal law or the law of the State in which the contract is made. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the State in which such different obligations are required. The Commission, upon showing, shall make such modifications as may be warranted in the premises.

PART II

It is further ordered, That respondents Melmar Industries, Inc., a New Jersey corporation, Melmar Industries, Inc., a Pennsylvania corporation, Prestige Industries Incorporated, a corporation, Gold Bond Industries, Inc., a corporation, their successors and assigns, and their officers, and Marc Wolf, individually and as an officer of the aforesaid corporations, and any subsidiary or affiliated company, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the arrangement, extension or advertisement of consumer credit in connection with the retail sale of swimming pools, swimming pool accessories or any other home improvement products, as "advertisement" and "consumer credit" are defined in Section 226.2(b) and Section 226.2(k), respectively, of Regulation Z (12 CFR §226) of the Truth in Lending Act (15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Causing to be disseminated to the public in any manner whatsoever, any advertisement, for the purposes of aiding, promoting or assisting, directly or indirectly, any extension of consumer credit unless such advertisement states all of the following items prescribed under Section 226.8 of Regulation Z, in the manner and form required by Section 226.10(d)(2) of Regulation Z:

(a) The cash price or the amount of the loan, as applicable;

(b) The amount of the downpayment required or that no downpayment is required, as applicable;

(c) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(d) The amount of the finance charge expressed as an annual percentage rate; and

(e) The deferred payment price.

2. Failing to employ the term "annual percentage rate" as required by Section 226.8(b)(2) of Regulation Z.

3. Failing to disclose the terms "annual percentage rate" and "finance charge" more conspicuously than other required terminology, as required by Section 226.6(a) of Regulation Z.

4. Including the amount of the finance charge in the computation of the amount financed, contrary to the requirements of Section 226.8(c)(7) of Regulation Z.

5. Failing to include the charge for credit life insurance, when not required to be placed within the finance charge, within the amount financed, as required by Sections 226.4(a)(5) and 226.8(c)(4) of Regulation Z.

6. Failing to disclose the annual percentage rate with an accuracy to the nearest quarter of one percent, as required by Section 226.5(b)(1) of Regulation Z.

7. Failing to employ the term "cash downpayment" to describe the downpayment in money, as required by Section 226.8(c)(2) of Regulation Z.

8. Failing to employ the term "unpaid balance of cash price" to describe the difference between the cash price and the cash downpayment, as required by Section 226.8(c)(3) of Regulation Z.

9. Failing to make a clear identification of the property in which a security interest is obtained and held as required by Section 226.8(b)(5) of Regulation Z.

10. Failing to notify the buyer of said buyer's right to rescind the contract, as provided for by Section 226.9 of Regulation Z.

11. Failing to provide each buyer who has the right to rescind with two copies of the notice prescribed by Section 226.9(b) of Regulation Z, as required by that Section.

12. Failing, in any consumer credit transaction or advertisement, to make all the disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, at the time and in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

PART III

It is further ordered, That respondents distribute a copy of this order to all operating divisions of said corporations and also distribute a copy of this order to all personnel, agents or representatives concerned with the promotion, sale and distribution of swimming pools, swimming pool accessories or any other home improvement products at retail and secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, or any of them, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

EPSHTEIN TRADING CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FUR PRODUCTS LABELING ACTS

Docket C-2720. Complaint, Aug. 25, 1975-Decision, Aug. 25, 1975

Consent order requiring a New York City importer and distributor of furs and fur products, among other things to cease falsely invoicing its merchandise.

Appearances

For the Commission: *Jerry R. McDonald.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Epshtein Trading Corporation, a corporation, and Jacob L. Epshtein, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Epshtein Trading Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 224 W. 29th St., New York, N.Y.

Individual respondent Jacob L. Epshtein is an officer of Epshtein Trading Corporation. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

Respondents are engaged in the importation and sale of furs.

PAR. 2. Respondents are now and for some time last past have been engaged in the sale and offering for sale in commerce, and in the importation into the United States, and in the transportation and distribution in commerce, of furs; and have imported for sale, sold, offered for sale, transported and distributed furs which have been shipped and received in commerce, as the terms "commerce" and "fur" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said furs were falsely and deceptively invoiced with respect to the names or designations of the animals that produced the said furs in violation of Section 5(b)(1) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced furs, but not limited thereto, were furs which were invoiced as "mink" or "South Korean mink" when in truth and in fact said furs were not produced by the designated animals. In accordance with Section 7 of the Fur Products Labeling Act and pursuant to the designations established thereunder by the Fur Products Name Guide, said furs were, in fact, produced by animals named in said guide, as "Kolinskys" or "Chinese Weasels", and were required to be designated "Kolinsky" or "Chinese Weasel."

PAR. 4. Certain of said furs were falsely and deceptively invoiced in that respondents set forth on invoices pertaining to said furs the names of animals other than the name or names of the animals that produced the said furs in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Epshtein Trading Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 224 W. 29th St., New York, N.Y.

Respondent Jacob L. Epshtein is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Epshtein Trading Corporation, a corporation, its successors and assigns, and its officers, and Jacob L. Epshtein, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the introduction, or importing for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of furs or fur products, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from falsely or deceptively invoicing any fur or fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.
2. Setting forth on an invoice pertaining to such fur or fur product any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur.
3. Setting forth on an invoice pertaining to such fur or fur product the name or names of any animal or animals other than the name of the animal producing the fur as specified in the Fur Products Name Guide.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KAISER STEEL CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket No. 8878. Complaint, Mar. 3, 1972–Decision, Aug. 27, 1975

Consent order requiring an Oakland, Calif., steel company, among other things to transfer the business of MSL Tube, acquired from MSL Industries, Inc., to a wholly-owned subsidiary, Kaiser Steel Tubing, Inc., whose records must be audited annually by an independent public accountant.

Appearances

For the Commission: *Stephen Miller, Harold J. Lamboley, D. Kenneth Kaplan* and *Perry W. Winston.*

For the respondents: *Wilmer, Cutler & Pickering,* Wash., D.C. and *Raymond Haile,* Oakland, Calif.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Kaiser Steel Corporation, a corporation, has violated Section 7 of the Clayton Act as amended, (15 U.S.C. §18) and that a proceeding in respect thereof would be in the public interest, issues its complaint pursuant to Section 11 of the Clayton Act, (15 U.S.C. §22) stating its charges as follows:

I. Definitions

1. For the purpose of this complaint, the following definitions shall apply:

(a). Electric resistance welded mechanical steel tubing denotes tubing formed from flat-rolled steel into solid-wall tubing in an electric resistance welded tube mill. It can be made from hot-rolled, cold-rolled or galvanized steel and may be in a round, square, rectangular or a special shape form. It includes structural tubing used in highway and building construction and, in smaller sizes for such applications as the manufacture of furniture, bicycles and lawn mowers. Electric resistance welded steel tubing is used for a wide variety of mechanical and structural purposes as opposed to pressure tubing which is used for the conduction of fluids and/or gases under pressure.

(b). Eleven Western States include the States of California, Oregon, Washington, Arizona, New Mexico, Idaho, Utah, Montana, Wyoming, Colorado and Texas.

II. Respondent Kaiser Steel Corporation

2. Kaiser Steel Corporation (hereafter "Kaiser") is a corporation organized and existing under the laws of the State of Nevada, with its principal office and place of business at 300 Lakeside Dr., Oakland, Calif.

3. Kaiser's business is conducted through three divisions: Resources, Steel and Metal Products. In addition to being the nation's tenth largest steel producer, it is the biggest steel producer in the West. In recent years, Kaiser has become a major world-wide developer of basic resources, principally iron ore, iron ore pellets and high-quality coking coal. Its primary marketing area is the seven western states.

4. For its fiscal year ending Dec. 31, 1969, Kaiser had net sales of $420.8 million, net earnings of $25.7 million, and total assets of $643.5 million.

5. At all times relevant herein, Kaiser sold and shipped, and is now selling and shipping products in interstate commerce throughout the United States; hence, Kaiser was, at the time of the acquisition challenged herein, and is now, engaged in commerce as "commerce" is defined in the Clayton Act.

III. Acquired Assets

6. MSL Industries, Inc. (hereafter "MSL") is a corporation organized and existing under the laws of the State of Minnesota with its principal office and place of business in Chicago, Ill. Prior to Mar. 31, 1970, MSL Tubing and Steel Co., (hereafter "MSL Tube") was an operating division of MSL, consisting of land, buildings and equipment located in Vernon, Calif. Prior to Mar. 31, 1970, MSL Realty, a Delaware corporation, organized to do business in California, was a wholly-owned subsidiary of MSL.

7. At the time of its acquisition, MSL Tube was the West Coast's largest manufacturer of electric resistance welded mechanical steel tubing. In addition, MSL Tube processed and distributed secondary sheet steel and slit coil products. The geographic sales area of MSL Tube's products included primarily the States of California, Oregon, Washington, Arizona, New Mexico, Idaho, Utah, Montana, Wyoming, Colorado and Texas. MSL Realty's assets included land leased to MSL Tube.

8. For its fiscal year ending Dec. 31, 1969, MSL had net sales of $131.4 million, net earnings of $304,000, and total assets of $110.8 million. In 1969, MSL Tube had net sales of $12.8 million, net earnings of $1.4 million and total assets of $8.2 million.

9. At all times relevant herein, MSL Tube sold and shipped products in interstate commerce and was engaged in "commerce" within the meaning of the Clayton Act.

IV. Acquisition

10. On Mar. 31, 1970, Kaiser acquired the properties, assets and facilities comprising MSL's west coast tube manufacturing business located in Vernon, Calif., and all of the outstanding common stock of MSL Realty for $10.4 million.

V. Trade and Commerce

11. The manufacture of electric resistance welded mechanical steel tubing entails feeding a width of strip steel into a welding mill where a series of special rolls form the flat steel into a tubular shape. The butted edges are then electrically welded under heat and pressure. Steel, the primary ingredient in the manufacture of electric resistance welded mechanical steel tubing, represents between 65 percent and 90 percent of the total cost of manufacturing the product.

12. Due principally to freight costs, the manufacture and sale of electric resistance welded mechanical steel tubing has tended to be a regional industry. In 1969, the six west coast companies engaged in the manufacture of such products, all of which were based in California, had $22.1 million sales representing over 68 percent of the market for electric resistance welded mechanical steel tubing in the eleven Western States market; MSL Tube, the largest manufacturer, accounted for approximately 27 percent of total sales. In 1969, the six companies had $18.1 million sales representing over 72 percent of the sales of electric resistance welded mechanical steel tubing in the State of California; MSL Tube, the largest manufacturer, accounted for approximately 30 percent of California sales.

13. In 1969, the six companies producing electric resistance welded mechanical steel tubing in the California market had not been integrated or affiliated with steel manufacturers.

VI. The Effects of the Acquisition

14. The effect of the acquisition of MSL Tube and MSL Realty may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of electric resistance welded mechanical steel tubing in the State of California and in the eleven Western States in the following ways, among others:

(a). The ability of MSL Tube's nonintegrated competitors effectively to compete in the manufacture and sale of electric resistance welded mechanical steel tubing has been and/or may be substantially impaired.

(b). The entry of new electric resistance welded mechanical steel tubing competitors may have been and/or may be inhibited or prevented.

(c). The dominant position of MSL Tube in the electric resistance welded mechanical steel tubing industry has been, or may be, further strengthened and entrenched vis-a-vis its competitors with the result that the likelihood of any reduction in such dominant position is remote.

VII. Violation Charged

15. The acquisition of MSL Tube and MSL Realty by Kaiser on Mar. 31, 1970, constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18).

DECISION AND ORDER

The Federal Trade Commission having initiated a complaint charging that the respondent named in the caption hereof has violated the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. §18; and

Respondent and complaint counsel, by joint motion dated Sept. 10, 1974 having moved to have the matter removed from adjudication for the purpose of submitting an executed consent agreement; and

The Commission, by order issued Sept. 24, 1974, having withdrawn this matter from adjudication pursuant to Section 3.25(c) of its rules; and

The executed agreement contains a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint which the Commission issued, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 3.25(d) of its rules, now in further conformity with the procedure prescribed in Section 3.25(d) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Kaiser Steel Corporation is a corporation organized,

existing and doing business under and by virtue of the laws of the State of Nevada, with its principal place of business located at 300 Lakeside Dr., in the City of Oakland, State of California.

2. The Federal Trade Commission has jurisdiction of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

For purposes of this order, the following definitions shall apply:

"ERWMSST," or Electric Resistance Welded Mechanical and Structural Steel Tubing, means tubing formed from flat-rolled steel into solid-wall tubing in an electric resistance welded tube mill and used for mechanical or structural applications. It can be made from hot-rolled, cold-rolled or galvanized sheet steel and may be in a round, square, rectangular or a special shape form. ERWMSST does not include pipe or tubing which is used for the conduction of fluids and/or gases ("pipe" or "pressure tubing").

"Respondent" means Kaiser Steel Corporation and any of its domestic subsidiaries and their respective successors and assigns.

"The Business of MSL Tube" means the tubing business acquired by respondent from MSL Industries, Inc. and all additions subsequently made thereto, including the physical plant located in Vernon, Calif. and presently owned by respondent and operated by the Kaiser Steel Tubing Division of respondent; the nine tube mills presently at such physical plant; and all related inventories, accounts receivable and current liabilities of the Kaiser Steel Tubing Division.

"California ERWMSST Producer(s)" means (1) the manufacturers of ERWMSST listed in Appendix A and (2) any other individual or corporation not affiliated with any of the manufacturers listed in Appendix A which, subsequent to the date of this order, commences to manufacture and sell ERWMSST within the State of California.

"Secondary Sheet Steel" means sheet steel which does not meet the producer's quality standards for prime sheet steel and which is for this reason sold at prices lower than the producer's prices for prime sheet steel.

"Affiliated Person" means a person who is at the time of any action taken pursuant to Paragraph III of this order an officer, director, employee or agent of respondent or who owns or controls, directly or indirectly, more than one percent of the outstanding shares of the capital stock of respondent.

I

It is ordered, That:

A. Respondent shall, within six months after the date this Order becomes final, transfer, assign and convey The Business of MSL Tube to a wholly-owned subsidiary, hereinafter called Kaiser Steel Tubing, Inc. ("KST"). KST shall maintain, in accordance with good accounting practice, separate and complete corporate records and accounts, which shall be audited annually by an independent public accountant. KST shall preserve such records for a period of at least five years.

B. Respondent shall not sell any type of sheet steel, including Secondary Sheet Steel, to KST at a price (including extra charges and discounts) lower than respondent's then current list price unless, to respondent's reasonable belief, other California ERWMSST producers can substantially satisfy their requirements for such type of sheet steel by purchases at such lower price.

C. With regard to all other commercial transactions between respondent and KST, Respondent shall establish procedures to insure that such transactions are no more favorable to KST than would be the case if they were entered into between respondent and independent parties on reasonable commercial terms. Respondent shall not enter into any such commercial transaction with KST except on terms which accord with these procedures. Respondent shall report annually to the Commission all such commercial transactions with KST in the preceding year involving more than $25,000. In addition, such transactions shall be reviewed by the independent accountants described in Paragraph I(A) above, and respondent shall submit to the Commission the reports containing the opinion of said accountants as to whether such transactions complied with the procedures established pursuant to this paragraph.

II

It is further ordered, That

A. Respondent shall in each calendar year make available for sale to each California ERWMSST producer, at a price not exceeding respondent's then current published list price (including applicable extra charges and discounts), subject to credit terms appropriate under the circumstances, and on conditions of sale not less favorable than those offered to KST, a quantity of sheet steel for use in the manufacture of ERWMSST equal to the average of such producer's annual purchases of sheet steel from respondent for use in the manufacture of ERWMSST for the three years during the period 1969 through 1973, inclusive, in which such company purchased the greatest quantities of sheet steel from respondent (its "base years"). In making such allocations, respondent shall use its best efforts to make available to each such ERWMSST producer, hot-rolled, cold-rolled and galvanized sheet steel in the same ratio as those types of steel were purchased by such producer from respondent during its base years. Respondent shall make available for sale to any California ERWMSST producer (1) whose average annual purchases of sheet steel from respondent for use in the manufacture of ERWMSST during its "base years" were less than 1,000 tons, or (2) who commenced the manufacture and sale of ERWMSST in the State of California subsequent to the date of this order, a minimum annual allocation of 1,000 tons of hot-rolled sheet steel for use in the manufacture of ERWMSST.

B. In any calendar year respondent shall increase the quantities of sheet steel made available to California ERWMSST producers pursuant to Paragraph II(A) by the same percentage by which its sales of sheet steel to KST for use in the manufacture of ERWMSST in the most recent calendar year exceeded its 1974 sales of sheet steel to KST for that purpose.

C. Respondent shall in each year, to the extent Secondary Sheet Steel is available, include in the quantity of sheet steel made available for sale to each California ERWMSST producer pursuant to this paragraph, at such producer's option, secondary sheet steel for use in the manufacture of ERWMSST in the same proportion that respondent's sales of secondary sheet steel to KST for use in the manufacture of ERWMSST in the then current calendar year bear to its total sales of sheet steel to KST for that purpose during such calendar year.

D. Respondent shall not be obligated to deliver sheet steel offered for sale to California ERWMSST producers pursuant to the provisions of this paragraph during any period when its ability to produce or deliver sheet steel is substantially impaired by reason of labor difficulties, war, civil commotion, act of God, governmental action, failure of equipment, sources of supply or transportation, or other occurrence beyond respondent's control; and the quantity of sheet steel which respondent shall be obligated to make available for sale to California ERWMSST producers in any year in which such an occurrence takes place shall be reduced in proportion to the total reduction in respondent's production of sheet steel, caused by such occurrence, below its projected production for that year.

III

It is further ordered, That within one year from the date this order becomes final, respondent shall, or shall cause KST to, with respect to each of three tube mills and associated equipment (including jib crane; pay-off reel; coil end joining table; looping system; forming mill; welder; tube cooling section; sizing mill; cut-off device; drive system and console table) suitable for the manufacture of ERWMSST in commonly used sizes from approximately 1/2 inch to approximately 1 1/2 inch diameter, presently included among the business of MSL Tube, either (1) sell such mill or mills and associated equipment to persons who are not affiliated persons; or (2) impound such mill or mills and associated equipment, provided that any mill or mills and associated equipment so impounded shall not again be used by respondent or KST for the production of ERWMSST within the State of California without prior consent of the Commission.

IV

It is further ordered, That if respondent or KST elects to sell any tube mill pursuant to alternative one of Paragraph III of this order, nothing in this order shall be deemed to prohibit respondent from retaining, accepting, and enforcing in good faith any security interest therein, not to exceed five years in duration, for the sole purpose of securing to respondent or KST full payment of the price, with interest, at which such tube mill is sold; *Provided, however*, That should respondent or KST, by exercise of such security interest regain direct or indirect control of any such tube mill, it shall be redivested or impounded in accordance with Paragraph III of this order, within one year from the date of reacquisition.

V

It is further ordered, That KST shall not sell or offer to sell ERWMSST and steel mill products together at a single price. Nothing in this paragraph shall prevent KST from offering carload or truckload discounts which are computed on the sale of quantities of both tubing and such other products, based on cost savings attributable to the sale of those products together.

VI

It is further ordered That respondent shall, within 60 days from the date this order becomes final, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the provisions of this order and in fulfilling its objectives. Every 60 days thereafter, until respondent has taken one of the alternative actions required by Paragraph III of this order, respondent shall submit a subsequent report on its progress in complying with Paragraph III. Respondent shall submit annually, within 90 days after the end of its fiscal year, a detailed written report of its actions in complying with the remaining provisions of this order.

VII

It is further ordered, That, pending sale or impoundment of the tube mills which are the subject of Paragraph III of this order, respondent shall not make any changes in, other than in the ordinary course of business, or permit any deterioration of, any of such tube mills which may impair such mill's capacity for the manufacture of ERWMSST.

VIII

It is further ordered, That, for a period of ten years from the date this order becomes final, respondent shall not, without the prior approval of the Federal Trade Commission, acquire, or acquire and hold, directly or indirectly, the whole or any part of the assets, stock, share capital, or other actual or potential equity interest or right of participation in the earnings of any domestic concern, corporate or noncorporate, engaged in the manufacture of ERWMSST in the States of Arizona, California, Idaho, Nevada, Oregon, Utah and Washington.

IX

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of this order.

X

It is further ordered, That the provisions of this order shall remain in effect for a period of ten years from the date this order becomes final.

APPENDIX A

California ERWMSST Producers:

Bernard Epps & Co., 3165 E. Slauson Avenue, Los Angeles, California 90058.

California Steel and Tube, Inc., 16049 Stephens Street, City of Industry, California 91744.

Cal-Metal Corporation, 1351 West Sepulveda Blvd., Torrance, California.

Harris Tube Division of Automation Industries, Inc., 8720 South San Pedro Street, Los Angeles, California 90003.

Pacific Tube Company 5710 Smithway Street, Los Angeles, California 90040.

Torrance Tube Division of Cyprus Mines Corporation, 1739 213th Street, Torrance, California.

Western Tube & Conduit Corporation, 2730 East 37th Street, Los Angeles, California 90058.

IN THE MATTER OF

STATE CREDIT ASSOCIATION, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2722. Complaint, Aug. 27, 1975-Decision, Aug. 27, 1975

Consent order requiring a Seattle, Wash., debt collection agency, among other things to cease misrepresenting the attachment, garnishment or foreclosure of any assets, wages, or property without making various disclosures to the alleged debtor, and instituting suits in counties other than where the defendant resides or the debt was incurred. Further, respondent is required to comply with the F.T.C.'s "Guides Against Debt Collection Deception."

Appearances

For the Commission: *Gregory L. Colvin.*
For the respondents: *David Gossard*, Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that State Credit Association, Inc., a corporation, and D. Keith Lasswell, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent State Credit Association, Inc. (hereinafter SCA) is a Washington corporation with its office and principal place of business located at 1314 Howell St., Seattle, Wash.

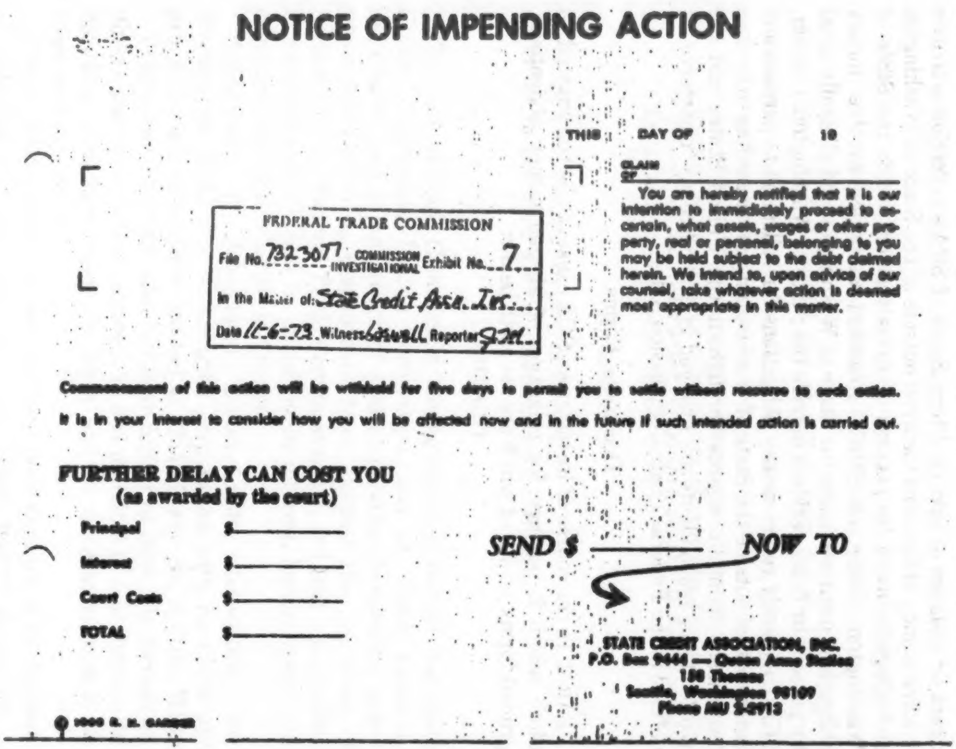
Respondent D. Keith Lasswell is an officer of SCA. He formulates, directs and controls the policies, acts and practices of said corporation, including those hereinafter set forth, and his business address is the same as that of SCA.

PAR. 2. Respondents are now and have been engaged in the business of collecting or attempting to collect alleged money obligations as agents or assignees of various creditors. Allegations stated below in the present tense include the past tense.

PAR. 3. In the course of its business, SCA engages in substantial interstate commercial intercourse, including transmittal of letters, checks and documents through the United States mails among the various States of the United States. In the course of its business, SCA solicits and receives accounts and other kinds of money obligations for collection from persons and firms, including interstate corporations, located outside the State of Washington. SCA, in such instances, acts as agent or assignee of said creditors. Some of SCA's collection activities involve money obligations incurred outside of the State of Washington and allegedly owed by persons or firms resident inside the State of Washington. Some of SCA's collection activities involve money obligations incurred inside the State of Washington and allegedly owed by persons or firms resident outside the State of Washington. Further, SCA frequently refers money obligations for collection to persons and firms located outside the State of Washington, and, according to its own letterhead, maintains agents throughout the United States and the World. Thus, respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Deceptive Forms

PAR. 4. In the course of its business, SCA causes to be transmitted, to those whom it pursues for collection of alleged money obligations, printed forms, copies of which are set forth below:



NOTICE OF IMPENDING ACTION

THIS DAY OF 19

CLAIM OF

You are hereby notified that it is our intention to immediately proceed to ascertain, what assets, wages or other property, real or personal, belonging to you may be held subject to the debt claimed herein. We intend to, upon advice of our counsel, take whatever action is deemed most appropriate in this matter.

FEDERAL TRADE COMMISSION
File No. 7323077 COMMISSION INVESTIGATIONAL Exhibit No. 7
In the Matter of: State Credit Assn. Inc.
Date 11-6-73 Witness Caswell Reporter GJM

Commencement of this action will be withheld for five days to permit you to settle without recourse to such action.

It is in your interest to consider how you will be affected now and in the future if such intended action is carried out.

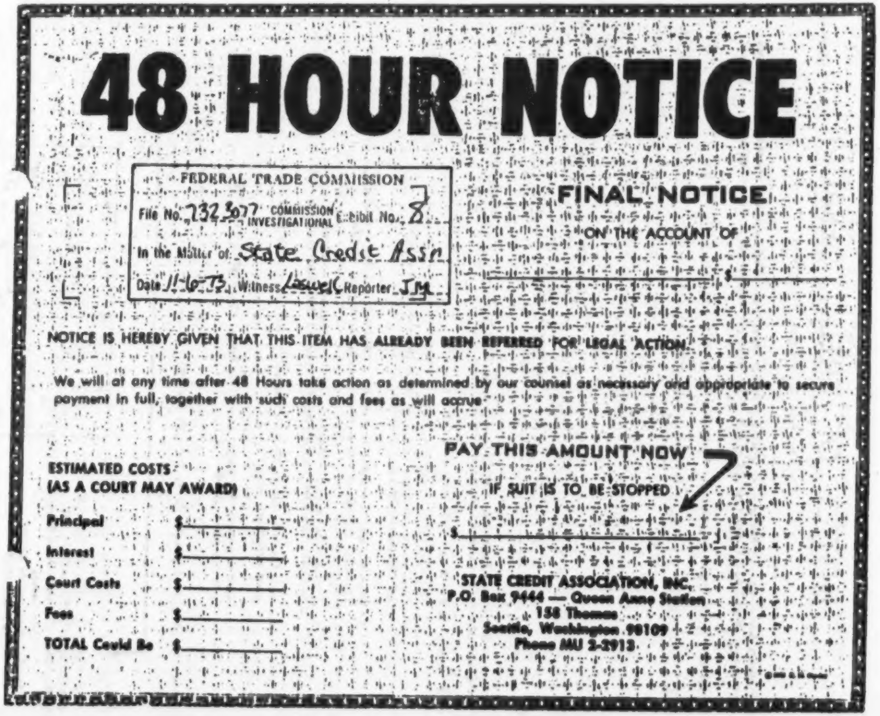
FURTHER DELAY CAN COST YOU
(as awarded by the court)

Principal	$
Interest	$
Court Costs	$
TOTAL	$

SEND $ ________ NOW TO

STATE CREDIT ASSOCIATION, INC.
P.O. Box 9444 — Queen Anne Station
158 Thomas
Seattle, Washington 98109
Phone MU 2-2913

© [illegible] R. H. GARDNER



48 HOUR NOTICE

FEDERAL TRADE COMMISSION
File No. 732 3077 COMMISSION INVESTIGATIONAL Exhibit No. 8
In the Matter of State Credit Assn
Date 11-6-73 Witness Laswell Reporter JM

FINAL NOTICE

ON THE ACCOUNT OF
________ $________

NOTICE IS HEREBY GIVEN THAT THIS ITEM HAS ALREADY BEEN REFERRED FOR LEGAL ACTION.

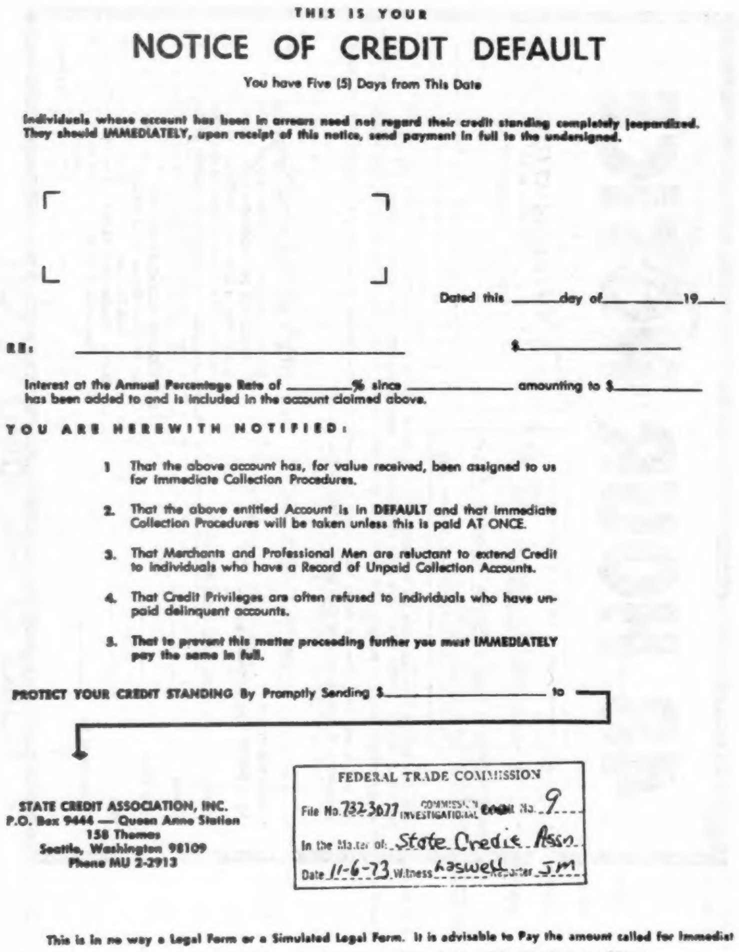
We will at any time after 48 Hours take action as determined by our counsel as necessary and appropriate to secure payment in full, together with such costs and fees as will accrue.

ESTIMATED COSTS
(AS A COURT MAY AWARD)

Principal $________
Interest $________
Court Costs $________
Fees $________
TOTAL Could Be $________

PAY THIS AMOUNT NOW
IF SUIT IS TO BE STOPPED
$________

STATE CREDIT ASSOCIATION, INC.
P.O. Box 9444 — Queen Anne Station
158 Thomas
Seattle, Washington 98109
Phone MU 2-2913



THIS IS YOUR

NOTICE OF CREDIT DEFAULT

You have Five (5) Days from This Date

Individuals whose account has been in arrears need not regard their credit standing completely jeopardized. They should IMMEDIATELY, upon receipt of this notice, send payment in full to the undersigned.

Dated this ______day of__________19___

RE: ______________________________ $______________

Interest at the Annual Percentage Rate of _______% since ____________ amounting to $_________ has been added to and is included in the account claimed above.

YOU ARE HEREWITH NOTIFIED:

1. That the above account has, for value received, been assigned to us for Immediate Collection Procedures.
2. That the above entitled Account is in **DEFAULT** and that Immediate Collection Procedures will be taken unless this is paid AT ONCE.
3. That Merchants and Professional Men are reluctant to extend Credit to Individuals who have a Record of Unpaid Collection Accounts.
4. That Credit Privileges are often refused to individuals who have unpaid delinquent accounts.
5. **That to prevent this matter proceeding further you must IMMEDIATELY pay the same in full.**

PROTECT YOUR CREDIT STANDING By Promptly Sending $_________________ to

STATE CREDIT ASSOCIATION, INC.
P.O. Box 9444 — Queen Anne Station
158 Thomas
Seattle, Washington 98109
Phone MU 2-2913

FEDERAL TRADE COMMISSION
File No. 732-3077 COMMISSION INVESTIGATIONAL Exhibit No. 9
In the Matter of: State Credit Asso.
Date 11-6-73 Witness Kaswell Reporter JM

This is in no way a Legal Form or a Simulated Legal Form. It is advisable to Pay the amount called for Immediat since Legal Forms served by the Sheriff require payment of Court Costs and Service Fees in addition.

PAR. 5. Through the use of statements and representations in said forms, SCA has misrepresented, directly or by implication, that:

A. Form 1

1. SCA will attach, garnish, foreclose, or otherwise take possession of some part of the assets, wages, or other property of the person against whom collection activities are being pursued, without allowing or being required to allow such person any defense or recourse except payment of the demanded amount of money.

2. Legal action on the allegedly unpaid obligation is about to be initiated.

3. If SCA does not receive full payment of the allegedly unpaid obligation within the specified time period, SCA will commence suit.

B. Form 2

1. The allegedly unpaid obligation has been referred to an attorney.

2. An attorney is actively involved in pursuing or reviewing a collection matter in preparation for initiation of legal action.

3. Legal action on the allegedly unpaid obligation has been or is about to be initiated.

4. If SCA does not receive full payment of the allegedly unpaid obligation within the specified time period, SCA will commence suit.

C. Form 3

1. SCA engages in credit reporting activities or engages in providing information to credit reporting agencies.

2. The existence of the allegedly unpaid obligation has impaired such person's credit standing already and can only be corrected by full payment to SCA.

3. Failure to make full payment to SCA of the alleged obligation within the specified time period will result in impairment of the credit standing or credit privileges of the person against whom collection activities are being pursued.

These threats have the capacity and tendency to mislead those who allegedly owe such money obligations as to their legal rights and as to the status of the collection activities being conducted against them, and thus tend to induce payment by such persons.

Therefore, the statements and representations referred to in Paragraphs Four and Five are deceptive and unfair.

Gag Calling

PAR. 6. In the course of its business, SCA collects or attempts to collect information by telephone using an assumed identity, or disguising the purpose for which information is desired. Such a practice is commonly known as "gag calling" in collection terminology.

Since recipients of such calls may be misled as to the true identity or purpose of the callers, they may be induced to provide information which is not in their interest to supply and which they normally would not voluntarily furnish. Therefore, this practice is deceptive and unfair.

Questioning of Others in the Debtor's Home

PAR. 7. In the course of its business, SCA telephones private residences and if the alleged debtor is not home, SCA proceeds to question other persons in the home, including minor children, about telephone numbers, places of employment or other information to facilitate collection.

Many persons in such a situation, especially minor children, cannot understand the nature or importance of information requested and are not in a position to determine whether or how they should respond to such questions. Thus, SCA may obtain private information from the child or other person which is not in the alleged debtor's interest to supply and which such debtor normally would not voluntarily furnish. Therefore, this practice is unfair.

Use of Judicial Process

PAR. 8. SCA regularly resorts to use of judicial process in collection matters not resolved by private settlement. The defendants in such cases are predominately low-income or middle-income persons not represented by counsel. SCA sues in its own name as assignee of the alleged money obligations and usually obtains default judgments against such defendants.

PAR. 9. SCA commences almost all its collection lawsuits in the district and superior courts of King County, Wash. In many of the superior court suits defendants reside, or incurred the underlying obligations, outside of King County, in places up to 200 or more miles from the court. Courts located in the county where defendants reside or where they incurred the underlying obligations could be used for these suits. Through such use of distant and inconvenient forum, SCA effectively deprives defendants of a reasonable opportunity to appear, answer and defend the lawsuits. Therefore, this practice is unfair.

PAR. 10. For its superior court lawsuits, SCA uses confusingly worded summonses which give defendants inadequate or misleading directions as to the proper procedure for responding. These summonses have the tendency to mislead defendants into defaulting. Thus, SCA effectively deprives defendants of a reasonable opportunity to appear, answer and defend the lawsuits. Therefore, this practice is unfair and deceptive.

PAR. 11. The use of the deceptive statements and representations described above has the tendency and capacity to lead alleged debtors into the erroneous and mistaken belief that the statements and representations are true. As a result of this belief, and as a result of these and other unfair practices described above, such alleged debtors are coerced and intimidated into paying the amounts claimed against them.

PAR. 12. The acts and practices alleged above are all to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent State Credit Association, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1314 Howell St., Seattle, Wash.

Respondent D. Keith Lasswell is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of said corporation.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents State Credit Association, Inc., a corporation, its successors and assigns, and its officers, and D. Keith Lasswell, individually and as an officer of SCA, and respondents' agents, representatives and employees, hereinafter collectively "respondents," directly or through any corporation, subsidiary, division or other device, in connection with the collection of money obligations or any other form of obligation or claim in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from representing in writing, orally, visually, or in any other manner, directly or by implication, that:

A. Respondents can or will attach, garnish, foreclose, or in any manner take possession of any part of the assets, wages or other property of anyone, or initiate any legal action unless (a) at the time of such representation, respondents have a present legal right to take such action, (b) respondents specify truthfully, in immediate conjunction with such representation, how soon such action will be taken if payment of the obligation is not made, and (c) respondents regularly take such action within the specified time period when no payment is made.

B. Any allegedly unpaid obligation has been referred to an attorney unless such is the fact.

C. An attorney is actively involved in pursuing or reviewing a collection matter in preparation for initiation of legal action unless such is the fact.

D. Legal action on an allegedly unpaid obligation has been or is being initiated unless such is the fact.

E. Respondents engage in credit reporting activities of any kind or engage in providing information to credit-reporting agencies.

F. The existence of an allegedly unpaid obligation has impaired or will impair any person's credit standing or credit privileges or that only payment to respondents can correct or avoid any credit impairment.

II

It is further ordered, That respondents, in any communication with any person or firm during any part of collection activities, refrain from engaging in any representations which disguise, obscure, or detract from respondents' true identity or the true purpose of the communication.

III

It is further ordered, That respondents, when speaking to persons present in the alleged debtor's home other than the debtor himself or herself, do forthwith cease and desist from attempting to obtain any information other than (1) whether the caller may speak to the debtor and, if the debtor is not present, (2) when the debtor is expected to be home, and (3) whether there is a telephone number where the debtor can be reached. When speaking to persons under the age of twelve (which respondents may verify by direct question if necessary), respondents cannot attempt to obtain any information other than whether the caller may speak to an adult.

IV

It is further ordered, That respondents comply with all provisions of the Federal Trade Commission's "Guides Against Debt Collection Deception" existing at the time this Order is finally accepted.

V

It is further ordered, That respondents do forthwith cease and desist from instituting suits except in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon, or, if there was no written contract, where the obligation was incurred. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions involving real property or fixtures attached to real property, that suit be instituted in a particular county.

VI

It is further ordered, That when respondents institute suit in any superior court in Washington State, they shall attach, to any summons served upon defendants, a notice which gives defendants adequate directions as to the proper procedure for responding to the suit and avoiding default. The notice shall use clear and unconfusing language, and shall appear clearly, conspicuously, and in type at least as large as typewriter pica type. Should superior court rules or procedures change respondents shall forthwith modify the notice accordingly. The initial form of the notice, and any modifications thereof, shall be subject to approval by authorized representatives of the Federal Trade Commission. Respondents shall not make any representation in writing, orally, visually or in any other manner, directly or by implication, which disguises, obscures, or detracts from the proper procedure for responding to the suit or for avoiding default.

VII

It is further ordered, That respondents shall forthwith deliver a copy of this order to each of their subsidiaries, operating divisions and employees engaged in collection activities.

VIII

It is further ordered, That respondents notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

IX

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment or of his affiliation with a new business or employment in the debt collection industry, in the event of such discontinuance or affiliation. Such notice shall include the respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

X

It is further ordered, That the respondents herein shall within sixty days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

THE HOUSE OF SCHILLER, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2723. Complaint, Aug. 27, 1975-Decision, Aug. 27, 1975

Consent order requiring a Long Island City, N.Y., manufacturer and distributor of plastic slipcovers, among other things to cease using bait and switch tactics in the sale of its merchandise.

Appearances

For the Commission: *Jerry R. McDonald.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The House of Schiller, Inc., a corporation, and Lawrence Kane and Donald Sherman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The House of Schiller, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 41-40 27th St., Long Island City, N.Y.

Respondents Lawrence Kane and Donald Sherman are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of plastic slipcovers to members of the purchasing public at retail.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business located in the State of New York, to purchasers thereof located in various other States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their merchandise, respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation and by oral statements and representations of their sales representatives and agents to prospective purchasers with respect to said merchandise and services.

Typical and illustrative of said statements and representations, but not all inclusive thereof, is the following:

Sofa $14.95 Chair $8.50 3 piece sectional $29.95

PAR. 5. By and through the use of said above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented and are now representing directly or by implication that:

1. Respondents are making a bona fide offer to sell the advertised merchandise at the price and on the terms and conditions stated in the advertisements.

PAR. 6. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell said merchandise at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of plastic slipcovers. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen who make little or no effort to sell to the prospective customer the advertised merchandise. Instead, they exhibit what they represent to be the advertised merchandise which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced merchandise of superior quality is thereupon exhibited, which by comparison disparages and demeans the merchandise. By these and other tactics, purchase of the advertised merchandise is discouraged, and respondents, through their salesmen, attempt to sell and frequently do sell the higher priced merchandise.

Therefore, the statements and representations as set forth in Paragraphs Four and Five, hereof, were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business as aforesaid, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such advertisements and representations were and are true, and into the purchase of substantial quantities of respondents' said merchandise by reason of said erroneous and mistaken beliefs.

PAR. 9. The aforesaid acts and practices of respondents as herein alleged were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent The House of Schiller, Inc. is a corporation organized, existing and doing business under and by virtue of the laws

of the State of New York with its offices and principal place of business located at 41-40 27 St., Long Island City, N.Y.

Respondents Lawrence Kane and Donald Sherman are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents The House of Schiller, Inc., a corporation, its successors and assigns, and its officers, and Lawrence Kane and Donald Sherman, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale and distribution of plastic slipcovers or other merchandise to the public at retail, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of plastic slipcovers or other merchandise or services.

2. Making representations, directly or indirectly, orally, or in writing, purporting to offer merchandise or services for sale when the purpose of the representation is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise or services at a higher price.

3. Disparaging in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

4. Representing, directly or indirectly, orally or in writing, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of plastic slipcovers and other merchandise, or utilized in the advertising, promotion or sale of plastic slipcovers and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of plastic slipcovers and other merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents who are engaged in the offering for sale and sale of respondents' products, or in any aspect of preparation, creation, or placing of advertising and that respondents secure a signed statement acknowledging receipt of said order from each such person and that respondents distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents maintain full and complete records of all complaints and correspondence received from customers, or any memoranda in connection therewith, for a period of two years after receipt.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business addresses and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

THE BUDD COMPANY

DISMISSAL ORDER, OPINIONS, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8848. Complaint, June 18, 1971-Decision, Aug. 29, 1975

Order dismissing complaint issued against a Philadelphia, Pa., automotive parts supplier for alleged violation of Section 7 of the Clayton Act. The Commission vacated the initial decision of the administrative law judge, finding respondent's acquisition of Gindy Manufacturing Corporation to be procompetitive rather than anticompetitive as alleged in the complaint.

Appearances

For the Commission: *K. Keith Thurman*, *Ronald J. Dolan* and *James C. Egan, Jr.*

For the respondent: *Ralph W. Brenner*, *Edward R. Sandell* and *T. Michael Mather*, *Montgomery, McCracken, Walker & Rhoads*, Philadelphia, Pa.

COMPLAINT

The Federal Trade Commission having reason to believe that The Budd Company, a corporation subject to the jurisdiction of the Commission, has acquired the stock of Gindy Manufacturing Corporation, a corporation, in violation of Section 7 of the Clayton Act (15 U.S.C. §18), hereby issues this complaint, pursuant to Section 11 of that Act (15 U.S.C. §21), stating its charges in that respect as follows:

I. Definition

1. For the purposes of this complaint, the following definitions shall apply:

(a) "Containers and chassis," as used here, refer to large, closed box-type structures which can be used for the intermodal transportation of goods, by rail, ship or motor carrier and chassis used to transport containers. The container is detachable from the chassis of a trailer or semi-trailer when so used. Sizes are now generally standardized to 8 feet wide, 8 feet high and either 20 feet or 40 feet long, although a few odd sizes are also made.

(b) "Van trailer," as used here, refers to a large box-type structure attached permanently to a chassis for use as a truck trailer or semi-trailer. Among the principal types are:

(1) Closed-top dry freight

(2) Open-top.

II. The Budd Company

2. Respondent, The Budd Company (hereafter "Budd") is now, and was at the time of the acquisition, a Pennsylvania corporation with its principal office, and place of business located at 2450 Hunting Park Ave., Philadelphia, Pa.

3. In 1967, Budd had sales of $330.9 million, and assets of $264.5 million. In that year it was the 250th largest industrial corporation in the Nation in total sales. In 1968, its sales increased to $469.5 million and assets increased to $346.7 million making it the nation's 209th largest industrial corporation in total sales. By 1969, Budd had annual sales of $561.7 million and assets of $402 million and in terms of sales had progressed to rank 191st among the nation's largest industrial corporations.

4. Budd is one of the largest independent automotive suppliers in the nation and the largest independent supplier of body components to the automotive industry. Budd manufactures automotive bodies, wheels, rims, hubs, drums, brakes and other automotive products. It also produces jigs, dies and fixtures used in the manufacture of automotive bodies and components, railroad cars, metal stampings and industrial plastic products. Approximately 85 percent of its sales are in the automotive field.

5. Prior to its acquisition of Gindy Manufacturing Corporation, Budd surveyed the transportation equipment field, including manufacturers of van trailers and containers and chassis, with a view to acquisition of such companies. As a major manufacturer of metal stampings and parts such as wheels, rims, hubs, and drums, Budd made

many of the parts used in the manufacture of van trailers and container chassis. Furthermore, Budd has designed and produced components used in the manufacture of stainless steel dry freight van trailers and aluminum containers.

6. By virtue of its position as a substantial manufacturer and supplier of transportation equipment and component parts, its financial resources, its marketing knowledge and its demonstrated interest in entering the van trailer and container and chassis industry, Budd was, prior to Oct. 22, 1968, one of the most likely potential entrants into the manufacture and sale of van trailers and containers and chassis.

7. At all times relevant herein, Budd sold and shipped its products throughout the United States and was and is now engaged in commerce as "commerce" is defined in the Clayton Act.

III. Gindy Manufacturing Corporation

8. Prior to its acquisition by Budd on Oct. 22, 1968, Gindy Manufacturing Corporation (hereafter "Gindy") was a Pennsylvania corporation with its principal office and place of business located in Downingtown, Pa.

9. Gindy was engaged principally in the manufacture, sale and distribution of van trailers and containers and chassis. Its manufacturing and assembly facilities were located in Eagle, Lebanon and Honey Brook, Pa.; Pennsauken, N.J.; Collinsville, Va.; and St. Louis, Mo.

10. For the fiscal year ending May 31, 1968, Gindy's sales were approximately $32.2 million, and its assets amounted to approximately $44 million.

11. In calendar year 1968, Gindy was a substantial manufacturer and seller of van trailers and containers and chassis. With sales of $32.2 million, it ranked fourth in the country in the sale of van trailers; with sales of $26.7 million, it ranked fourth in the country in the sale of closed-top dry freight van trailers; with sales of $3.1 million, second in the sale of open-top van trailers; and, with sales of $3.1 million, sixth in the sale of containers and chassis. In that year, Gindy accounted for 8.4 percent of van trailer shipments, 10.8 percent of closed-top dry freight van trailer shipments, 15.9 percent of open-top van trailer shipments and 3.8 percent of container and chassis shipments. In calendar year 1969 Gindy's shipments of van trailers increased to $42.6 million, and its market share increased to 8.8 percent. In that same year its shipments of closed-top dry freight van trailers increased to $40.3 million, making Gindy the 3rd largest supplier with 12.9 percent of shipments. A significant increase in Gindy's position in the shipment of containers and chassis also occurred in 1969; its value of shipments increased to

$9.0 million making it the 3rd largest supplier with 9.9 percent of that market.

12. At all times relevant herein Gindy sold and shipped its products throughout the United States and engaged in commerce as "commerce" is defined in the Clayton Act.

IV. The Acquisition

13. On or about Oct. 22, 1968, Budd acquired all of the then issued and outstanding capital stock of Gindy, aggregating 62,730 shares, for approximately 900,000 shares of Budd common stock. At the time of the acquisition the Budd stock exchanged for Gindy was valued at approximately $24 million. Gindy has been operated as a Budd subsidiary since the acquisition.

V. Trade and Commerce

14. The relevant geographic market involved in this complaint is the United States as a whole. The relevant product markets are:

(a) Van trailers
(b) Containers and chassis.

The relevant product sub-markets are:

(a) Closed-top dry freight van trailers
(b) Open-top van trailers.

15. The manufacture of van trailers and containers and chassis is a significant industry in the United States. During 1968, the approximate total value of shipments in the relevant markets and submarkets by domestic producers was as follows:

(a) Van trailers, $381.7 million;
(b) Closed-top dry freight van trailers, $246.1 million;
(c) Open-top van trailers, $19.8 million; and
(d) Containers and chassis, $81.6 million.

During 1969, the approximate total value of shipments in the relevant markets and submarkets by domestic producers was as follows:

(a) Van trailers, $486.4 million;
(b) Closed-top dry freight van trailers, $312.3 million;
(c) Open-top van trailers, $16.3 million; and
(d) Containers and chassis, $91.6 million.

16. The van trailer manufacturing industry is marked by a high degree of concentration. In 1968, the four largest companies accounted for approximately 58.9 percent and the eight largest companies for approximately 81.1 percent of total industry sales. The closed-top dry freight van trailer market is even more highly concentrated with the

top four firms accounting for 65.9 percent of 1968 shipments and the top eight firms accounting for 84.8 percent. Concentration in the open-top van trailer market is also high, with the top four firms accounting for 56.9 percent of 1968 shipments and the top eight firms accounting for 72.1 percent. Concentration in the sale of containers and chassis is extremely high; in 1968 four firms accounted for 90.4 percent of shipments and the top eight for virtually all of the shipments in this market.

17. By 1969 concentration in the shipment of van trailers and closed-top dry freight van trailers had increased. In that year the top four firms accounted for 61.5 percent of van trailer shipments and the top eight firms for 81.7 percent. In 1969 the top four firms accounted for 72.0 percent of closed-top dry freight van trailer shipments and the top eight firms for 88.7 percent.

18. Of major importance to most purchasers of van trailers and containers and chassis, in many instances governing the purchaser's choice of supplier, are the terms relative to extent, duration, and rate of financing for proposed sales transactions. Access to significant financial resources which will permit a manufacturer to extend generous credit on easy repayment terms constitutes a decisive competitive advantage in the sale of van trailers and containers and chassis.

19. Entry into the manufacture and sale of van trailers and containers and chassis is difficult. A successful manufacturer and supplier of van trailers and containers and chassis must possess manufacturing and marketing knowledge of transportation equipment, must have ample financial resources, and must possess the ability to accept, service and dispose of substantial numbers of used trade-in van trailers.

VI. Effect of the Acquisition

20. The effects of the acquisition of Gindy by Budd may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of: (1) van trailers, (2) closed-top dry freight van trailers, (3) open-top van trailers, and (4) containers and chassis throughout the United States in violation of Section 7 of the Clayton Act, as amended, in the following ways among others:

(a) Substantial potential competition between Budd and Gindy in each such line of commerce has been eliminated.

(b) Potential competition in each such line of commerce has been substantially lessened.

(c) Other manufacturers in each such line of commerce may be led to agree to acquisition by financially strong companies for defensive or retaliatory reasons.

(d) Barriers to entry of new manufacturers into each such line of commerce have been raised significantly.

VII. The Violation Charged

21. The acquisition of Gindy by Budd constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18).

INITIAL DECISION BY RAYMOND J. LYNCH, ADMINISTRATIVE LAW JUDGE

MARCH 8, 1974

PRELIMINARY STATEMENT

The Federal Trade Commission, on June 18, 1971, issued its complaint in this proceeding alleging that The Budd Company, a corporation, hereinafter referred to as Budd, by its acquisition of the stock of the Gindy Manufacturing Corporation, hereinafter referred to as Gindy, violated Section 7 of the Clayton Act (15 U.S.C. §18).

For the purposes of the complaint, the Commission has chosen the following definitions:

(a) "Containers and chassis," as used here, refer to large, closed box-type structures which can be used for the intermodal transportation of goods, by rail, ship or motor carrier and chassis used to transport containers. The container is detachable from the chassis of a trailer or semi-trailer when so used. Sizes are now generally standardized to 8 feet wide, 8 feet high and either 20 feet or 40 feet long, although a few odd sizes are also made.

(b) "Van trailer," as used here, refers to a large box-type structure attached permanently to a chassis for use as a truck trailer or semi-trailer. Among the principal types are:

(1) Closed-top dry freight
(2) Open-top

In addition, the relevant product markets are:

(a) Van trailers
(b) Containers and chassis

The relevant product submarkets are:

(a) Closed-top dry freight van trailers
(b) Open-top van trailers

and the relevant geographic market involved in the complaint is the United States as a whole.

Further, Budd's acquisition of Gindy violated Section 7 of the Clayton Act.

Summary of Proceedings

On Oct. 22, 1968, Budd acquired all the then outstanding capital stock of Gindy Manufacturing Corporation, a Pennsylvania corporation with its principal office and place of business located in Downingtown, Pa.

Although an initial investigation was conducted by the Federal Trade Commission at the time of the acquisition, no action was taken at that time. Several years later, on June 18, 1971, the Federal Trade Commission issued a complaint charging that Budd's aforesaid acquisition of Gindy violated Section 7 of the Clayton Act. An answer and an amended answer were duly filed by the respondent, admitting in part and denying in part the various allegations of the complaint.

Prehearing conferences were held on several occasions between Dec. 15, 1971 and May 15, 1973. In addition, depositions of three foreign nationals were taken in England, France and Belgium during the month of April 1973. The course and conduct of the prehearing procedures were regulated by the administrative law judge through the issuance of a series of prehearing orders.

Presentation of the case-in-chief began in Wash., D.C., on July 30, 1973, hearings being held continuously through Aug. 16, 1973, on which date they were adjourned until Sept. 17, 1973, on which latter date, in that city, complaint counsel rested their case.

Respondent filed a motion to dismiss with a supporting memorandum of law. Complaint counsel filed a memorandum of law in opposition. The administrative law judge denied the motion on Sept. 17, 1973, to hear respondent's defense.

Respondent's defense was presented at hearings held in Washington, D.C., during the periods Sept. 17 through Oct. 3, 1973, Oct. 29, 1973 through Oct. 31, 1973, and on Nov. 15, 1973, on which latter date respondent rested its defense and complaint counsel presented rebuttal.

The record, which included a transcript of testimony of 2,273 pages, was closed on Nov. 26, 1973. Upon order of the administrative law judge, both counsel for the respondent and complaint counsel filed proposed findings of fact and conclusions of law on Dec. 26, 1973, and filed reply briefs on Jan. 11, 1974.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this initial decision, are hereby denied.

This proceeding is before the administrative law judge upon the complaint, answer and amended answer, testimony and other evidence, proposed findings of fact and conclusions of law filed by counsel supporting the complaint and by counsel for respondent. The proposed findings of fact, conclusions and arguments of the parties have been carefully considered, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial issues not necessary for this decision.

References to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX - Commission's Exhibits.
RX - Respondent's Exhibits.

The transcript of the testimony is referred to with either the last name of the witness and the page number or numbers upon which the testimony appears or with the abbreviation Tr. and the page.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings and conclusions submitted by the parties, the administrative law judge makes the following findings:

FINDINGS OF FACT

I. Identity and Business of Respondent and Acquired Company

A. *The Budd Company*

1. Respondent Budd is now, and was at the time of the acquisition, a Pennsylvania corporation with its principal office and place of business located at 2450 Hunting Park Ave., Philadelphia, Pa. (complaint and answer, par. 2).

2. Since the acquisition, the executive offices of Budd have been removed from the aforesaid principal office in Pennsylvania to 2155 W. Big Beaver Road, Troy, Mich. (admitted by respondent).

3. In 1967, Budd had sales of $330.9 million, and assets of $264.5 million. In that year, it was the 250th largest industrial corporation in the nation in total sales. In 1968, its sales increased to $469.5 million and assets increased to $346.7 million making it the nation's 209th largest industrial corporation in total sales. By 1969, Budd had annual sales of $561.7 million and assets of $402 million, and in terms of sales had progressed to rank 191st among the nation's largest industrial corporations (complaint and answer, par. 3).

4. Budd is one of the largest independent automotive suppliers in the nation and the largest independent supplier of body components to the automotive industry. Budd manufactures automotive bodies, wheels, rims, hubs, drums, brakes and other automotive products. It also produces jigs, dies and fixtures used in the manufacture of automotive bodies and components, railroad cars, metal stampings and

industrial plastic products. Approximately 85 percent of its sales are in the automotive field (complaint and answer, par. 4).

5. Prior to its acquisition of Gindy Manufacturing Corporation, Budd surveyed the transportation equipment field, including manufacturers of van trailers and containers and chassis, with a view to acquisition of such companies. As a major manufacturer of metal stampings and parts such as wheels, rims, hubs, and drums, Budd made many of the parts used in the manufacture of van trailers and container chassis. Furthermore, Budd has designed and produced components used in the manufacture of stainless steel dry freight van trailers and aluminum containers (complaint and answer, par. 5).

6. At all times relevant herein, Budd sold and shipped its products throughout the United States and was, and is now, engaged in commerce as "commerce" is defined in the Clayton Act (complaint and answer, par. 7).

B. *Gindy Manufacturing Corporation*

7. Prior to its acquisition by Budd on Oct. 22, 1968, Gindy was a Pennsylvania corporation with its principal office and place of business located in Downingtown, Pa. (complaint and answer, par. 8).

8. Gindy was engaged principally in the manufacture, sale and distribution of van trailers and containers and chassis. Its manufacturing and assembly facilities were located in Eagle, Lebanon and Honey Brook, Pa.; Pennsauken, N.J.; Collinsville, Va.; and St. Louis, Mo. (complaint and answer, par. 9).

9. For the fiscal year ending May 31, 1968, Gindy's sales were approximately $32.2 million, and its assets amounted to approximately $44 million (complaint and answer, par. 10).

10. In calendar year 1968, Gindy was a substantial manufacturer and seller of van trailers and containers and chassis. With sales of $32.2 million, it ranked fourth in the country in the sale of van trailers; with sales of $26.7 million, it ranked fourth in the country in the sale of closed-top dry freight van trailers; with sales of $3.1 million, second in the sale of open-top van trailers; and, with sales of $3.1 million, sixth in the sale of containers and chassis. In that year, Gindy accounted for 8.4 percent of van trailer shipments, 10.8 percent of closed-top dry freight van trailer shipments, 15.9 percent of open-top van trailer shipments, and 3.8 percent of container and chassis shipments. In calendar year 1969, Gindy's shipments of van trailers increased to $42.6 million, and its market share increased to 8.8 percent. In that same year, its shipments of closed-top dry freight van trailers increased to $40.3 million, making Gindy the third largest supplier with 12.9 percent of shipments. A significant increase in Gindy's position in the shipment of containers and chassis also occurred in 1969; its value of shipments

increased to $9.0 million, making it the third largest supplier with 9.9 percent of that market (complaint and answer, par. 11).

11. At all times relevant herein, Gindy sold and shipped its products throughout the United States and engaged in commerce, as "commerce" is defined in the Clayton Act (complaint and answer, par. 12).

II. The Acquisition

12. On or about Oct. 22, 1968, Budd acquired all of the then issued and outstanding capital stock of Gindy, aggregating 62,730 shares, for approximately 900,000 shares of Budd common stock. At the time of the acquisition, the Budd stock exchanged for Gindy was valued at approximately $29.7 million. Gindy has been operated as a Budd subsidiary since the acquisition (complaint and answer, par. 13; admission 19, 1/15/73).

III. Trade and Commerce

13. The relevant geographic market involved in this complaint is the United States as a whole. The relevant product markets are:

(a) Van trailers;
(b) containers and chassis.

The relevant product submarkets are:

(a) Closed-top dry freight van trailers;
(b) open-top van trailers (complaint and answer, par. 14).

14. The manufacture of van trailers and containers and chassis is a significant industry in the United States. During 1968, the approximate total value of shipments in the relevant markets and submarkets by domestic producers was as follows:

(a) Van trailers, $381.7 million;
(b) closed-top dry freight van trailers, $246.1 million;
(c) open-top van trailers, $19.8 million; and
(d) containers and chassis, $81.6 million (counsel supporting the complaint's confidential proposed finding 57).

During 1969, the approximate total value of shipments in the relevant markets and submarkets by domestic producers was as follows:

(a) Van trailers, $486.3 million;
(b) closed-top dry freight van trailers, $312.3 million;
(c) open-top van trailers, $16.3 million; and
(d) containers and chassis, $91.6 million (counsel supporting the complaint's confidential proposed finding 59).

15. The van trailer manufacturing industry is marked by a high

degree of concentration. In 1968, the four largest companies accounted for approximately 59.0 percent and the eight largest companies for approximately 80.7 percent of total industry sales. The closed-top dry freight van trailer market is even more highly concentrated, with the top four firms accounting for 65.9 percent of 1968 shipments and the top eight firms accounting for 84.9 percent. Concentration in the open-top van trailer market is also high, with the top four firms accounting for 57.2 percent of 1968 shipments and the top eight firms accounting for 72.1 percent. Concentration in the sale of containers and chassis is extremely high; in 1968, four firms accounted for 89.9 percent of shipments and the top eight for virtually all of the shipments in this market (counsel supporting the complaint's confidential proposed finding 57).

16. By 1969, concentration in the shipment of van trailers and closed-top dry freight van trailers had increased. In that year, the top four firms accounted for 61.6 percent of van trailer shipments and the top eight firms for 80.8 percent. In 1969, the top four firms accounted for 72.2 percent of closed-top dry freight van trailer shipments and the top eight firms for 87.9 percent (counsel supporting the complaint's confidential proposed finding 59).

17. Of major importance to most purchasers of van trailers and containers and chassis, in many instances governing the purchaser's choice of supplier, are the terms relative to extent, duration, and rate of financing for proposed sales transactions. Access to significant financial resources which will permit a manufacturer to extend generous credit on easy repayment terms constitutes a decisive competitive advantage in the sale of van trailers and containers and chassis (complaint and answer, par. 18).

18. Entry into the manufacture and sale of van trailers and containers and chassis on a large scale is difficult. A successful manufacturer and supplier of van trailers and containers and chassis must possess manufacturing and marketing knowledge of transportation equipment, must have ample financial resources, and must possess the ability to accept, service and dispose of substantial numbers of used trade-in van trailers (complaint and answer, par. 19).

19. By 1972, Gindy's total sales of van trailers, containers and chassis had increased to $62 million (Hindin 1314).

20. Gindy enjoyed a good reputation, both among its competitors and its customers (CX 10; CX 11B, D; CX 63; CX 68B; CX 73A; CX 82; Ginsberg 260; Miller 376-77; Hammond 666).

21. Prior to its acquisition, Gindy was a very profitable company and never lost money in any single year (CX 42; CX 45; Ginsberg 274; Scott 1035, 1048-49, 1106). Indeed, Budd was interested in acquiring

Gindy because of the latter's profitability (Scott 1035, 1048-49, 1059). Gindy's average rate of return on sales before taxes in the five years preceding its acquisition was over 10 percent (CX 45F; Scott 1106). In the year preceding its acquisition, Gindy's average rate of return on stockholders' equity, before taxes, was 27.1 percent (RX 395, *in camera*).

22. Prior to Oct. 22, 1968, Gindy had credit arrangements with several banks and an insurance company (Ginsberg 275; Morris 1227; Todd 1540-41). In 1968, these creditors indicated that Gindy's borrowing power would be continued at a level which would have enabled Gindy to maintain its then present market share in its various product markets (Todd 1547). However, because of the tight money situation then extent for all van trailer manufacturers, Gindy could not secure the financing to expand its position in its various markets as rapidly as it had been expanding (Ginsberg 274-76; Morris 1228-29, 1239-40; Todd 1543, 1547). At the time of the acquisition, Gindy had a four- to five-month backlog of orders (CX 46).

23. At all times relevant herein, Gindy sold and shipped some of its products throughout the United States and engaged in commerce, as "commerce" is defined in the Clayton Act (complaint and answer, par. 12; Ginsberg 317, 346; Heinmiller 691).

IV. The Transaction

24. On Oct. 22, 1968, Budd acquired all of the then issued and outstanding capital stock of Gindy, aggregating 62,730 shares, in exchange for approximately 900,000 shares of Budd common stock and a contingent right to about 300,000 additional shares of common stock two years after said date (complaint and answer, par. 13). The Budd stock exchanged for the capital stock of Gindy on that date had a value of approximately $29.7 million (admission 19, 1/15/73). Gindy has been operated as a Budd subsidiary since the acquisition (complaint and answer, par. 13).

V. The Geographic Market

25. The relevant geographic market is the United States as a whole for van trailers, closed-top dry freight van trailers and open-top van trailers (complaint and answer, par. 14).

26. The leading van trailer manufacturers sold throughout the United States (CX 68C; Bernstein 1426-27; Crumrine 1725; Linnen 1767; Bachman 1912).

27. The relevant geographic market is the United States as a whole for containers and chassis (findings 28-32).

28. Current federal regulations prohibit subsidized American shipping line operators from purchasing cargo containers of foreign manufacture with capital reserve funds or with general funds if reimbursement to the general fund for such purposes will be sought from the capital reserve fund.[1]

29. The governments of Western Europe prohibit the use of American manufactured containers in point-to-point commerce within each country unless a duty has been paid (CX 149Z-41; CX 150Z-41). In fact, American manufactured containers do not meet the standards required by France (CX 149Z-12). The use within the United States of foreign built containers for which no duty has been paid is also severely restricted.[2]

30. When containers were first introduced, the United States was about the only place where they were available (Hindin 1336). Later, the foreign steamship lines bought them from manufacturers in their own countries (Hindin 1335-36).

31. Containers produced in the United States are delivered domestically, whereas containers produced outside the United States are delivered abroad (Heinmiller 720). American container producers manufacture and sell aluminum containers primarily (CX 150Z-14). European manufacturers of containers produce and sell steel containers primarily (Hindin 1335). This reflects the fact that shipping lines in the United States prefer and buy aluminum containers, while European shipping lines prefer and buy steel containers (CX 150Z-13; Hindin 1335).

32. Since the devaluation of the United States dollar, foreign container manufacturers have found it difficult to sell containers to domestic companies (Ginsberg 313).

VI. Lines of Commerce

A. *Van Trailers*

33. Van trailers are recognized as constituting a separate product market. The Bureau of the Census reports van trailer shipments separately (CX 39; CX 40; RX 48-50). The Truck Trailer Manufacturers Association (hereinafter "TTMA") assisted in establishing the classifications reported on by the Bureau of the Census (Calvin 914; Berard 1461, 1477). TTMA, manufacturers of trailers and the Bureau of the Census accept these categories, including van trailers, as appropriate categories (Calvin 915-16; Berard 1463).

34. There is a special section of TTMA to which manufacturers of

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[1] 30 F.R. 12036 (Sept. 21, 1965).

[2] 19 CFR §10.41 a(f) (Jan. 1, 1972).

van trailers belong and a different section to which manufacturers of tank trailers belong (Calvin 914-15).

35. Van trailers have distinct physical characteristics which determine their end use. A van trailer is enclosed on at least five sides and is permanently attached to wheel assemblies. As a result of its construction, a van trailer is utilized in hauling a wide variety of commodities over the road (finding 36).

36. Van trailers have uses distinct from other types of trailers (Bernstein 1453). Van trailers are utilized to carry a wide variety of cargo, whereas other types of trailers are utilized to carry specific types of cargo (Ginsberg 235-37). Platform trailers are used to transport certain types of commodities, including steel girders and heavy equipment, which are bulky and not affected by weather conditions (Ginsberg 239; Miller 359; Walters 483; Weaver 904; Persinger 938). Low bed heavy haulers are used to haul anything extremely heavy, primarily construction equipment (Ginsberg 239-40; Walters 484-85; Heinmiller 690; Bernstein 1454). Pole and logging trailers are used to carry logs, poles, and long steel bars (Ginsberg 239; Walters 484; Bernstein 1454-55). Tank and bulk commodity trailers are used to transport liquids, chemicals or gaseous commodities (CX 143; CX 144; Ginsberg 238; Walters 483; Hammond 658). Dump trailers are used to transport bulk items such as dirt or coal (Ginsberg 240; Walters 485).

37. Van trailers are produced on unique production lines which cannot be economically utilized to produce other types of trailers (Miller 367-68, 386-87; Bachman 572; Bertsch 640; Hammond 661; Heinmiller 696-97; Brown 885; Persinger 940-41; Crumrine 1719-21, 1723; Linnen 1791). All types of van trailers can be produced on the same assembly line (Miller 386-87; Hegner 468; Bertsch 640; Heinmiller 703; Tway 877; Hindin 1341-43; Linnen 1791; Bertolini 1833-34). Tank trailers or bulk commodity trailers cannot be built on the same assembly lines used to produce van trailers (Ginsberg 249-51; Miller 367, 388; Bertsch 643-45; Hammond 659, 661, 679; Bernstein 1447-50; Crumrine 1719-21, 1723). A major revamping of Gindy's plants would have been necessary before it could have produced tank trailers (Ginsberg 252; Walters 495). It is not practical or economical to manufacture flat beds, low beds or dump trailers on the same assembly lines used to produce van trailers (Ginsberg 252; Miller 367-68; Walters 496; Bertsch 643-45; Hammond 679; Heinmiller 697; Brown 885; Hindin 1341-43; Crumrine 1750-51).

38. Van trailers, in general, are sold to different customers than those who purchase other types of truck trailers (Hammond 658; Weaver 904; Paterson 1631). Common carriers are generally restricted

by their Interstate Commerce Commission license to hauling general commodities; therefore, such carriers do not have specialized truck trailers such as tank trailers and low bed heavy haulers (Gross 1570; Burten 1577). Fruehauf's van trailer customers generally do not purchase tank trailers (Weaver 904). Strick's customers use only van trailers (Bachman 458-49, 574).

39. Some leasing companies purchase only van trailers while others purchase different types of truck trailers (Hindin 1381-82; Bernstein 1450-51; Paterson 1631). Such purchases are made after they have business from a customer (Weaver 904; Hindin 1382; Paterson 1631). Rental companies do not stock tank trailers (Weaver 909).

40. There are unique producers of van trailers (Ginsberg 231; Miller 356; Bachman 546). Few van trailer producers make tank trailers or low bed heavy haulers (Miller 356; Bachman 546; Hindin 1311-12, 1318). Conversely, Butler and Heil, leading producers of tank trailers, do not make van trailers (Paterson 1631-32).

41. Because of the uses for which they are intended, there is no substitution of van trailers for other types of trailers or containers, or vice versa, due to price changes of either (findings 36, 42; Bernstein 1453). Van trailers do not compete with tank trailers, dump trailers or platform trailers (Hammond 672; Hindin 1312; Bernstein 1453).

42. Van trailers are priced without regard for the pricing of other types of truck trailers (Bachman 552; Hammond 659; Brown 885; Bernstein 1455-56).

43. The van trailer market consists of several distinct submarkets, including closed-top dry freight van trailers and open-top van trailers (findings 44-52).

44. Each of these submarkets is recognized as being a distinct market by the industry. The industry trade association, TTMA, in cooperation with the Department of Commerce, established separate census reporting categories for closed-top dry freight van trailers and open-top van trailers (CX 39; CX 40; RX 48-51; Calvin 914; Berard 1461, 1477).

45. Each type of van trailer is designed to haul a specific type of cargo. Closed-top dry freight van trailers are designed to haul general, nonbulk commodities that do not require refrigeration or special loading (Ginsberg 232; Miller 358; Walters 481; Bachman 547; Hammond 658; Heinmiller 690; Burten 1595). Refrigerated or insulated van trailers are designed to haul commodities requiring constant or cool temperatures, although they may occasionally be used to haul general dry freight commodities on a backhaul basis when no freight requiring refrigeration or constant temperature is available (Ginsberg 233; Miller 358-59; Bachman 547; Hammond 658; Bernstein 1455; Gross 1566, 1568,

1573; Burten 1595). Drop frame van trailers are designed to haul furniture or high bulk, lightweight cargo (Ginsberg 236; Miller 359; Walters 482; Hammond 658; Heinmiller 690). Livestock van trailers are designed and used to haul livestock (Walters 483; Persinger 938). Open-top van trailers are designed to haul cargo that must be top loaded (Walters 481-82; Bachman 548; Hammond 658; Weaver 903; Gross 1567; Burten 1595). Open-top van trailers occasionally may be used on a backhaul basis to haul general freight if a canvas top is added; such use occurs when no top loaded freight is available (Weaver 903; Gross 1566-67). Open-top van trailers used with a canvas top experience some leakage problems that makes them inferior to a regular closed-top dry freight van trailer (Walters 481-82).

46. Only closed-top dry freight van trailers and refrigerated or insulated van trailers are designed for dock level loading by means of fork lift trucks (Miller 358-59; Hammond 665). Open-top van trailers generally are top loaded while drop frame van trailers are difficult to load from most docks and can, at most, be only partially loaded by means of a fork lift truck (Ginsberg 236-37; Miller 358-60; Hammond 665-66).

47. There are specialized customers for certain types of van trailers. Drop frame van trailers are commonly sold to different customers than those who purchase closed-top dry freight van trailers (Walters 380-81; Hammond 657; Weaver 902-03). Refrigerated van trailers are generally sold to different customers than those who purchase closed-top dry freight van trailers (Walters 534; Weaver 903). Livestock and grain trailers are sold to individuals, whereas other van trailers are sold to common carriers (Ginsberg 231-33; Persinger 938).

48. There are differences in the construction between closed-top dry freight van trailers and open-top van trailers (Brown 887). The top rail on the latter is much heavier than on the former (Hammond 665; Brown 895). Likewise, there are differences in the construction between closed-top dry freight van trailers and refrigerated van trailers. The body on the latter is sealed tighter than on the former and the latter has ventilators and insulation, whereas the former does not (Hammond 665).

49. Each type of van trailer is priced individually without regard to the prices for other types of van trailers (Ginsberg 244-46; Miller 361-62; Walters 487-88; Bachman 551-52; Brown 885; Bernstein 1455). Prices for other types of van trailers sold by competitors are not considered in submitting bids for closed-top dry freight van trailers (Walters 489; Hammond 659; Brown 885; Bernstein 1456).

50. Each type of van trailer has a distinct price (Ginsberg 240-42; Bachman 551; Hammond 659-60; Persinger 939; Gross 1569).

51. There are many producers of van trailers who specialize in a particular type of van trailer (Bachman 571; Persinger 937; Hindin 1318).

52. Budd recognized that closed-top dry freight van trailers constitute a separate product market, characterizing them as a "product line" in reports to its shareholders and listing their sales separately (CX 94K).

B. *Containers and Chassis*

53. Containers and chassis are reported to the Bureau of the Census under SIC 37150 53 "Detachable Trailer Bodies, Sold Separately" and SIC 37150 54 "Detachable Trailer Chassis, Sold Separately" (CX 39; CX 40; Berard 1461; Collier 1641, 1658). TTMA assisted in establishing these Census categories (Calvin 916-17; Berard 1461, 1477).

54. Containers have a use distinct from closed-top dry freight van trailers. As a result of their detachable characteristics, containers are most frequently used to transport commodities to and from seaports and over bodies of water (Ginsberg 234, 238; Brown 886) in contrast to closed-top dry freight van trailers, which are utilized almost exclusively for overland transportation (Brown 886).

55. Containers are constructed in a manner different from that utilized in van trailer production. Because containers are stacked on shipboard, the compressive loads required in the construction of shipping containers are completely different from those required in a van trailer (Brown 886-87; Bertolini 1832-33).

56. In contrast to van trailers, containers have to be tested with regard to their ability to sustain loads (Bertolini 1833). Such tests are performed by lifting the container from the four corners (Bertolini 1833). These tests must be certified by an independent agency whom the customer specifies (Bertolini 1833).

57. Containers are often constructed on different assembly lines than those used to build van trailers (Hindin 1318; Crumrine 1750-51; Bertolini 1833-34). It is difficult to construct a container on a van trailer assembly line, as additional fixtures are required (Hindin 1343-44).

58. Most containers and chassis are sold to different customers than purchase van trailers. The vast majority of containers and chassis are sold to ship lines (Ginsberg 234; Miller 357-58; Walters 481; Bachman 546-47; Brown 886). Van trailers generally are sold to common carriers or private truckers (Ginsberg 231-34; Miller 357; Walters 479-81; Bachman 546).

59. Containers are priced without regard to the price of van trailers (Walters 488; Bachman 550).

60. The average price of a container or a chassis is far lower than the average price of a van trailer. In 1968, the average price of a

container was $2,500 and a chassis was about $2,200 (CX 39A-H; Ginsberg 242, container $2,500 to $2,800, chassis $2,500; Miller 360, container $2,850, chassis $2,700 to $2,800; Walters 487, container $3,200 to $3,400, chassis $1,400; Bachman 551, container $2,750, chassis $2,400 to $2,600).

VII. The Market

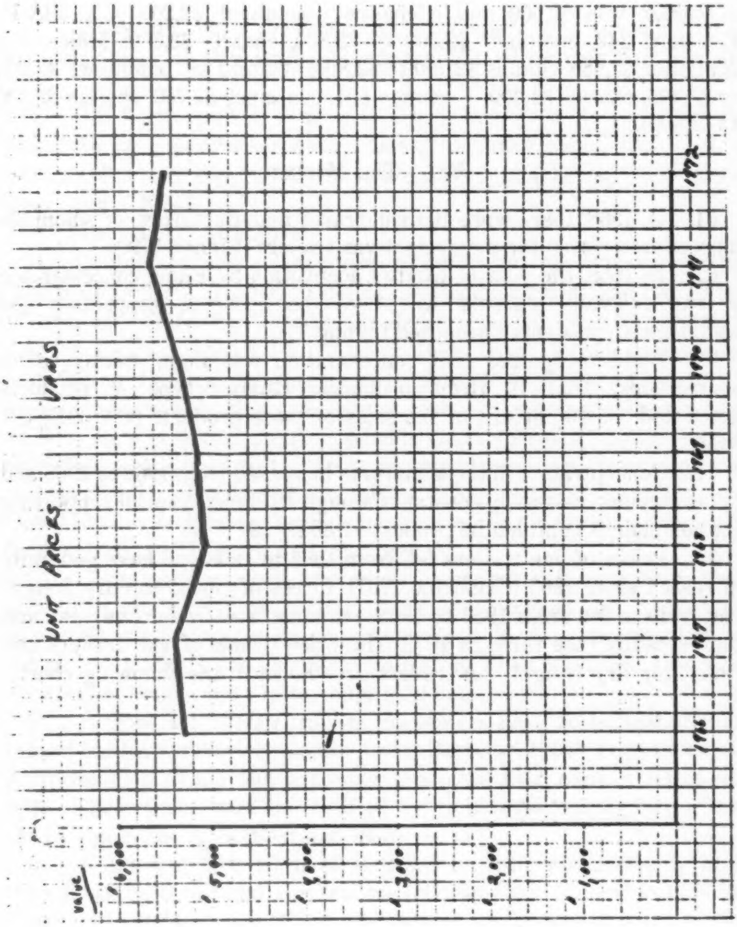
61. In 1968, there were 100 van trailer manufacturers, of whom 35-40 produced closed-top dry freight van trailers (Linnen 1799).

62. In 1968, the year of Gindy's acquisition by Budd, concentration in the relevant markets was high (see counsel supporting the complaint's confidential proposed finding 57).

63. Budd recognized that concentration was high, stating to its shareholders that 10 firms producing Gindy's type of products accounted for 90 percent of the sales of these products (CX 69E; CX 94M).

64. Concentration in these markets increased from 1968 to 1969 and then remained relatively constant through 1972 (see counsel supporting the complaint's confidential proposed finding 59).

65. Prices of van trailers fell from 1966 to 1968 and have generally increased since 1969 (Crumrine 1737). Prices of closed-top dry freight van trailers fell from 1966 to 1968, remained steady for one year and then steadily rose through 1972. The price trends of van trailers and closed-top dry freight van trailers are shown in the following charts:


UNIT PRICES VANS
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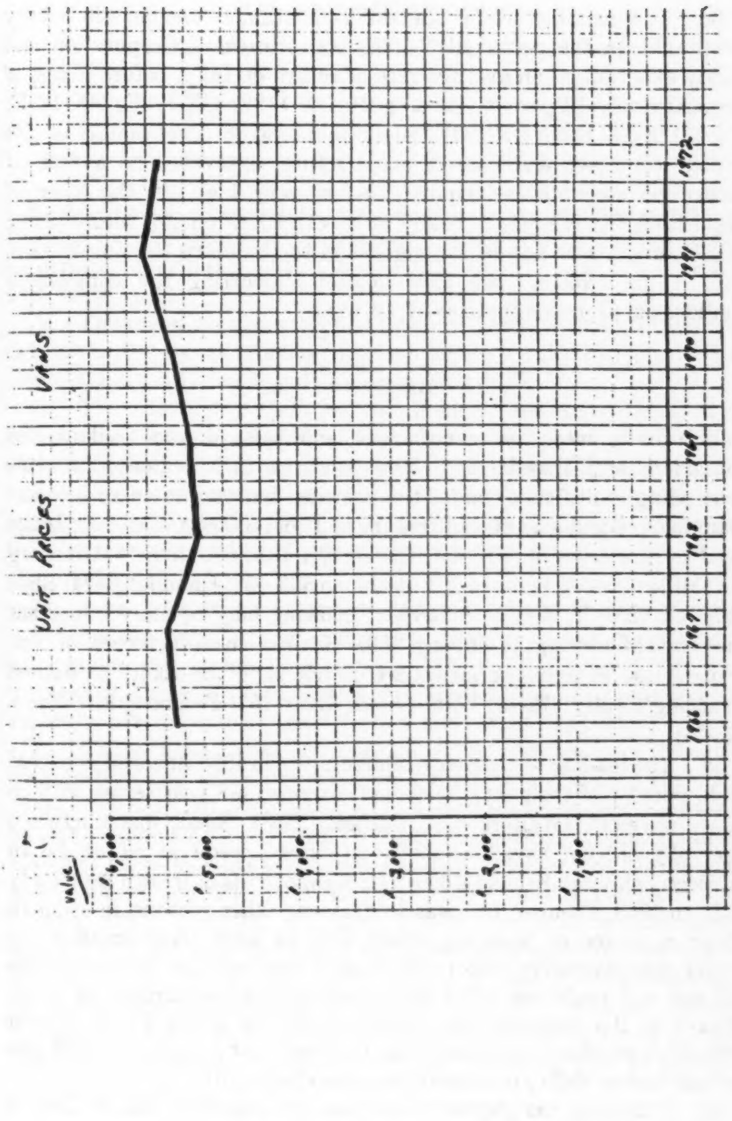
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66. The manufacture of van trailers, containers and chassis is very profitable. In the period 1962-1967, both Fruehauf Corporation and Gindy experienced an average rate of return on sales, before taxes, of approximately 10 percent (finding 21; CX 118E; CX 119E; CX 120E; CX 121E; CX 122E; CX 123E; Silverstein 1886-88). Profitability of van trailer, container and chassis manufacture, expressed as a rate of return on stockholders' equity, also is very high. In the year of acquisition, Gindy's rate of return on stockholders' equity, before taxes, of 27 percent was one of the highest in the industry (finding 21; RX 38F, Y, *in camera*; see also counsel supporting the complaint's confidential proposed findings 57, 59, 61).

VIII. Barriers to Entry

67. Entry into the manufacture and sale of van trailers and containers and chassis on a level such as that evidenced in this proceeding is difficult. One of the principal barriers to entry into the manufacture and sale of van trailers and containers and chassis is the need to finance sales (CX 10F; CX 46; CX 73B; CX 150Z-19; Ginsberg 257; Miller 371-73; Walters 502; Bachman 555, 558; Hammond 674; Blatt 757; RX 429J, T, Z-4, *in camera*). Financing may be more important than manufacturing (Feinberg 829). Smaller manufacturers of van trailers lose business because they do not have the ability to extend financing (Miller 372-73; Walters 502; Blatt 757; Feinberg 840; Tway 873-74).

68. The leading van trailer manufacturers in 1968 financed in excess of 40 percent of their total sales and extended 6-8 year terms with no down payment (Walters 502; Bachman 558). Small manufacturers generally did not have the ability to extend credit at all, or did so indirectly through banks (Miller 371; Hammond 662; Brown 886; Tway 873). In 1969, Theurer, Inc. was sold, among other reasons, in order to obtain a source of financing (Blatt 757). In 1968, those smaller van trailer manufacturers who could finance internally or through banks did not and could not offer credit terms as advantageous as those offered by the dominant firms (Ginsberg 257-58; Miller 371-73; Brown 886). Such smaller van trailer manufacturers lost business in 1968 due to their lack of ability to extend financing (finding 67).

69. Financing has played an increasingly important role in Gindy's sale of van trailers (Morris 1227). From 1965 through 1969, the number of van trailers Gindy sold with virtually no downpayment increased steadily from 46 percent to 64 percent, a fact which is dramatically reflected in the following table (CX 48B; CX 53B; Ward 1149):

GINDY MANUFACTURING COMPANY

Percentage of trailers sold with less than 10 percent down

1965	45.7%
1966	56.9%
1967	60.3%
1968	61.6%
1969	64.1%

Gindy also has extended its terms so that the percentage of trailers financed over 60 months has increased from 9 percent in 1965 to almost 44 percent in 1969 (CX 48B; CX 49B; CX 50B; CX 51B; CX 52B; CX 53B; Ward 1149).

70. The trend toward extended payment terms existed throughout the van trailer manufacturing industry during the period from 1965 to 1969 (Walters 501; Hammond 663; Todd 1543, 1548).

71. The substantial facilities and financial resources required to accept trade-ins and dispose of them is another principal barrier to entry into the manufacture and sale of van trailers (CX 11C). A small van trailer manufacturer does not have the funds or the outlets to accept used trailers (Tway 873). Unless the van trailer purchaser can turn in his used trailer, he does not purchase the new van trailer (Heinmiller 699-700).

72. It is difficult to enter into the sale of van trailers to large customers (answer, Par. 19). Since 1967, the size of customers buying van trailers has increased (Crumrine 1733, 1735; Linnen 1782). This increase in the size of customers for van trailers has increased the difficulty of entry into the manufacture and sale of van trailers.

73. There have been no entrants of any significance into the manufacture and sale of van trailers, containers and chassis for many years (Ginsberg 261, 334; Miller 377-78, 400; Bachman 563; Hammond 666-67; Heinmiller 700, 711-12). To the contrary, several manufacturers have left these markets (admission 24, 1/15/73; Miller 370, 378; Hegner 464; Walters 505; Bachman 563; Heinmiller 700-01; Paterson 1632; Linnen 1797; Bertolini 1828-29, 1855-56). Several manufacturers entered into the manufacture of containers or chassis in recent years and then have left within a short period of time. Several such new entrants went broke (Bertolini 1849-50, 1858-59). Grumman Aircraft entered into the manufacture of specialized van trailers, made no more than 200 and quit (CX 186; CX 187A-C; Ginsberg 323-24; Bertolini 1828-29, 1855-56).

IX. Budd Was The Most Likely Entrant

A. *Budd's Desire to Enter*

74. From 1934 to 1968, Budd was at the edge of the van trailer,

container and chassis market (CX 73A). During the period 1934 to 1956, Budd manufactured the primary portion of a van trailer, stainless steel shells (Bachman 552; Brown 887-88; Necker 1415; Bernstein 1435). These shells were sold to Fruehauf who incorporated them in complete van trailers (Bachman 552; Brown 888; Scott 1028; Bernstein 1438). Budd's role as a supplier of this component was widely known among van trailer manufacturers (Ginsberg 271; Miller 382; Walters 505-06; Bachman 552-53; Hammond 662-63; Heinmiller 699; Brown 888; Hammond 1306; Bernstein 1438).

75. As early as 1956 or 1957, Budd desired to enter the van trailer market. When Budd's relationship with Fruehauf concerning the stainless steel trailer shells was about to be terminated, Budd approached Brown Trailer Company, a manufacturer of van trailers, with a view to acquiring it or selling stainless steel trailers to or through Brown Trailer Company (Brown 887-88, 1532-36).

76. Between September 1960 and September 1961, Budd built aluminum containers for sale to Union Carbide at its Red Lion plant (complaint and answer, par. 5; Scott 1083).

77. In the early 1960's, Budd built a prototype sky-lounge, made primarily of aluminum, at its Red Lion plant (CX 19; CX 20).

78. In late 1961, Mr. Scott, then executive vice president of Budd, presented a white paper to Budd's top management (Scott 1017). This paper recommended closing down Budd's Railway Division as it was a losing operation and broadening the base of the company to make it less vulnerable to the whims of Budd's principal customers, the Big Three auto makers, and especially Ford (CX 69B; Scott 1017-18). For example, in 1966, 70 percent of Budd's sales were to the four domestic automobile manufacturers, including 35 percent of sales to Ford Motor Company (CX 94J). Budd felt that it had become "semicaptive" to the Big Three auto makers and desired to extricate itself from this "very dangerous situation" (CX 69B; CX 94J; Scott 1018-19; Ward 1116-17).

79. At that time, Budd decided to broaden its base by going into a proprietary, industrial type product which it would manufacture (Scott 1019). Budd considered van trailers to be a proprietary product (Scott 1093).

80. By 1965, Budd had decided to continue in the railway car business despite the fact that its "passenger rail business was getting into some difficulty" (CX 94H-J; Scott 1021-22). Therefore, it decided to attempt to add some products that had some relationship to this business (CX 2B; Scott 1021-22).

81. During the period from 1963 to 1968, Budd contacted Utility Trailer Manufacturing Company (hereinafter "Utility") at least twice concerning the possibility of acquiring Utility (Heinmiller 694-95; Ward

1133). During this period of time, Utility was a small manufacturer of van trailers, containers and chassis (RX 412A-B, *in camera*; finding 62; Scott 1090).

82. In the spring of 1967, Mr. Dudley Ward, a vice president of Budd and its chief financial officer, demonstrated Budd's intent to enter the van trailer market by interviewing an owner of a trucking company (the primary customers of van trailer manufacturers) (CX 73A-B; Ward 1135). This owner was told of Budd's prior involvement in highway trailers and its interest in getting into van trailer manufacturing (Ward 1136-37). Mr. Ward then asked for "an appraisal of the manufacturers of trailers, their products and how they compare—from the point of view of the trucker * * *." (CX 73A-B; Ward 1136). The memorandum of this interview was given to Mr. Scott, then president of Budd (Ward 1135).

83. On May 6, 1967, a Budd official submitted to Budd's management a report on the competitive conditions and future growth prospects in truck trailer sales (CX 24).

84. On Aug. 9, 1967, the president of Budd, Mr. Scott, wrote his recommendations concerning the future expansion plans of Budd (CX 14; Scott 1037, 1043). The ideas contained in this memo reflected a plan that "had been evolving and had been the subject of discussion by Mr. Scott and myself [Ward] almost from the day I joined the Budd Company in 1964." (CX 69B; Ward 1160). These views were communicated both to the Budd management and to its board of directors (Scott 1037, 1043; Ward 1161-62). The purpose of these recommendations was to focus the attention of Budd's staff on plans to enter areas which were related to Budd's current activities and which Budd could understand and have the ability to manage (CX 2B; Scott 1038). The list was titled "The Transportation Equipment Concept" and referred solely to various items used to transport goods or people (CX 9B; CX 14A-B; CX 67; CX 69B; Scott 1043, 1074-75). "In the list I [Scott] listed highway trailers as one possibility." (CX 14A-B; Scott 1038, 1042-43; Cf. Ward 1160-61). Another item included on the list was containers (CX 14A-B; Scott 1044-45; Ward 1160-61).

85. In 1967, Budd believed it possessed a managerial staff attuned to manufacture trailers:

> JUDGE LYNCH: Was it your view that The Budd Company's managerial staff was attuned to manufacture trailers?
>
> THE WITNESS: I think in terms of being able to learn and understand the trailer business, yes. This is something they could have some understanding about. That does not mean you can go out and run a plant immediately and make trailers as such. But if it involved the formation and welding of metal, this is something that Budd Company management and talents knew something about and could learn more about if they had to. (Scott 1039).

86. Budd had no interest in entering any area outside of hard goods manufacturing because it didn't believe its management understood these other areas (Scott 1038-39). It believed that van trailers had "a definite and planned 'fit' into the Budd picture." (CX 99C; CX 101C). Indeed, Budd's interests with regard to possible areas of expansion lay entirely within transportation equipment, exclusive of power equipment (locomotives or trucks), ships, aircraft and aircraft parts (CX 9B; CX 12, CX 13A; CX 14A-B; CX 67; CX 99A-B; CX 100B; CX 101B-D; Scott 1074-80).

87. Budd's interest in acquiring firms in the transportation equipment field and specifically van trailer manufacturers, was conveyed to several merger brokers utilized by Budd and to Budd's investment bankers (Blatt 749; Scott 1089; Ward 1162-63; Githens 1243, 1246, 1255).

88. The intentions of Mr. Scott regarding Budd's expansion plans as expressed in CX 14 became public knowledge as they were featured in an article appearing in the *New York Times* and in a President's Report to Shareholders sent to Budd's stockholders (CX 9B; CX 22).

89. Budd's intent to enter the van trailer business was clear in 1967-1968. Budd's president indicated, during Budd's acquisition negotiations with Gindy, that Budd would enter the van trailer manufacturing business whether Budd acquired Gindy or not (Ginsberg 267, 272-73; Scott 1057-58). "He [Scott] said he was going to go into the business regardless of whether I sold to him or not." (Ginsberg 267).

90. The acquisition of a trailer manufacturer made an "extremely attractive fit" for Budd (CX 99C; CX 101C; Ward 1121). Budd's chief financial officer described the nature of this fit as follows:

> * * * One of the things that was different about Gindy, which appealed to me, was the fact it was not subject to the same automotive styling cycle that we had been confronted with before and yet the business of manufacturing and marketing of trailers did not seem to me to be so vastly different from the business that we were currently engaged in as to present a serious management problem. (Ward 1121.)

91. Budd considered a profit rate of the level experienced by Gindy to be "interesting" (Scott 1035). Gindy's profit level, expressed as a return on the sales dollar, was "a great deal better than Budd's was." (CX 45F; Scott 1082.)

92. Budd's intention of entering the van trailer market even without the acquisition of Gindy is made clear by its actions in early 1968, during a recess in the Gindy acquisition negotiations. At that time, Budd contacted several smaller van trailer manufacturers regarding their possible acquisition by Budd (CX 23; Ginsberg 272; Miller 379; Scott 1052; Ward 1128, 1130). In April 1968, Budd contacted The Dorsey Corporation concerning the possibility of acquiring one of its divisions, Dorsey Trailers, a manufacturer of van trailers (CX 147A-

B; Scott 1052-53, 1090-91; Ward 1133; Collier 1662). Late in 1967 or early in 1968, a third-party consultant, acting on behalf of Budd, contacted Theurer, Incorporated (hereinafter "Theurer"), a small manufacturer of van trailers, containers and chassis, concerning the possibility of Budd's acquiring Theurer (admission 15, 1/15/73; Blatt 748-49; Scott 1087). The president of Budd and its chief financial officer discussed the possibility of acquiring Miller Trailers, Inc. (hereinafter "Miller"), a manufacturer of van trailers, with the president of Miller in the spring of 1968 (Miller 379-80; Scott 1052; Ward 1130). A consultant working for Budd, discussed acquiring Great Dane Trailers, Inc. (hereinafter "Great Dane"), a manufacturer of van trailers (Scott 1087, 1091). During 1968 or 1969, Budd again contacted Utility regarding the possible acquisition of that company (Heinmiller 696).

93. In 1967-1968, Budd not only considered toehold acquisitions of van trailer manufacturers prior to acquiring Gindy, but also considered *de novo* entry into van trailer manufacturing. Budd recognized it could go into van trailer manufacture, but decided not to go into it because:

> One is you had the problem of cash * * *. And the second problem is that timewise, to try and do that and have an influence on the company, you are looking at seven, eight years down the road, that sort of thing, and we wanted something that was much more imminent than that. (Scott 1060.)

In explaining to its shareholders what it received by acquiring Gindy, Budd related that it acquired "a leading manufacturer of truck trailers and cargo containers. We wanted to expand into this field, but the cost to build that kind of business from scratch would have been excessive." (CX 100C.)

94. In 1968, prior and subsequent to the acquisition of Gindy, Budd demonstrated its continued interest in the van trailer manufacturing industry by working with a major trucking firm to develop a double-deck system for closed-top dry freight vans and subsequently obtaining a license for the purpose of manufacturing and selling this system to van trailer manufacturers (CX 21A-B; Bruce 612-13, 616, 630).

95. Budd possessed an interest in significantly expanding its position in the van trailer market subsequent to any acquisition (Scott 1050, 1059; Ward 1130-31; Hindin 1313-14). This interest was shown not only by testimony of several top Budd officers, but also Budd's continued attempts to purchase van trailer manufacturers other than Gindy and its plan to expand the plants of Gindy (findings 96-99). In describing Budd's plans for Gindy, Mr. Scott stated:

> * * * that this might well form the nucleus for the development of a major part of the industry. * * * We thought this would be the possibility of using them as the base for developing a truly nationwide competitor to the giants, Fruehauf and Trailmobile. * * * we could take that and build that into a national company of some substance. (Scott 1050)

96. Also, subsequent to the acquisition of Gindy, Mr. Cerra was sent

by Budd to examine the facilities of Highway Industries, Inc. (hereinafter "Highway"), a van trailer and container manufacturer, with a view to the possible acquisition of these facilities (Ginsberg 273; Cerra 422, 451; Scott 1056-57; Bertolini 1829).

97. In 1969, the president of Budd asked the general manager of the Automotive Division to contact Utility with regard to the possible acquisition of this van trailer manufacturer (finding 81; Heinmiller 696; Scott 1056, 1090).

98. Subsequent to the acquisition of Gindy, Mr. Scott made at least two trips to Timpte, Inc., a small producer of van trailers (Ginsberg 273-74; Scott 1055-56, 1091). On these occasions, he viewed Timpte, Inc.'s facilities and discussed the possible acquisition of Timpte, Inc. with Mr. Robert Ruland, the chief executive officer of Timpte, Inc. (Ginsberg 273).

99. Since its acquisition, Budd has undertaken many steps to increase Gindy's production and sales, including the rebuilding of one plant and the proposed building of another plant to make van trailers (findings 155-177).

100. Budd has been at the market's edge since 1957, ready and able to enter, until it finally entered through its 1968 acquisition of one of the leaders, Gindy (findings 74-94).

B. *Availability of a Toehold Firm*

101. On or about the time Budd acquired Gindy, there were a number of smaller manufacturers of van trailers, containers and chassis who were available for acquisition by Budd (findings 102-107).

102. Miller, a small manufacturer of van trailers, considered an offer from Budd immediately prior to the Gindy acquisition (Miller 379-80; Scott 1052). In November 1968, Miller agreed to merge with GAC Corporation. This agreement became final in February 1969 (Miller 370). The principal owners of Miller decided to sell the company in 1968 to solve their estate problems (Miller 393).

103. Great Dane, a small manufacturer of van trailers, was acquired by United States Freight Company in 1967 (Hammond 662; Scott 1087). A third party acting on behalf of Budd approached Great Dane regarding its possible acquisition (finding 92).

104. The president of Kentucky Manufacturing, Inc., a small producer of van trailers, testified that he would have considered a cash offer for his business (Tway 879-80).

105. Highway, a producer of van trailers, containers and chassis, in 1968 was owned by GAC which was willing to sell it or its assets (Scott 1091). In 1968, Budd knew that Highway was "getting into trouble" (Scott 1091). By July 1970, Highway was being prepared for liquidation, which occurred in 1971 (Hegner 463-64).

106. Trailco, a small van trailer manufacturer, was offered for sale to Budd by a broker (Scott 1087; Burten 1597). Subsequently, in 1971 Dorsey acquired Trailco (Collier 1656).

107. In 1969, V&W Trailer Co. (hereinafter "V&W") contacted Budd with regard to its possible acquisition by Budd (Scott 1090). Subsequently, V&W ceased van trailer manufacture and became a Gindy distributor (CX 58; CX 145; Miller 379; Hammond 667).

C. *On Objective Criteria, Budd Was One of the Few Most Likely Entrants*

108. Budd had an engineering and railroad car manufacturing business, which would have provided a solid basis from which Budd could have developed its own van trailer, container and chassis products (CX 37B; Ginsberg 322-23; Cerra 416-17).

109. The producers of railroad cars are among the most likely entrants into the manufacture of van trailers, containers and chassis. Several foreign producers of railroad cars have entered into the manufacture of van trailers or containers and chassis, including Cravens Homalloy (Sheffield) Limited (hereinafter "Cravens"),[3] a corporation located in the United Kingdom; Societe Nouvelle Des Ateliers De Venissieux (hereinafter "SNAV"),[4] a French corporation located in Venissieux, France; and LaBrugeoise et Nivelles (hereinafter "B/N"), a Belgium railroad car manufacturer with its headquarters in Brussels, Belgium, and a former Budd licensee for railroad cars (CX 149B; CX 150B-C, Z-43; CX 151B). Pullman considered using its railroad car facilities to build van trailers, but, after a cost study, decided not to do so at that time (Crumrine 1745-46).

110. Prior to producing van trailers or containers and chassis, Cravens was primarily a manufacturer of railroad passenger cars; it also produced multiple diesel carriages, electric carriages, freight wagons, small railroad freight containers and pressed steel bodies to be mounted on a 2-ton chassis (CX 151D-E). SNAV manufactured railroad freight cars, steam shovels, small mining cars, and as a sideline, was a welding subcontractor for other manufacturers (CX 149D). B/N was a manufacturer of railroad rolling stock, including railroad passenger cars (CX 150E, L).

111. Cravens and SNAV, prior to starting to produce van trailers or chassis, entered into the manufacture of containers (CX 149J; CX 151F). Within two years of its entry into container manufacture, Cravens began the manufacture of van trailers (CX 151C, D, G). SNAV

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[3] "Cravens" refers to Cravens Homalloy (Sheffield) Limited, incorporated in 1967, and its predecessor, Cravens, Limited (CX 151D).

[4] Although SNAV did not make railroad passenger cars as Budd does, the manufacture of both involves similar techniques, the only differences being the design of the railroad passenger car which must have toilets, electrical and lighting fittings, air conditioning, heating devices and the like (CX 149Z-28).

began the manufacture of container chassis one year after it began the manufacture of containers (CX 149H-K). B/N first began the manufacture of van trailers in 1963-64, then added containers in 1966 and container chassis in 1967 (CX 150H-J).

112. There are similarities in the manufacture of railway cars and van trailers, containers and chassis which make railroad car manufacturers likely entrants into the production of containers, chassis and van trailers. The development of container manufacturing at SNAV:

> * * * is the result of an internal expansion of activity previously existing in our Company.
>
> In fact, our Firm has been manufacturing railway wagons since its origin. It is because of a similar technology together with the ability to mass produce metal products that we were directed to containers and later on, in 1968, to chassis for the transport of containers.
>
> Knowledge and technical experience we gained in mass-producing wagons, have been very useful for us, especially for working out our container and chassis manufacture; mainly with regard to steel containers, which are now forming the whole of our production, the experience of techniques and processes for assembling, welding and handling, which we obtained through wagons has been determinative in the choice of launching container and chassis manufacture. (CX 149Z-44.)

113. Although their former products were composed primarily of steel and wood, the containers initially built by Cravens, SNAV, and B/N and all of their van trailers were of aluminum construction (CX 149G, M; CX 150H-J, L-M; CX 151E). The chassis produced by SNAV and B/N were of steel construction (CX 149M; CX 150M).

114. Budd possessed the ability to fabricate aluminum, the principal material used in van trailer production (CX 16; CX 19; CX 20).

115. A plant used to produce railroad cars can be used to make van trailers, containers and chassis (findings 116-117). Budd knew this because of its experience with its manufacturing arrangements with Fruehauf.

116. Cravens, SNAV and B/N each initially used the same factory which formerly produced railroad cars to make van trailers or containers and chassis (CX 149P; CX 150G, O-Q, Z-1; CX 151V).

117. Budd's Red Lion plant, at which it produced railroad cars in 1968, could have been used to produce van trailers, containers and chassis (Ginsberg 255-56, 323; Cerra 417, 458-59). Budd recognized this possibility when it stated in its first supplement to statement of respondent's position:

> In 1968 respondent's rail car production facilities (the only ones which might be considered siutable [sic] for trailer, container or chassis production) were fully-utilized * * *. (p. 7)[5]

This plant was used to build aluminum containers in 1961 (Walters 506; Scott 1083).

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[5] It should be noted here that Budd did not have to acquire Gindy.

118. A corporation that makes railroad cars has the machinery to go into the manufacture of van trailers (Ginsberg 253, 255). The manufacturing operations—assembling, metal forming, welding, riveting, piercing—are basically similar (Cerra 413; Brown 895).

119. The capital equipment needed to produce railroad cars, automotive components, van trailers, containers and chassis—presses, cutting machines, shears, oxygen torches, welding equipment—are basically similar (CX 149V; Ginsberg 253-55; Cerra 413-14).

120. In 1968, the equipment in Budd's Gary plant could be used to manufacture van trailers, containers and chassis (Cerra 417, 446-47). At that time, the Gary plant produced automobile deck lids, deck assemblies, door assemblies, fender assemblies and similar products (Cerra 445). Budd's Red Lion plant also had equipment which could have been used, with rearrangement, to produce van trailers (Ginsberg 255-56; Cerra 417, 458-59). The Red Lion plant manufactured railroad cars and automotive frames in 1968 (Cerra 418).

121. Budd officials indicated, during the merger negotiations with Gindy that Budd was well qualified to make cross members or side rails (Walters 507; Scott 1062). Since the merger, Budd Gindy has been making parts which formerly Gindy had purchased (CX 146L). Among these parts are fifth wheels, landing gear parts and castings (Ginsberg 280-81; Hindin 1389).

122. Budd is a supplier of components such as wheels, hubs and drums used in the manufacture of trailers and chassis (admissions 10, 12 and 13, 1/15/73). It is one of the few suppliers of wheels and is the largest supplier of disc-type wheels, which are used almost exclusively west of the Mississippi River and are being used increasingly east of the Mississippi River (Ginsberg 248, 317, 321; Walters 489; Bachman 560-61; Hammond 682; Heinmiller 692, 706; Scott 1063-64; Paterson 1634; Collier 1659-60; Linnen 1776). As a manufacturer of these components, Budd has been and is a member of TTMA (RX 383; Ginsberg 262, 336; Miller 381-82; Calvin 913-14).

123. Budd contemplated, in a premerger analysis, that it "could capture some wheel sales that we do not have at the present time," by virtue of entering into the manufacture of van trailers and chassis (CX 10C-D).

124. The production of van trailers, containers and chassis requires knowledge and application of assembly line and mass production techniques (Cerra 414-15; Bertsch 641-42; Crumrine 1740-41). Budd was knowledgeable in the application of assembly line and mass production techniques because of its experience in the production of automotive stampings, railway passenger cars, disc brakes and disc wheels (CX 4B; CX 5B-G; CX 28; Cerra 416-18).

125. When Budd's corporate manager of facilities became a vice president of Gindy, he applied mass production techniques to Gindy and succeeded in improving the productive capability of Gindy's plants (CX 99B; finding 164; Cerra 419-20).

126. For many years prior to the acquisition of Gindy, Budd possessed technical and supervisory personnel familiar with the design and production of van trailers, containers and chassis (findings 126-128).

127. Between 1934 and 1958, Budd designed and produced stainless steel shells for closed-top dry freight van trailers (Necker 1415). Between September 1960 and September 1961, Budd personnel designed and manufactured aluminum box-type containers (complaint and answer, par. 5). During the Gindy acquisition negotiations, Budd mentioned its familiarity with containers, due to this previous experience in their production (Walters 506).

128. In 1968, Budd possessed the engineering personnel necessary to produce van trailers, containers and chassis (CX 37B; Cerra 415, 424). In a Budd memorandum dated Aug. 9, 1967, highway trailers and containers were included among transportation equipment products not then produced by Budd, but covered by Budd skills in engineering and manufacturing (CX 14).

129. At that time, Budd had not only the ability to design and construct the plant used for the manufacture of van trailers, containers and chassis, but also the ability to produce the necessary tools and lay out the machinery and assembly lines necessary to manufacture these products (CX 86; Cerra 416-17; Scott 1066). Subsequent to the acquisition of Gindy, Budd advertised that its new subsidiary, Gindy, could call on Budd's engineering skills (CX 37). Indeed, subsequent to the acquisition, Gindy did call on Budd's engineering skills. Several Budd engineers were brought over to Gindy from Budd (Walters 512). Budd's corporate manager of facilities was transferred to Gindy after the merger and became Gindy's vice president of operations (Walters 510). At Gindy, he set up new assembly lines and built a new facility for producing refrigerated van trailers (CX 86; Cerra 422-23; Scott 1066, 1097-98).

130. Subsequent to the acquisition of Gindy, Budd assumed full control of the operations of the company (Ginsberg 270). Budd promised the former owner and his son that they would run Gindy (Ginsberg 269). However, David Ginsberg, the former owner, became merely the honorary chairman of the Gindy board and his son Milton left shortly after the acquisition as "He [Milton] felt that they [Budd] were giving orders instead of taking advice." (Ginsberg 228, 270).

131. Budd possessed a name familiar to purchasers of van trailers and containers (findings 132-136).

132. Budd advertised in trade publications designed to reach motor carriers and other users of van trailers and containers (CX 35).

133. Prior to the acquisition, Budd and its distributors sold wheels directly to motor carriers and leasing companies, the major purchasers of van trailers (CX 10C; Ginsberg 232-33; Walters 489-90; Heinmiller 693; Scott 1064; Brown 1503-04; Paterson 1623).

134. Motor carriers and leasing companies often specified Budd wheels on the van trailers which they purchased (Ginsberg 248, 316; Miller 365; Bachman 553, 560, 586; Hammond 661; Heinmiller 706; Scott 1096-97; Brown 1504; Paterson 1623, 1634). Indeed, the name "Budd wheel" was almost a generic description of one of the two types of wheels used on van trailers (CX 33; Ginsberg 249; Bachman 553; Hammond 680; Heinmiller 693, 706).

135. Budd recognized that it possessed a favorable reputation among purchasers of van trailers (CX 101F). During acquisition negotiations with Gindy, Budd officials indicated that Budd's contacts with motor carriers and railroads that owned van trailers could help Gindy (CX 10G; Walters 508-09; Ward 1123).

136. Railroads purchase substantial numbers of van trailers (CX 44F; Miller 357; Bachman 546; Hammond 657, 680, Tway 873; Weaver 908). Budd has long been a leading supplier of passenger cars to railroads (CX 18B-C; CX 34; CX 76B; CX 94D).

137. Budd possessed the requisite financial ability to enter into the manufacture and sale of van trailers and containers and chassis, either *de novo* or through the acquisition and expansion of a toehold firm, and to become a substantial competitive factor in the sale of these products (complaint and answer, par. 6; CX 37B; Githens 1259; findings 138-143).

138. Budd is one of the largest companies in the Nation, ranking 191st in sales on the Fortune 500 list for 1969. Its securities are publicly traded on the New York Stock Exchange (CX 92; CX 94; CX 95; CX 96; Ward 1126).

139. One means by which Budd could obtain funds was the issuance of additional common stock. In 1968, 1969, and 1970, Budd issued additional common stock for the purpose of making acquisitions (CX 92; CX 95; CX 96) and common share purchase warrants issued in connection with loan transactions (CX 94A; CX 97). Budd's chief financial officer characterized Budd's ability to raise funds through the issuance of stock in 1968 as follows:

> * * * our stock was a well accepted medium at that particular point in time. We were a New York Stock Exchange, a listed company, and our results were considered by the financial community, to be on the upswing, and the price of stock was attractive and that made acquisition possibilities for stock that much more attractive. (Ward 1126.)

140. Another means by which Budd could and did raise substantial sums of money was through borrowings and public debt offerings. In 1969, Budd raised $30 million by a public funding (CX 94A; CX 98; Githens 1258). Of this sum, $8 million was immediately channeled directly to Gindy "to finance its increased installment receivables arising from the expansion of its business" (CX 94D; CX 98B; Githens 1252, 1258). In 1970-1971, Budd borrowed $30 million from several life insurance companies (CX 97A; Githens 1258).

141. Since the merger, Budd has provided substantial sums of money to Gindy directly and indirectly. Budd spent about $1.5 million to renovate Gindy's Eagle plant in order to achieve a higher degree of automation (CX 86; CX 94K-L; Walters 512). Budd will also spend $4 million to build a new plant for its Gindy Division in Martinsville, Va. (Ginsberg 279). The Budd Financial Corporation was established in 1970 as a wholly-owned subsidiary of The Budd Company primarily to service the installment financing originated by Gindy (CX 99B-C; admission 26, 1/15/73; Ginsberg 277). By the end of 1970, Budd had confirmed open lines of credit with banks of about $113 million, of which about $34 million was earmarked for Budd Financial Corporation (CX 101F).

142. Budd's financial ability has strengthened Gindy and could have strengthened a toehold firm (Miller 370-71). Budd had more leverage than Gindy in the money market (Ginsberg 277). Budd's financial ability has enabled Gindy to finance van trailer sales which it otherwise would have lost. Likewise, Budd's financing has increased Gindy's ability to accept, service and dispose of used trailers traded in on the purchase of new trailers (CX 65; CX 146L; Feinberg 834; 837). Finally, Budd's financial backing of Gindy has enabled Gindy to finance the sale of containers, something Gindy could not do previously, as a creditor cannot really secure his interest in the collateral and only Budd could risk the potential disastrous losses of a default (Walters 514-15). Since the acquisition, Gindy's expenditures on advertising have been considerably higher than previously (CX 57).

143. Budd's financial ability has helped Gindy and could have helped a toehold firm establish wholly-owned distribution branches (finding 173). Gindy had three wholly-owned distribution branches prior to the merger (finding 172). By 1973, Gindy had opened six additional branches which repair and sell new and used van trailers (finding 173).

144. In 1968, Budd had research and development capabilities in all kinds of metals, including aluminum (CX 19; CX 20; CX 26B-F; CX 37B; Scott 1039-40). It had developed the Plane-Mate, an aluminum vehicle used as a traveling lounge at airports (CX 80; CX 132; Scott 1048).

145. Budd operated a van trailer testing facility in 1968 (CX 94M; Miller 364; Cerra 420; Walters 490; Bachman 554; Bruce 612; Hammond 1306). This facility could perform almost any kind of test upon a van trailer (Cerra 420-21; Walters 490-91). Budd tested trailer kingpins, frames and beef plates and the heat transfer properties of refrigerated van trailers (CX 94M; Walters 490-91; Bachman 554; Bruce 611-12, 617-19; Hammond 1306).

146. The manager of Budd's testing facility was personally involved in designing and setting up all of the tests, evaluating the results, and writing the reports (Bruce 620). As a result, Budd could have learned about the insulating or heating qualities of van trailers, the strength of materials in the van trailer frame, and the mechanical properties of a van trailer (CX 21A-B; Cerra 421). This knowledge could be very helpful to a van trailer manufacturer (CX 21A-B; Bachman 554-55; Bruce 619-20).

147. At the time of the Gindy acquisition, Budd was the most likely entrant into the manufacture and sale of van trailers, including closed-top dry freight and open-top van trailers, containers and chassis. At that time, no other firm indicated both a strong desire to enter and possessed the several advantages described above which would have aided Budd either as a *de novo* entrant or in the expansion of a toehold firm in these markets (Scott 1092).

148. Only a few firms expressed an interest in entering (Ginsberg 302, 306, 308; Scott 1091). Of these, only Walter Kidde expressed an interest in acquiring a firm smaller than Gindy (Blatt 750, 755-56). Likewise, only Walter Kidde expressed an interest in more than one van trailer manufacturer (Ginsberg 308). Neither of these firms, nor any other firm, was shown to have possessed any of the factors which made Budd a likely *de novo* entrant or gave it the ability to expand a toehold producer. Budd's president knew of no firm other than Budd who was seeking a van trailer manufacturer in 1967 or 1968 (Scott 1092). Furthermore, the several firms suggested by respondent's counsel as purported possible entrants had no interest whatsoever in entry (CX 176; CX 179-191; Morris 1237-38).

149. No firm other than Budd possessed the number of advantages possessed by Budd which made Budd a likely *de novo* entrant or gave it the ability to expand a toehold producer.

150. Truck tractor manufacturers are not as likely entrants into van trailer manufacturing as was Budd. No manufacturer of truck tractors currently makes van trailers (Brown 1512-13; Crumrine 1742; Linnen 1795, 1801). No truck tractor manufacturer, except Mack Truck which has not pursued its expression of interest, has indicated any interest in

entering the manufacture of van trailers (CX 181; CX 182A-D; CX 189; Scott 1092; Morris 1237-38; Crumrine 1742).

D. *Gindy Is Not a Toehold*

151. Budd did not view Gindy as a toehold at the time of its acquisition (CX 11A). In its notice to its shareholders concerning this acquisition, Budd characterized Gindy as "a leading manufacturer of truck trailers and cargo containers * * *." (CX 100C). Similar language was used subsequent to the acquisition to describe the role of Gindy in the van trailer market (CX 59; CX 101B; CX 175).

152. The president of Budd testified that Gindy was a substantial factor in the van trailer market at the time of its acquisition (Scott 1035).

153. Prior to the merger, Gindy was acknowledged to be a major and leading competitor in the industry (CX 41A; CX 59; CX 69E; CX 100C; Bachman 549; Hammond 659; Feinberg 826). Two competitors characterized Gindy as one of "The Big Ones" (Tway 878; Collier 1658). Gindy was viewed as a tough competitor by other van trailer producers (CX 11A; Miller 376-77; Hammond 666; Heinmiller 700; Weaver 904-05; Bernstein 1427; Collier 1658; Crumrine 1731; Linnen 1775). Gindy's customers viewed it as a major competitive factor (CX 73A-B; Feinberg 840; Crumrine 1730).

154. In 1968, Gindy was the fourth largest supplier of closed-top dry freight vans, accounting for 11 percent of shipments (finding 10). In 1969, Gindy was the third largest supplier of closed-top dry freight vans, accounting for 13 percent of such shipments (finding 10).

E. *Budd Entrenched Gindy*

155. A finance company helps a van trailer manufacturer obtain additional funds which can be used to finance van trailer sales (Miller 370-71 Bachman 558; Hammond 662; Scott 1095; Ward 1143; Bernstein 1425; Todd 1546). The lack of such a finance company was "extremely limiting" on the ability of a van trailer manufacturer to handle a large volume of installment notes (Ward 1134). The ability of a van trailer manufacturer to extend financing to its customers in 1968 was "vitally important" to that manufacturer (finding 67; Miller 372, 396).

156. By use of a finance company, a van trailer manufacturer can obtain funds for financing of his sales at a lower interest rate (Ginsberg 277; Todd 1546).

157. The three largest manufacturers of van trailers in 1968 had finance companies, whereas the smaller van trailer manufacturers did not (CX 124K; Miller 371; Bachman 558, 594; Hammond 662; Feinberg 840; Tway 872; Brown 886, 1497, 1524; Scott 1095, 1101; Ward 1144; Bernstein 1432-33; Crumrine 1730; Linnen 1769). Indeed, the smallest

manufacturers did not even finance any of their sales (Feinberg 840; Tway 872).

158. Prior to its acquisition by Budd, Gindy, unlike the smaller van trailer manufacturers, provided extensive financing of its sales (CX 48A-B; CX 49A-B; CX 50A-B; CX 51A-B; CX 52A-B; CX 53A-B). Gindy financed its installment paper on van trailer sales by means of bank loans and long-term borrowing from insurance companies (Ginsberg 375-76, 338-39; Ward 1139-40; Morris 1228; Hindin 1322; Todd 1540-41).

159. Subsequent to acquisition, Budd's investment bankers recommended that a finance company be established for Gindy (Morris 1233; Todd 1545-46).

160. Budd Financial Corporation (hereinafter "Budd Finance") was established in 1970 to help finance the van trailers sold by Gindy (CX 99B-C; CX 146Z-6; Ginsberg 277; Scott 1066; Ward 1143-44; Hindin 1323; Todd 1545).

161. Budd contributed $8 million in funds to establish Budd Finance (CX 94D; Ward 1144: Morris 1234; Githens 1252-53, 1258; Todd 1548).

162. In 1970, Budd loaned Budd Finance an additional $4 million (CX 97B; Ward 1144; Githens 1252-53, 1258).

163. By virtue of the additional equity contributed to Budd Finance, Gindy's capacity to finance van trailer sales increased (Ward 1141-43, 1153; Morris 1235; Hindin 1322-23, 1380-81). At the time of acquisition, the total amount of funds Gindy could borrow to finance its van trailer sales was $16 million (Ward 1141). In May 1969, Budd was able to increase the amount of funds available to Gindy for financing van trailer sales from $16 million to $35 million (Ward 1141-42). Subsequent to the establishment of Budd Finance, the amount of funds available to Gindy for financing van trailer sales was further increased to $48 million (Ward 1144).

164. Budd enlarged and redesigned Gindy's Eagle plant at a cost to Budd of $1 3/4 million (CX 86; CX 94K-L; CX 99B; Walters 512; Scott 1066; Hindin 1327, 1388). This expansion resulted in a 40 percent capacity increase at the Eagle plant (CX 99B). It also erected an addition to the Lebanon plant at a cost to Budd of $500,000 (CX 146L; Hindin 1327, 1388). Such alterations made Gindy by 1971 a more efficient van trailer producer than it was at the time of its acquisition of Budd (Scott 1108).

165. It is an advantage for a van trailer manufacturer to have plants located in major market areas throughout the country (Miller 370-71; Bernstein 1425, 1431; Crumrine 1722-23; Linnen 1774). However, only Fruehauf comes close to having a van trailer manufacturing plant located in each major market area (Bernstein 1427; 1447-50).

Trailmobile and Brown operate three van trailer plants, but neither has a southern or southwestern plant (Linnen 1765; Crumrine 1719-21). In 1968, Strick had no van trailer plants located in the South, Southwest or West (Bachman 559).

166. Budd has plans to erect two new van trailer plants for Gindy (CX 99B). One of these plants, now under construction, will be an enlarged facility to be located in Martinsville, Va. (Ginsberg 278; Walters 512; Hindin 1327). Its expected cost is $4.5 million (Ginsberg 278-79; Hindin 1389). This plant will replace Gindy's present inadequate plant in Martinsville (Ginsberg 318; Hindin 1318, 1327). Budd also purchased land near Chicago for a new midwestern plant for Gindy (Ginsberg 279; Walters 512; Scott 1066; Hindin 1327).

167. It is advantageous for a van trailer manufacturer to be integrated into the manufacture of the components used in assembling a van trailer (Ginsberg 343; Miller 383; Bachman 557; Hindin 1388). The major manufacturers of van trailers are vertically integrated into many of the components used in assembling a van trailer (Bachman 561-62; Crumrine 1731-32; Linnen 1779). Smaller van trailer manufacturers are less highly integrated than are the major manufacturers (Collier 1645).

168. Since the acquisition, Budd has helped Gindy achieve further integration by starting the production of certain components such as kingpin subframes, running gear subframes, landing gear subframes and front and rear ends (CX 146L; Ginsberg 280-81; Hindin 1389).

169. Factory-owned branches (hereinafter "branches") are considered by many manufacturers to be preferable to independent dealers (hereinafter "dealers") in distributing new van trailers (CX 146L; Miller 397; Hammond 674-75; Hindin 1322; Bernstein 1425, 1429; Brown 1495-96; Crumrine 1727). Branches can handle used equipment service and sales more effectively than can dealers (Miller 397; Hammond 674-75; Hindin 1322; Bernstein 1429-31; Brown 1495-96). Branches are used to stock new trailers and thereby gain additional sales from customers who want fast delivery (Miller 374; Crumrine 1727; Linnen 1768-69).

170. Several of the largest manufacturers of van trailers utilize both branches and dealers to distribute their van trailers, relying primarily on the former (Bernstein 1445-46; Brown 1494; Crumrine 1725; Linnen 1767). However, the second largest van trailer manufacturer in 1968 had only a very few branches (Walters 502; Bachman 559).

171. Smaller manufacturers of van trailers rely almost entirely on direct sales efforts from the factory or dealers to distribute their van trailers (Heinmiller 699; Brown 1494; Collier 1640; Daniel 2215).

172. Prior to acquisition, Gindy utilized primarily dealers to sell its van trailers (CX 94K; Hindin 1320). However, it did operate branches in New Jersey, Chicago and Cleveland (Ginsberg 280; Walters 502).

173. Since Budd acquired Gindy, Gindy has opened six additional branches and plans to open four more within the next few years (CX 65; CX 146L; Ginsberg 280; Walters 512-14; Hindin 1322, 1327; Bernstein 1442). Budd has provided between $3 and $4 million to enable Gindy to open these branches (Hindin 1389).

174. Subsequent to the acquisition, Budd has improved the quality of the Gindy van trailer (Weaver 905; Bernstein 1442; Burten 1584; Paterson 1620). In part, this was achieved through a redesign of the Gindy van trailer (CX 86; CX 87; CX 89; CX 146L; Cerra 423-24; Hindin 1331-32; Bernstein 1442; Gross 1562; Paterson 1620). Gindy has introduced a unique inclined roller tandem to replace the sliding tandem previously used (CX 88).

175. Since the acquisition, Gindy has broadened the types of van trailers which it offers by adding furniture and deep drop frame van trailers to its product lines (CX 58; CX 146L; Walters 530-31; Hindin 1332; Bernstein 1442-43).

176. Gindy currently is at maximum capacity. It has a five-month backlog and is turning down orders because it cannot meet delivery times (Hindin 1385-86).

177. Subsequent to the acquisition, Budd has increased substantially the amount of advertising done for Gindy's van trailers, compared to the amount of advertising done by Gindy prior to its acquisition (CX 57; CX 59-62; CX 76; CX 83-84; CX 86-89; Walters 504).

X. The Facts and the Law

A. *The Lines of Commerce*

One of the principal issues in this case is the product markets. The legal standards to be used in determining the proper line of commerce in Section 7 cases were laid down by the Supreme Court:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes * * *. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in *any* line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).

When the *Brown Shoe* criteria are applied to the facts in this matter, it becomes apparent that the four relevant product markets are van trailers, closed-top dry freight van trailers, open-top van trailers and containers and chassis.

Van trailers as a separate and distinct line of commerce meets the following *Brown Shoe* criteria: *industry recognition* (findings 33, 34); *peculiar characteristics and uses* (findings 35-36); *unique production facilities* (finding 37); *distinct customers* (findings 38-39); *sensitivity to price changes* (findings 41-42); and *specialized vendors* (finding 40).

Closed-top dry freight van trailers and open-top van trailers as separate and distinct lines of commerce meet the following *Brown Shoe* criteria: *industry recognition* (findings 44, 52); *peculiar characteristics and uses* (findings 45-46, 48); *distinct customers* (finding 47); *sensitivity to price changes* (findings 49-50); and *specialized vendors* (finding 51).

Containers and chassis as a separate and distinct line of commerce meets the following *Brown Shoe* criteria: *industry recognition* (finding 53); *peculiar characteristics and uses* (findings 54, 57); *distinct customers* (finding 58); *distinct prices* (finding 60); and *sensitivity to price changes* (finding 59).

It is now well established that it is not necessary for each of the seven criteria set forth in *Brown Shoe* to be present in every merger case in order to establish a market. A relevant market has been found to exist where three or less of the *Brown Shoe* criteria were present. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957); *General Foods Corporation* v. *FTC*, 386 F.2d 936, 941 (3rd Cir. 1967); *Reynolds Metals Company* v. *FTC*, 309 F.2d 223 (D.C. Cir. 1962).

Further analysis is unnecessary since the Commission has already outlined the relevant product markets in *Fruehauf Trailer Co.*, 67 F.T.C. 878 (1965). In that case, involving horizontal acquisitions by Fruehauf, the Commission said:

> The hearing examiner, applying the test declared by the Supreme Court in [*Brown Shoe*], correctly found that aluminum vans, platform trailers, and dump trailers, among others, were appropriate product markets in which to appraise the competitive effects of the acquisitions, as well as truck trailers generally. 67 F.T.C. at 930, n.2.

B. *Budd as an Actual Potential Entrant*

The importance of the potential competition doctrine in antitrust analysis is now well established. The latest Commission decision dealing with potential competition is *General Mills, Inc.*, Docket No. 8836 (Oct. 5, 1973), in which the Commission analyzed the effect of eliminating an actual potential entrant:

> Secondly, aside from whether it is viewed as a potential competitor by firms in the market, elimination of a potential entrant by acquisition of a leading firm in that market will eliminate the competition that would have been added had the acquiring firm entered the market *de novo* or by toehold acquisition. *General Mills, Inc.*, *supra*, at 5.

When analyzing the "impact" of the loss of a potential entrant, it is important to look not only at what the impact would have been had the potential entrant actually entered through internal expansion or by acquisition of a "toehold," but also at the impact which it had as a deterrent to current competitors by its mere presence on the fringe of the market. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). As the Supreme Court held in *Ford-Autolite*, a lost potential entrant:

> * * * may well have been more useful as a potential than it would have been as a real producer, regardless how it began fabrication. Had * * * [the potential entrant] taken the internal-expansion route, there would have been no illegality; not, however, because the result necessarily would have been commendable, but simply because that course has not been proscribed. 405 U.S. at 567-68.

More recently, in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the Court stated:

> Suspect also is the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate § 7 because the entry eliminates a potential competitor exercising present influence on the market. *FTC* v. *Proctor & Gamble Co.*, 386 U.S. at 580-581; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 173-174 (1964). As the Court stated in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S., at 174, "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." (410 U.S. at 531-32). *See* also *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967); *Beatrice Foods Company*, 67 F.T.C. 473, 716-722 (Apr. 26, 1965).

In *Falstaff*, the Court went on to hold that even if it is found that the alleged potential entrant *would not have entered otherwise*, this

> * * * does not *ipso facto* dispose of the potential-competition issue.
>
> The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market. (410 U.S. at 533.)

The record is clear that it is reasonable to consider Budd a potential entrant into the sale of van trailers, closed-top dry freight van trailers, open-top van trailers, and containers and chassis to motor carriers and other users of these products prior to its acquisition of Gindy. Budd had great financial capabilities; enjoyed a reputation as a quality manufacturer of railroad cars and wheels for van trailers; had the know-how and capacity to enter the markets; had evidenced a long-sustained and strong interest in entering the markets; and had compelling reasons for entering. Moreover, the markets were highly concentrated, the barriers to entry very high and no corporation other than Budd had the inclination, resources and know-how to enter the markets.

Budd made no secret of its interest in the markets under consideration. Budd approached various van trailer manufacturers when merger negotiations with Gindy were suspended (findings 81, 92).

Furthermore, Budd made an inquiry of a possible customer concerning its possible entry. Considering the above, it cannot be said that those already competing in sales to motor carriers, railroads and other users of the products under consideration were unaware of Budd's interest in entering the sale of van trailers, containers and chassis.

It is also now well established that when assessing the loss of a potential entrant "[t]he form of entry is clearly not a determinative factor." *Kennecott Copper Corporation*, 78 F.T.C. 744, 927 (1971), *aff'd*, 467 F.2d 67 (10th Cir. 1972). As the Commission stated in *The Bendix Corporation*, 77 F.T.C. 731 (1970), remanded for further proceedings, 450 F.2d 534 (6th Cir. 1971):

> Various forms of merger entry other than through acquisition of a leading company—for example, a "toehold" acquisition of a small company capable of expansion into a substantial competitive force—may be as economically desirable and beneficial to competition as internal expansion into a relevant market, and must be considered in assessing the potential competition of the acquiring firm which has been eliminated as a result of the challenged merger.
>
> Although previous cases * * * have only involved potential entry in one form, *i.e.*, by internal expansion, it is clear that the *form* of entry was not controlling in these decisions. What was determinative in each of these cases was (1) the actual elimination of the additional decision-making, the added capacity, and the other market stimuli which would have resulted had entry taken a pro-competitive form, such as internal expansion; and (2) anticompetitive consequences of the removal of the disciplining effect of a potential competitor from the market's edge. We believe that these adverse effects on competition may result from the elimination of a potential entrant who might have entered by internal expansion or who might have entered by a toehold acquisition. 77 F.T.C. at 817.

A long line of cases sets forth the factors to be considered in determining whether a respondent is an actual potential entrant. The relevant market must be substantially concentrated or exhibit a trend toward concentration *The Stanley Works* v. *FTC*, 469 F.2d 498 (2d Cir. 1972); *Beatrice Foods Co.*, 81 F.T.C. 481 (1972). The firm within the market must be a leading or major factor, so that the merger cannot be justified as a "toehold" acquisition:

> From the standpoint of Section 7, and the statutory policy of favoring mergers which may increase competition and prohibiting mergers which may lessen competition, it made a crucial difference whether Bendix merged with Fram or *another* leading firm, or with any one of the various smaller and less established firms with which it unsuccessfully negotiated (emphasis added). *The Bendix Corp., supra*, at 824.

A company outside the market will be viewed as a likely or potential entrant if it is shown to have distinctive capabilities, resources, incentives, and interests to enter the particular market. Thus, in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 660 (1964), the Supreme Court looked to the nearness of the absorbed company to the relevant market, the acquiring firm's "eagerness to enter that market, its resourcefulness and so on." The Supreme Court expanded this analysis in *United States* v. *Penn-Olin Chemical Co., supra*, at 175

(1964), in which it discussed the factors it considered key in deciding whether a company was a potential entrant: The company's inclinations, resources, know-how, its long-standing and strong interest in entry, its reputation and business connections with firms in the relevant market, its capacity to enter, and its competitive and economic reasons to do so. Finally, it is essential to show that the acquiring firm is the most likely entrant or one of a few such likely entrants *The Bendix Corp., supra,* at 830; *FTC* v. *Procter & Gamble Co., supra; United States* v. *El Paso Natural Gas Co., supra.*

Thus, considering the principles derived from these decisions, a merger eliminates potential competition and is illegal if the following four factors are established: (1) The particular market is shown to be substantially concentrated; (2) the merging firm within the market is shown to be a leading or major factor in that market; (3) the merging firm outside the market is shown to be a likely entrant by internal growth or by a relatively small acquisition as an alternative to the proposed merger; and (4) the acquiring firm is shown to be the most likely entrant or one of few such likely entrants *Beatrice Foods Company,* Docket 8864 (Oct. 25, 1973); *Beatrice Foods Company, supra,* at 326 (1972).

Applying these factors to the facts in this matter, Budd was a potential entrant by internal expansion or by "toehold" acquisition or by both methods of entry into the manufacture and sale of van trailers, closed-top dry freight van trailers, open-top van trailers, containers and chassis.

1. Trend Toward Concentration

The Commission has recognized that the elimination by merger of a potential entrant into an industry exhibiting such a high degree of concentration as found in the markets under consideration, can violate Section 7 of the Clayton Act:

> Once having recognized the importance of potential competition, the question then arises under what conditions does the elimination of a potential competitor have the effect proscribed by Section 7 of the Clayton Act? As a general rule, a violation of Section 7 has been found in those circumstances in which the acquired firm is a leading factor in a tight oligopoly. A tight oligopoly has been defined as an industry having a "very small number (eight or fewer) firms supplying 50 percent of the market, with the largest firm having a 20 percent or higher share * * *." *Kennecott Copper Corp., supra,* at 921-22.

The markets under consideration were already tight oligopolies in 1968, the year of the merger, yet became more concentrated in 1969. The top four van trailer manufacturers accounted for 59 percent and 62 percent of shipments in 1968 and 1969, respectively, and the top four manufacturers accounted for 90 percent and 89 percent of container and chassis shipments, respectively, in these years (findings 62, 64).

Concentration in the major submarket, closed-top dry freight vans, was even higher. The top four manufacturers accounted for 65 percent and 72 percent of shipments in 1968 and 1969, respectively (findings 62, 64).

Moreover, Fruehauf, admittedly the largest factor in the industry, met or exceeded the 20 percent market share benchmark accepted in *Kennecott* in each of the product markets in question except for open-top van trailers (findings 62, 64).

There had been no substantial entry into the product markets under consideration for 15 years (finding 73). Instead, firms have been leaving these markets (finding 73).

2. Gindy Was a Leading and Major Factor in the Relevant Product Market

Budd itself characterized Gindy as "a leading manufacturer of truck trailers and cargo containers" (findings 151-152). Gindy sold its trailers throughout the United States, and competitors acknowledged that Gindy was a major and leading competitor in the industry, some characterizing Gindy as "one of The Big Ones" (finding 153).

Gindy was the fourth largest supplier of van trailers in 1968 and 1969 (findings 62, 64). As for closed-top dry freight vans, Gindy was also the fourth largest producer in 1968, and third largest in 1969, accounting for 10.8 percent and 12.9 percent of shipments, respectively, in each year (finding 10).

3. Budd Was a Likely Entrant by Internal Growth or by a "Toehold" Acquisition

The record shows conclusively that in 1968 Budd had the distinctive capabilities, resources, incentives, and interests to enter the van trailer, container and chassis markets.

Budd, as a railroad car manufacturer, had the engineering background from which it could have developed its own van trailers, containers and chassis (findings 108-120, 124-130). The metal working skills and machines necessary to manufacture the products sold by Budd and Gindy are similar (findings 108-121). Indeed, Budd had built aluminum containers at its Red Lion plant (finding 117). Budd personnel had the background and experience to manufacture van trailers, containers and chassis (findings 126-130). Budd's executives recognized that van trailer manufacturing was complementary to its production and managerial skills (findings 85-86). In addition, Budd had experience with assembly line techniques necessary to manufacture van trailers (finding 124); had a name familiar to truckers (finding 131); produced items used by truckers, namely, wheels (finding 122); sold to the same types of customer as Gindy (findings 133-136); and had van trailer testing facilities from which Budd could learn a great deal about van trailer design (findings 145-146).

Barriers to entry into the manufacture and sale of van trailers, containers and chassis are high. One of the principal barriers is the need to finance sales, especially to large customers (findings 67-70). The substantial facilities and financial resources required to accept trade-ins and dispose of them is another major entry barrier (finding 71). Budd had the financial resources necessary to surmount these barriers (findings 137-143).

Budd's longstanding interest in the relevant product markets is clearly reflected in the record. Budd made trailer components for Fruehauf during the fifties (finding 74); had approached Brown Trailer to take Fruehauf's place when the relationship with Fruehauf was terminated (finding 75); contacted Utility twice concerning possible acquisition during the period from 1963 to 1968 (finding 81); and, in 1967, Budd's president recommended that Budd seek to enter areas in the transportation equipment industry, among which were highway trailers and containers (finding 84). Budd never seriously considered an acquisition outside the transportation equipment industry (finding 86). When Gindy suspended merger negotiations, Budd made acquisition overtures to several smaller van trailer manufacturers (finding 92). During these negotiations, Budd's president declared that Budd would enter Gindy's business whether or not it acquired Gindy (finding 89).

Budd also had sufficient incentives to enter the relevant product markets. As early as 1961, a Budd executive recommended that Budd cease its railroad car activities and broaden its base to deemphasize Budd's traditional role as a semicaptive supplier to the automotive industry (finding 78). Budd decided to broaden its base by selling proprietary products such as van trailers (finding 79). By 1967, Budd's executives adopted the recommendations of Budd's president that the company enter into areas such as van trailers and containers. These were areas, according to Budd's president, which related to Budd's then current activities and which Budd could understand and manage (findings 84-86). Finally, acquisitions in van trailers, containers and chassis were attractive, as these markets were considerably more profitable than Budd (findings 21, 91).

Given Budd's interest, abilities and incentives, it could have expanded into Gindy's business through internal expansion or by acquiring a smaller, toehold manufacturer. The declaration of Budd's president, that Budd would enter Gindy's business whether or not it purchased Gindy, clearly reveals an intent to enter had its acquisition attempt failed. Other railroad car manufacturers have expanded internally into the manufacture of van trailers, containers and chassis, using railroad car manufacturing facilities, personnel and machinery (findings 109-113, 116). Budd recognized that it too could do so (finding 93), but decided to pursue an easier course, acquisition of Gindy. Several toehold van trailer manufacturers were available to Budd at or about the time of the merger (findings 101-107). Budd could have acquired and expanded one of these toeholds as it planned to, and did, expand Gindy (findings 155-177).

4. Budd Was the Only Likely Potential Entry into the Relevant Product Markets

The record fails to show any other firm interested in entering the relevant product markets (findings 148-150). On the contrary, it was shown that many of the purported potential entrants suggested by Budd's counsel had no interest whatsoever in entry (findings 148-150). The inescapable conclusion is, therefore, that Budd was the only likely potential entrant, either by acquisition or internal expansion.

C. *Budd as a Perceived Potential Entrant*

Before Budd's acquisition of Gindy, Budd was a perceived potential entrant. In the spring of 1968, Gindy suspended negotiations with Budd (finding 92). At that time, Budd's executives contacted Miller and Dorsey, both van trailer manufacturers, concerning possible acquisition (finding 92). A third-party consultant approached Theurer, another van trailer manufacturer (finding 92). Budd had also contacted Utility twice during the period from 1963 to 1968 (finding 81). Thus, at least four van trailer manufacturers were aware of Budd's interest shortly before the acquisition of Gindy. Because the acquisition occurred so soon after these contacts, Budd did not influence existing competition in the relevant product markets only because the contacted companies did not have enough time to react to Budd's known interest in entry.

D. *The Recent Commission Decision in General Mills Does Not Apply to the Instant Case*

The evidence which establishes Budd as a potential competitor in van trailers, containers and chassis differs in several respects from the evidence presented in *General Mills, supra*.

(1) Unlike General Mills, Budd had expressed definite, specific interest in entering the van trailer, container and chassis markets (findings 75-76, 81-93).

(2) Budd not only sought to enter these markets, but to expand *within* them (findings 95-96, 99), unlike General Mills which sought postacquisition expansion outside of frozen seafood.

(3) The markets in which Budd was alleged to be a potential entrant fit Budd's internal criteria outlined in preacquisition memos and conversations (findings 78-80, 84-91); whereas Gorton did not fit the recommended criteria contained in General Mills' study. Specifically, Budd acquired a highly profitable firm, one whose profit rate was three times that of Budd, whereas Gorton was a low profit firm, especially compared to General Mills (finding 91).

(4) Unlike the lack of complementary relationship between General Mills and Gorton, the products of Gindy were complementary to those of Budd. Both sold products to the same customers (finding 136) and even belong to the same trade association (finding 122). Furthermore, there are similarities in production which were recognized by Budd's management (findings 84-85) and shown by numerous technological relationships (findings 108, 125). Indeed, Budd possessed personnel and production facilities which could have been used to produce Gindy's products (findings 115-121).

(5) If General Mills had not acquired Gorton, it would not have entered the frozen fish market. However, Budd management not only stated that they would enter Gindy's markets with or without Gindy (finding 89), but took steps to implement those alternative entry plans (finding 92).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the subject of this proceeding and of respondent Budd.

2. On Oct. 22, 1968, Budd acquired the business and assets of Gindy.

3. Budd and Gindy were, at all times relevant herein, corporations engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

4. The proper product markets within which to determine the probable effects of said acquisition, for purposes of this proceeding are: (a) van trailers; (b) closed-top dry freight van trailers; (c) open-top trailers; and (d) containers and chassis.

5. The proper geographic market within which to determine the probable effects of said acquisition, for purposes of this proceeding, is the United States, as a whole.

6. The effect of the acquisition of Gindy by Budd has been, or may be, to lessen competition substantially or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following ways:

(a) Substantial potential competition between Budd and Gindy in the sale of van trailers, closed-top dry freight and open-top van trailers, and containers and chassis, has been eliminated.

(b) Budd has been eliminated as a substantial potential competitor in the sale of van trailers, closed-top dry freight and open-top van trailers, and containers and chassis.

(c) Entry of new manufacturers into the sale of van trailers, closed-top dry freight and open-top van trailers, and containers and chassis, may be inhibited or prevented.

(d) Other manufacturers in each such line of commerce may be led to agree to acquisition by financially strong companies for defensive or retaliatory reasons.

(e) Barriers to entry of new manufacturers into each such line of commerce have been raised significantly.

7. The acquisition of Gindy by Budd may be substantially to lessen competition, or tend to create a monopoly, as described in Paragraph 6 above, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18).

8. Total divestiture of the acquired assets and all additions and improvements thereto is both necessary and appropriate to remedy the probable anticompetitive effects of the unlawful acquisition.

9. As Justice Marshall discussed in *Falstaff*, the objective evidence in this proceeding makes it abundantly clear that the product market (van trailers, closed-top dry freight and open-top van trailers, and containers and chassis) constituted a highly concentrated market held by a few large firms. Further, the objective evidence in the record, although denied by the respondent, strongly suggests that Budd had both the capability and the incentive to enter the van trailer, closed-top dry freight and open-top van trailer, container and chassis market *de novo*. There is no question from the testimony of Budd's own witnesses that it intended to go into the market, and furthermore, that it intended to become a national competitor on a par with Fruehauf, Strick and Trailmobile. Budd had the money, all the facilities, plant and equipment to accomplish what it set out to do, *de novo*, without attaining entry into the market by acquisition of a large firm such as Gindy.

While the testimony of the witnesses and the evidence adduced by Budd would lead one to believe that it had no intention of entering the market *de novo*, it is the opinion of the trier of the facts in this case that while the subjective statements of the witnesses may appear to be credible, they are insufficient to outweigh the strong objective evidence to the contrary.

The Remedy

It is well settled that the choice of the remedial order is committed to the discretion of the Commission *FTC* v. *Mandel Bros.*, 359 U.S. 385, 392-93 (1959); *Niresk Industries, Inc.* v. *FTC*, 278 F.2d 337, 343 (7th Cir.

1960), cert. denied, 364 U.S. 883 (1960); *L. G. Balfour Company* v. *FTC*, 442 F.2d 1 (7th Cir. 1971). The Commission has the power to order divestiture to restore competition to the state of health it might be expected to enjoy but for the acquisition *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 606 n. 4 (1966); see *Pan American World Airways Inc.* v. *United States*, 371 U.S. 296, 312-13 nn. 17 and 18 (1963); *Ekco Products Company*, 65 F.T.C. 1204, 1214-17 (1964). The remedial phase of antitrust cases is crucial and the primary focus of inquiry as to remedy is whether the relief adequately redresses the economic injury arising out of the violation *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326, 327. Moreover, "once the government has successfully borne the considerable burden of establishing a violation of law all doubts as to the remedy are to be resolved in its favor." *United States* v. *du Pont*, *supra*, at 334. Generally, the most appropriate remedy to redress a Section 7 violation is divestiture *FTC* v. *Procter & Gamble Co.*, *supra*.

Divestiture is the only appropriate remedy in this matter. Such divestiture will restore Budd as a force on the edge of the market and a *de novo*[6] potential entrant. See *FTC* v. *Procter & Gamble Co.*, *supra*, for a complete discussion of considerations which govern the framing of relief in a Section 7 violation.

ORDER

I

It is ordered, That the respondent, The Budd Company (hereafter Budd), a corporation, and its successors and assigns, shall divest all stock, assets, properties, rights and privileges, tangible and intangible, acquired by Budd as the result of its acquisition of the stock of Gindy Manufacturing Corporation (hereafter Gindy), together with all additions and improvements thereto. Budd shall cause to be transferred as part of such divestiture such portion of the assets of Budd Financial Corporation as relate to or derive from, in whole or in part, Budd's operation of Gindy, including, but not exclusively, personnel, finance contracts, and a share of the uncommitted funds and credit lines, along with such guarantees by Budd as shall be necessary to effect such transfer. Such divestiture shall be absolute, shall be accomplished no later than one (1) year from the service of this order, and shall be subject to the prior approval of the Federal Trade Commission.

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[6] The term "*de novo*," as used in this instance, includes entrance by both internal expansion and by toehold.

II

It is further ordered, That such divestiture shall be accomplished absolutely to an acquirer approved by the Federal Trade Commission so as to transfer Gindy as a going business and a viable, competitive, independent concern engaged in the manufacture, production, distribution, sale and financing of van trailers, containers and chassis.

III

It is further ordered, That none of the assets, properties, rights or privileges, described in Paragraph I of this order, shall be sold or transferred, directly or indirectly, to any person who is, at the time of the divestiture, an officer, director, employee, or agent of, or under the control or direction of, Budd, or any of Budd's subsidiary or affiliate corporations, or anyone who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Budd or to anyone who is not approved in advance by the Federal Trade Commission.

IV

It is further ordered, That pending divestiture Budd shall maintain and operate Gindy (as more fully described in Paragraph I), in the same manner and form as Gindy was being operated at the date the complaint herein issued; shall not commingle Gindy's assets, properties, and financing with other of Budd's businesses and operations, and, shall take no steps to impair or otherwise adversely affect the economic, competitive and financial position of Gindy.

V

It is further ordered, That, for a period commencing on the effective date of this order and continuing for ten (10) years from and after the date of completing the divestiture required by this order, Budd shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, any interest in or any interest of, any domestic concern, corporate or noncorporate, engaged in the manufacture, production, distribution, sale or financing of van trailers, containers and/or chassis, nor shall Budd enter into any arrangement with any such concern by which Budd obtains the market share, in whole or in part, of such concern in the above-described product lines.

VI

It is further ordered, That within thirty (30) days from the date of service of this order and every thirty (30) days thereafter until divestiture is accomplished, Budd shall submit, in writing, to the Federal Trade Commission a report setting forth in detail the manner and form in which Budd intends to comply, is complying, or has complied with the order. All compliance reports shall include, among other things that are from time to time required, (a) the steps taken to accomplish the required divestiture, and (b) copies of all documents, reports, memoranda, communications and correspondence concerning or relating to the divestiture.

With respect to Paragraph V of this order, Budd shall on the first anniversary date of the effective date of Paragraph V and each anniversary date thereafter until the expiration of the prohibition set forth in Paragraph V, submit a report, in writing, listing all acquisitions made by it, the date of each such acquisition or merger, the products involved and such additional information as may from time to time be required.

VII

It is further ordered, That The Budd Company shall notify the Commission at least thirty (30) days prior to any proposed changes which may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of successor corporations, and that this order shall be binding on any such successor.

DISSENTING STATEMENT OF COMMISSIONER DIXON

SEPTEMBER 3, 1975

My reading of the record in this matter convinces me that Budd was an actual potential entrant into the markets found relevant by the administrative law judge,[1] and that Budd's entry through Gindy was anticompetitive as it did not come about through internal expansion or

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[1] Based on the finding that closed-top dry freight trailers and open-top van trailers could be manufactured by the same machinery and distributed through the same channels, the majority concluded that these two products should not be viewed as comprising distinct submarkets. Although cross-elasticity of production and distribution is determinative when considering the outer boundaries of a market, such cross-elasticity is only one of the factors to be considered when drawing submarkets. My reading of the record comports with that of the administrative law judge insofar as he finds that these closed and open-top van trailers are sufficiently distinct to warrant the finding that each should be considered a relevant submarket. Particularly persuasive in this connection is the administrative law judge's finding that these two products are sold to different customers because their end uses are distinct and the finding that there is no cross-elasticity as to price between them. It may be, as an example, that peanut butter and peanut oil are produced by the same machines and distributed by the same wholesalers. Yet we would not conclude from their cross-elasticity of production and distribution that each does not comprise a separate product market. That one cannot be substituted

(*Continued*)

by acquisition of a toehold firm. I cannot accept the majority's holding that Gindy was a toehold firm. It is my understanding that a firm cannot qualify as a toehold if it is already a significant competitive factor in the relevant markets, or is likely to achieve that status without the infusion of capital from the acquiring firm. Assuming, *arguendo*, that Gindy became significant only after the challenged acquisition,[2] the manner in which it achieved this position demonstrates that Gindy was capable of ascending to such a position in the relevant markets on its own, and that it was likely to do so. There is no dispute that Budd's investment of a few million dollars increased Gindy's production capacity and geographical distribution and was all that was required to bring Gindy into more direct competition with the "industry giants." In brief, it was well within the capacity of Gindy to become, through internal expansion, a significant competitor of Fruehauf, Strick, and Trailmobile, if it was not already at the time of the acquisition. Since this prospect was obviated by the Budd acquisition, as was the potential for Budd to become a significant competitor through internal expansion or acquisition of one of the smaller firms in the relevant markets, the acquisition should not be permitted to stand.

DISSENTING STATEMENT OF COMMISSIONER HANFORD

SEPTEMBER 15, 1975

I agree with Commissioner Dixon that open-top van trailers and closed-top dry freight vans are distinct product submarkets, and that the submarket which the majority has defined as encompassing both types of trailers fails to reflect economic reality. Accordingly, I find I am unable to agree with the majority's conclusion that Budd's purchase of Gindy constitutes entry by toehold acquisition.

What we have here is a situation in which Budd was, prior to the acquisition, an actual potential entrant into markets which are characterized by high concentration and substantial barriers to effective competition. Moreover, it was one of the few most likely potential entrants into these markets. Budd could have entered these markets by toehold acquisition or *de novo* through internal expansion. It had the capacity to do so. Had it entered in either of these two ways, it would have been a direct competitor of Gindy, which at the time of the acquisition was ranked number two in the production of open-top van trailers. In addition, the other leading firms in this market would have had to contend with aggressive new competition from Budd as

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for the other by the end user, and that there is no price cross-elasticity between them would be determinative. So it should be with open and closed-top van trailers.

[2] This assumption is unquestionably without merit with respect to the open-top van trailer submarket, as Gindy's 16 percent share of that submarket placed it as the second largest producer of these vans.

well as the existing competition from Gindy. Thus, the acquisition results in the loss of one of the few firms which could have and was likely to be, had it entered *de novo* or by a toehold acquisition, an important additional competitor in this highly concentrated market.

OPINION OF THE COMMISSION

AUGUST 29, 1975

BY ENGMAN, *Commissioner:*

The Budd Company appeals from the initial decision in this matter in which the administrative law judge found that its acquisition of the Gindy Manufacturing Corporation ("Gindy") in 1968 violated Section 7 of the Clayton Act.

According to the Fortune Directory of the 500 Largest United States Industrial Corporations, in 1967 Budd was the 250th largest industrial corporation in the nation in terms of sales ($469.5 million) and was one of the largest independent automotive suppliers in the nation and the largest independent supplier of body parts to the automotive industry. Budd principally manufactured automotive bodies, wheels, rims, hubs, drums, brakes, jigs and dies used in the manufacture of automotive body parts. In addition it was a leading manufacturer of railroad and mass transit cars.

Prior to its acquisition by Budd on Oct. 22, 1968, Gindy was a Pennsylvania corporation engaged in the manufacture and sale of van trailers, containers and container chassis. For fiscal year 1968, Gindy sales were approximately $32 million and its assets amounted to about $44 million.

On Oct. 22, 1968, through an exchange of Budd stock valued at $29.7 million, Budd acquired the outstanding capital stock of Gindy.

The complaint alleges that prior to the acquisition Budd was one of the most likely potential entrants into the manufacture and sale of van trailers, closed-top dry freight van trailers, open-top van trailers, and containers and container chassis, and that by acquiring Gindy, Budd eliminated itself as a substantial potential competitor in these markets. The complaint further alleges that these markets and segments thereof are highly concentrated and characterized by high entry barriers.

After extensive hearings, the administrative law judge sustained these allegations and entered an order requiring divestiture of the acquired firm.

I. RELEVANT PRODUCT MARKETS

The broadest product markets found by the ALJ to be appropriate for this case are (1) "van trailers" and (2) "containers and chassis." "Van trailers" refers to the large box-type trailers attached permanently to a chassis with wheels that are pulled by a truck tractor. Truck trailers that are *not* "van trailers" would include tank and bulk commodity trailers (for hauling liquids, gas, cement, and the like); platform trailers and low bed heavy haulers (used, for instance, to transport heavy machinery and girders); pole and logging trailers; and dump trailers. Trucks and truck bodies are not included with the term "van trailers" which is used exclusively to refer to trailers of 5-ton capacity or more that are pulled by a truck tractor. A van trailer can be open or closed at the top and is usually made with aluminum or steel or both. Vans represent by far the largest percentage of all types of truck trailers.

"Containers and chassis" refer to large, closed box-type structures which can be used for intermodal transportation of goods, by rail, motor carrier, or ship. The container is designed to be detachable from the chassis on which it sits when pulled by a truck. Sizes are standardized and containers must be strong enough to be hoisted and stacked on top of one another during shipboard transit.

Respondent does not dispute the existence of these product markets, although it suggests that a broader "all truck trailer" market would be a more appropriate market in which to view the acquisition.

We are satisfied that the "van trailers" and "containers and chassis" each constitute appropriate markets for purposes of the case. It is not disputed that van trailers are produced on fairly unique production lines which cannot be quickly utilized to produce other types of non-van trailers such as tank, platform, logging, or dump trailers. Also, because of their special design, there is little or no substitution in end use between van trailers and these other types of truck trailers. Likewise, containers and chassis serve a distinct function that separates them from van trailers and they are usually constructed on different assembly lines than those used to build van trailers.

In addition to the foregoing product markets, the ALJ found that subcategories of van trailers listed by the Department of Census as "closed-top dry freight van trailers" and "open-top van trailers," constitute relevant submarkets for purposes of this case. Respondent takes sharp issue that these finer divisions constitute markets, as did its economist-witness Dr. Oliver Williamson (Tr. 2088-2090).

We agree with respondent and its expert witness that "closed-top dry freight van trailers" and "open-top van trailers" do not constitute meaningful economic markets. The market for open top trailers is limited as they are used mainly to carry freight, such as steel lengths, which must be loaded from the top by cranes. Census reported a total of $19.8 million in open-top van trailer production for 1968 as compared to $246.1 million for closed-top dry freight van trailers.[1] Although it is true that a buyer may not find these types substitutable for particular end uses, the record nevertheless establishes that production and distribution facilities for each are identical and are essentially identical among other types of vans. Both "closed" and "open" top vans are commonly made by all van trailer manufacturers, including Gindy, and do not require separate assembly lines (CX 90, 91, Tr. 386-87, 572, 640-41, 703, 877, 890, 1343).

No doubt the reason that complaint counsel urge the existence of separate "closed-top" and "open-top" van markets is that Gindy's "market share" is much higher if these product lines are used. Although Gindy's share of all van trailer shipments in 1968 was 8.4 percent (giving it an industry rank of number 4), its production of open-top trailers happened to represent nearly 16 percent of all open-top van trailer shipments in that year (giving it a rank of number 2 in the production of open-top vans). Its share of U.S. production of "closed-top dry freight vans" in 1968 and 1969 also exceeded 10 percent. The inappropriateness of making a distinction in market definitions based on the presence or absence of a top on the trailer[2] is evidenced by the fact that in the following year, although Gindy's market share and ranking stayed nearly the same in overall van sales, its shipment of open-top trailers declined precipitously from $3,150 million to $1,268 million resulting in a drop from 15 percent to 7.8 percent of the industry total in just one year. The difference was made up by the production of other types of van trailers, thus evidencing ease of production flexibility. By 1972, Gindy's share of open-top vans dropped even further, down to 4.17 percent.

The ALJ, in accepting complaint counsel's argument that "closed-top" and "open-top" van trailers each constitute a relevant submarket, mechanically relied on the fact that several of the submarket criteria referred to in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962) were applicable, such as peculiar characteristics and uses, distinct prices, and industry recognition of open-top van trailers as a category of truck trailers. But as the Court observed in a later case, "[T]hese [Brown Shoe] guidelines offer no precise formula for judgment and they necessitate, rather than avoid, careful consideration based upon the entire record" *United States* v. *Continental Can Co.*, 378 U.S. 441, 449 (1964). Cross-elasticity of supply can also be an important consideration in defining markets. See *Brown Shoe, supra* at 325 n. 42. The interchangeability of production and distribution facilities between two products is a strong indication that in measuring the relevant market and the degree of market power held by firms, the output of both products should be included since the manufacturer of one can shift readily to the production and sale of the other in response to profit opportunities. *Cf. Sterling Drug, Inc.*, 80 F.T.C. 477 (1972). See also *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 510-11 (1948). Because the record establishes such a high degree of cross-elasticity of production, and identical marketing ease, among van trailers, we conclude that "open-top" and "closed-top" van trailers do not constitute separate submarkets.

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[1] Total production of all vans in 1968 amounted to $381.7 million. It should be noted that "open-top vans" and "closed-top dry freight vans" do not account for all vans. In addition to these subcategories, Census lists under "vans" the following; insulated vans ($84 million), drop frame (furniture-type) vans ($22 million), and livestock vans ($9 million).

[2] There are differences in construction between open-top and closed-top freight trailers in addition to the presence or absence of a roof. Open-top trailers must have stronger top rails among other things and in fact sell for a slightly higher price than equivalent size closed-top vans. Nevertheless, as noted, production procedures and equipment are the same. Both types of trailers are produced on the same assembly line, and no additional expenditures are required to switch production capability from one to the other (Tr. 386-87, 1343).

In adopting "van trailers" and "containers and chassis" as lines of commerce, we do not deny that there is probably an even broader economic market encompassing these and other trailers. It appears that there is considerable interchangeability in production equipment and skills over the long-run between all types of truck trailers except for tank and bulk commodity trailers which seem to fall in a specialized production class all of their own. Indeed, the Commission in *Fruehauf Trailer Co.*, 67 F.T.C. 878 (1965) found "truck trailers generally" to be a relevant product market for analyzing the acquisitions involved there. Consequently, in addition to the two product markets adopted in the initial decision, we will also examine the instant acquisition in terms of market share statistics for a broader market consisting of all truck trailers (except tank and bulk commodity trailers).

II. GEOGRAPHIC MARKET

The record supports the ALJ's findings that the relevant geographic market is the United States as a whole for sales of van trailers and containers and chassis. This is not to say that all trailer manufacturers are able to compete uniformly throughout the Nation. High transportation costs, even for such mobile products as trailers, make it difficult to supply trailers to distant locations. Nevertheless neither party suggests that anything less than the Nation should be considered the proper geographic market.

Respondent does argue that foreign producers of containers have competed with domestic producers of containers and that purchasers of containers look beyond the boundaries of the United States for supplies of this product. Respondent asserts that since the market statistics for containers do not include container production of foreign firms, the initial decision's market analysis is defective insofar as containers are concerned. The record indicates that there has been little competition from foreign-made containers insofar as domestic consumption in this country is concerned. Shipping lines are the primary buyers of containers and Federal regulations prohibit American shipping line operators from purchasing cargo containers of foreign manufacture with capital reserve funds. 30 F.R. 12036 (Sept. 21, 1965). Furthermore, since the devaluation of the U.S. dollar, foreign container manufacturers have found it particularly difficult to sell containers in this country.

III. MARKET CONCENTRATION

Universe figures for the various lines of commerce described above were taken from Census Bureau publications. Shipments of individual firms were obtained directly from the manufacturers. The following tables show relevant data for the years 1966 through 1968 for Gindy and the leading three firms in each of the markets:[3]

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[3] The record source for much of the tabulated data was placed *in camera* by the ALJ. In view of the fact that the figures are over six years old, no third party interests are likely to be harmed by their disclosure. See Section 3.45(a) the Commission's Rules of Practice and Procedure.

TABLE I

All Trailer Production Less Tanks and Bulk Commodity Trailers

	1966 Industry: $579,350		*1967 Industry: $506,462*		*1968 Industry: $593,387*	
	$(000)	*%*	*$(000)*	*%*	*$(000)*	*%*
Fruehauf	146,226	25.24	125,156	24.71	171,377	28.88
Trailmobile	89,268	15.41	64,859	12.81	73,238	12.34
Strick	72,900	12.58	65,321	12.90	66,781	11.25
Gindy	37,769	6.52	24,776	4.89	35,661	6.01
Top 4	59.75		55.59		58.49	
Top 8	75.46		73.79		75.83	
Gindy's Rank	4		5		4	

Source: Table V of "Respondent's Confidential Proposed Findings," Industry totals: RX 48, CX 39; Fruehauf, RX 406 A-F-18, CX 165A-165I, RX 436A-F-9, CX 166A-166D; Trailmobile, RX 407 A-E-63, CX 168A-172L; Strick RX 408 A-L, CX 157 A-B; Gindy RX 409 A-H, CX 178 A-D.

TABLE II

Van Trailers

	1966 Industry: $400,001		*1967 Industry: $318,567*		*1968 Industry: $381,665*	
	$(000)	*%*	*$(000)*	*%*	*$(000)*	*%*
Fruehauf	92,500	23.13	68,073	21.37	105,148	27.61
Trailmobile	67,913	16.98	48,341	15.17	47,465	12.35
Strick	55,512	13.88	41,122	12.91	40,441	10.60
Gindy	28,992	7.25	22,725	7.13	32,176	8.43
Top 4	61.24		56.68		58.99	
Top 8	79.89		80.83		80.69	
Gindy's Rank	4		4		4	

Source: Table III of "Respondent's Confidential Proposed Findings," Industry totals: RX 48, 49, CX 39; Fruehauf, RX 406 A-F-18, CX 165A-165I, RX 436A-F-9, CX 166A-166D; Trailmobile, RX 407 A-E-63, CX 168A-172L; Strick RX 408 A-L, CX 157 A-B; Gindy RX 409 A-H, CX 178 A-D.

TABLE III

Containers and Chassis

	1968 *Industry: $81,956*	
	$(000)	*%*
Fruehauf	28,868	35.35
Strick	21,029	25.75
Trailmobile	19,094	23.38
Dorsey	4,703	5.75
Great Dane	3,709	4.18
Gindy	3,128	3.83
Top 4	90.23	
Top 8	99.48	
Gindy's Rank	6	

Source: Commission exhibit 90.

Before the loss of a potential entrant can be viewed as violating Section 7, it must be established that the market is concentrated or threatens to become so, that entry barriers are high, and that the acquired firm is a leading factor in the market. *Kennecott Copper Corp.*, 78 F.T.C. 744, 921-22 (1971), *aff'd*, 467 F.2d 67 (10th Cir. 1972); *The Bendix Corp.*, 77 F.T.C. 731 (1970), *remanded for further proceedings*, 450 F.2d 534 (6th Cir. 1971). If the market is not concentrated, there is usually little opportunity for the sellers to collectively maintain prices above competitive levels and any diminution of potential competition will not be material. On the other hand, if the market is concentrated but entry barriers are low, potential competition will be important but since there will be a large number of firms able to come into the market under approximately the same conditions, the merger of one of those firms with an existing seller will make no difference because the threat of new entry will remain approximately the same. *Beatrice Foods Company*, 81 F.T.C. 481, 530 (1972); *General Mills, Inc.*, Dkt. 8836, Slip Opinion Oct. 5, 1973, p.5 n.2 [83 F.T.C. 696].

As the foregoing tables show, 4-firm concentration ratios are approximately 60 percent or more, with the largest firm, Fruehauf, usually representing about 25 percent of output. The top three firms (Fruehauf, Trailmobile, and Strick) collectively shared more than 50 percent of the output in each of the markets during the three years leading up to the year of acquisition. Although the record indicates that the balance of the markets are shared by nearly a hundred firms, clearly these markets are substantially concentrated. *The Stanley Works*, 78 F.T.C. 1023, 1065 n. 12 (1971), *aff'd*, 469 F.2d 498 (2d Cir. 1972); *Beatrice Foods Company*, Dkt. 8864 (July 1, 1975) [86 F.T.C. 1].

In addition, the ALJ found that there were substantial barriers to entry insofar as entering on a substantial level of production is concerned. Respondent argues that no barriers exist, as the manufacture of trailers and containers requires no extensive know-how or expensive equipment, patent licenses are not required, only a small amount of capital is needed to start manufacturing, and there appear to be no significant economies of scale in manufacturing. However we think the record bears out the ALJ's finding, although the term "barriers to effective competition" might convey a more accurate picture than "barriers to entry," see *Fruehauf Trailer Co.*, 67 F.T.C. 878, 930-931 (1965). Small van trailer manufacturers generally do not have the ability to extend or obtain credit to finance a sale of a large number of trailers to large customers or to offer finance terms competitive with terms offered by the large trailer manufacturers. It is not uncommon for the largest companies in the industry to sell trailers to fleet operators with virtually no downpayment on 6 to 8 year credit terms (I.D. findings 68-69). Manufacturers who do not have the capital resources to finance sales on these terms generally cannot arrange such favorable terms through banks (Tr. 257-58, 371-73, 502, 757, 829, 840, 873-74, 886).

In addition, the larger van manufacturers have an advantage as they have geographically-dispersed branch outlets that enable them to service and resell large lots of used trailers that have been accepted as trade-ins in sales to fleet operators.

Respondent argues that these requirements are merely incremental in nature since any given sales transaction requires a small additional amount of money and it is possible to enter "on a shoestring" if one is willing to do so. This may be so, but the most important customers are the large motor common carriers and truck-leasing companies who buy in large lots—often a hundred or several hundred units at a time. Only a few trailer manufacturers, led by Fruehauf and Trailmobile, have had the facilities to deal with these fleet operators who prefer to place their orders with manufacturers who can accept trade-ins on a large scale and extend favorable financing terms.

Lest there be any misunderstanding, we do not suggest as does the initial decision, that the superior ability of the larger trailer manufacturers to offer services and financing is an "unfair" advantage that is somehow anticompetitive. The advantages are ones that basically arise out of firm size and, although in part may be caused by imperfections in the capital market, are nevertheless beneficial to the customers who are served thereby. They should therefore, be viewed as providing real, and not simply "pecuniary," economies.

The ALJ found that the trailer manufacturing industry is "highly profitable." However there is little concrete evidence in the record in the form of actual profit data. Although Gindy in the year preceding the acquisition had been highly profitable (this fact quickened Budd's interest in acquiring it), little information is revealed by the profit and loss statements of the top firms since for the most part they are parts of conglomerate corporations which do not report profits and losses on a product-line basis.[4] There was much testimony to the effect that the industry is at least *regarded* by both insiders and outsiders as a low-profit industry. A number of firms have exited from the industry in recent years because of losses, including Highway Trailer Company, which in 1968 ranked number six in the van trailer market.

The record indicates that from 1966 onward van trailer prices have not risen at a pace commensurate with increases in cost of labor and material. Prices even declined to below 1966 levels from 1967 through 1969 (I.D. finding 65 and accompanying charts).

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[4] By 1968, Fruehauf was a large diversified corporation. In terms of assets it exceeded Budd in size and ranked as the 234th largest industrial corporation in the country. Trailmobile was owned by the Pullman Company which was the 149th largest corporation. Until December 1968 Strick was a subsidiary of Penn Central. Brown Trailers was a division of the Clark Equipment Company, the 193rd largest corporation in terms of sales. Great Dane Trailers was a subsidiary of United States Freight Company.

The foregoing suggests that despite the degree of concentration evidenced by the market share figures, the market may have been performing in a manner that has yielded prices and profits at a competitive or near-competitive level. The Commission has taken this into account in evaluating complaint counsel's argument that the loss of Budd as a grassroots entrant was an important loss to the market.

IV. BUDD AS A POTENTIAL ENTRANT

The administrative law judge found that since at least 1956 Budd has been a potential entrant into the manufacture and sale of van trailers and containers and chassis and that by acquiring Gindy, Budd removed itself as an actual future entrant in these markets either by entry *de novo* or by acquisition of a small company. In addition he found that Budd was perceived by firms in the market as a potential entrant and loss of its presence at the edge of the market removed any disciplining effects that would have ensued from its continued presence as a perceived potential entrant.

Respondent takes strong issue with all of these findings, arguing that Budd was not interested in entering the trailer industry except by acquisition of a firm having an operation of the scale and profitability that Gindy possessed. Respondent argues that the Gindy acquisition was in fact procompetitive because Gindy's advancement in the market had reached a plateau and without access to capital for expansion and financing of sales on a mere competitive basis it could not hope to make inroads on the market position of Fruehauf and Trailmobile.

On the question of whether Budd was a perceived potential entrant, we disagree with the ALJ. A large number of industry witnesses testified in this proceeding and when asked whether they had viewed Budd as a potential entrant before the Gindy acquisition, the response was uniformly "no." Notwithstanding such testimony the ALJ reasoned:

> In the spring of 1968, Gindy suspended [merger] negotiations with Budd. At that time Budd's executives contacted Miller and Dorsey, both van trailer manufacturers, concerning possible acquisition. A third-party consultant approached Theurer, another van trailer manufacturer. Budd also contacted Utility twice during the period 1963 to 1968. Thus, at least four van trailer manufacturers were aware of Budd's interest shortly before the acquisition of Gindy. (initial decision pp. 50-51. [pp. 562, herein])

However executives from Miller, Dorsey, Theurer and Utility testified they did not perceive Budd as a potential entrant (Tr. 714, 1660, 1831, 1852, 1917). Prior to the time Budd acquired Gindy, these and the other trailer companies who appeared at the hearing did not take Budd into account in formulating competitive practices and prices (Tr. 524, 714, 753-54, 1304, 1439, 1510-11, 1646, 1738-39, 1776, 1904, 1917, 2216-17). Nor is there any reason to believe that had the Gindy acquisition not taken place Budd's continued presence outside the market would have influenced industry prices. Numerous industry witnesses, including representatives from the market leaders, identified other firms and types of firms they considered more likely to enter the truck trailer industry than Budd. These included automobile manufacturers (Tr. 1362-63), truck tractor manufacturers (Tr. 1362-63, 1511-14, 1591, 1628-29, 1633, 1740-42, 1777-78, 1868) and truck body manufacturers (Tr. 1588-91, 1753-54). No witness testified that their prices or practices were affected by these firms. The only conclusion that can be reasonably drawn from the evidence is that there is no basis upon which to believe that *Budd's* continued presence at the edge of the market would have any greater effect on market performance.

We are left then with the argument that Budd was a likely actual entrant which would have entered the market at some time in the future by means other than the Gindy acquisition.[5] This finding is also strongly disputed by the respondent. We find it unnecessary, however, to review the lengthy arguments that have been presented on this issue.

Although the ALJ found that Budd was an actual potential entrant into the van and container markets, we think he jumped too quickly to the conclusion that entry by way of acquiring Gindy was anticompetitive. Insufficient attention was paid to whether Gindy should be viewed as a "toehold or foothold firm," acquisition of which would lead to improved competition against dominant market leaders. As the Commission observed in *Bendix Corporation, supra* 77 F.T.C. at 818-19 (1970); "[I]n a highly concentrated, sluggish market, the acquisition of a small industry member by a powerful, innovative firm which, by building upon the base of the smaller firm can pose a more effective competitive challenge to the industry giants [may promote competition]. Such procompetitive mergers are not only not forbidden by Section 7, they are positively encouraged." "[T]he threat of a toehold merger by a powerful firm may often serve as a much greater incentive to competitive performance in the affected market than the prospect of more costly and slower internal, *de novo* expansion." *id.* at 819.[6]

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[5] The Supreme Court has explicitly reserved decision on whether elimination of a non-perceived but likely entrant can violate Section 7 of the Clayton Act. As it noted in *United States* v. *Marine Bancorporation, supra*, 418 U.S. at 625:

"The Court has not previously resolved whether the potential competition doctrine proscribes a market extension merger solely on the ground that such a merger eliminates the prospect for long-term deconcentration of an oligopolistic market that in theory might result if the acquiring firm were forbidden to enter except through a de novo undertaking or through the acquisition of a small existing entrant (a so-called foothold or toehold acquisition). Falstaff expressly reserved this issue." Accord *U.S.* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 537.

The Commission has recently reaffirmed its view that elimination through merger of a likely procompetitive entry falls within the scope of Section 7. *Beatrice Foods Company*, Dkt. 8864, July 1, 1975, slip opinion, p. 12 n.6 [86 F.T.C. 1 at 63].

In the *Bendix* case the Commission struck down the acquisition by Bendix of the third-ranking firm (Fram) which had 17.2 percent of the market. However it characterized as a toehold firm that could lawfully have been acquired by Bendix, fourth-ranking Wix Manufacturing Company which had 9.5 percent of the market and was not shown to be technologically inferior. Similarly, the Ajax Company, recognized as a permissible toehold or foothold candidate in *Stanley Works,* 78 F.T.C. 1023, 1072 (1971) *aff'd on other grounds,* 469 F.2d 498, 508-09 n.24 (2d Cir. 1972), ranked third in the market with a share of about 8 percent. As we recently noted, the Commission has generally considered "firms having market shares below 10 percent as toehold companies, acquisition of which would have been procompetitive" *Beatrice Foods Company,* Dkt. 8864 (July 1, 1975, slip opinion p. 17 n.8 [86 F.T.C. 1 at 67]).

V. GINDY'S POSITION IN THE INDUSTRY

Market share data set forth *supra,* show that Gindy ranked considerably below Fruehauf, Trailmobile, and Strick. In the overall trailer market Gindy's share fluctuated between 4.9 percent and 6.5 percent during the three years prior to the merger. In the van trailer market, where Gindy's share was highest, it never rose appreciably above 7-8 percent as compared to Fruehauf's 27 percent and Trailmobile's 17 percent. Gindy's market position in 1968 was much closer to firms ranking below it, such as Brown Trailer (6.6 percent of the van trailer market in 1968), Highway (5.5 percent), and Great Dane (5.1 percent). Complaint counsel in fact characterize Highway and Great Dane as available "toehold" firms. In the container-and-chassis market, Gindy ranked number 6 with only 3.8 percent of the market.

At the time of acquisition, Gindy's principal manufacturing plant was located in Eagle, Pa., in addition to which it had a manufacturing plant located in Lebanon, Pa. and in Martinsville, Va.; and a relatively small production facility in St. Louis, Mo., which was later closed down as obsolete. Gindy was described by numerous industry witnesses as being a regional producer. Ninety-five percent of its sales were made in the Eastern part of the United States. In contrast, Fruehauf and

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[6] See also *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319: "When concern as to the Act's breadth [amended Section 7] was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market * * *."

Trailmobile were viewed by industry witnesses as the "national companies," and for many years have dominated the industry.[7] Fruehauf, for instance, had trailer production plants located in California (two plants), Texas (two plants), Nebraska, Tennessee, Pennsylvania, and Ohio. In addition it owned 80 sales and/or service outlets located throughout the country. Trailmobile had production facilities in Pennsylvania, Missouri, Texas, and California, and 30 factory-owned branch service and sales outlets. At the time Gindy was acquired by Budd the only facilities owned by Gindy outside of the Philadelphia area, except for the aforesaid manufacturing plants, was an outlet for selling used trailers which was located in Chicago, Ill. and a facility in Camden, N.J. for repairing used trailers.

Fruehauf, Trailmobile, and Strick had their own finance divisions, which because of their leverage in the money market, were able to offer financing on better terms than were generally available from banks. Prior to the merger, Gindy depended upon credit arrangements with several banks and an insurance company. The record shows, and the ALJ found, that "because of the tight money situation [in 1968] for all van trailer manufacturers, Gindy could not secure the financing to expand its position in its various markets rapidly as it had been expanding" I.D. finding 22; Tr. 275-76.

The administrative law judge, in holding that Gindy could not be viewed as a toehold or foothold acquisition candidate, relied on the fact that Gindy's shares in the alleged submarket "closed-top freight vans" exceeded 10 percent in 1968 and 1969 (findings 151-154). However, as we have held, this is not a meaningful economic market or submarket and Gindy's shares varied from 3 to 8 percent in the relevant markets during the years immediately prior to the merger.

We believe it to be desirable to observe a general rule in potential competition cases that firms possessing no more than 10 percent in a target market (where, as here, the 4-firm concentration is approximately 60 percent or more) should ordinarily be presumed to be toehold or foothold firms. This presumption by no means is conclusive and the inference of lack of anticompetitive effects flowing from acquisition of such a firm can be rebutted in particular cases.[8] The 10 percent

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[7] "From the earliest days of the truck-trailer industry, fifty years ago * * * respondent [Fruehauf] has at all times been the nation's leading manufacturer of trucks, and by a substantial margin. . . . With one other large firm, Trailmobile, it has consistently accounted for more than one-half of the industry's sales * * *." *Fruehauf Trailer Co.*, 67 F.T.C. 878, 929-30 (1965).

[8] In *United States* v. *Phillips Petroleum Co.*, 367 F. Supp 1226 (C.D. Cal. 1973), *aff'd per curiam without opinion*, 94 S. Ct. 3199 (1974), the district court held that acquisition of Tidewater Oil Company by the Phillips Petroleum was not a toehold or foothold acquisition. Tidewater ranked seventh in the sale of motor gasoline in California (the relevant market) and had a 6-7 percent share of the market. The Court specifically found that "Phillips did not use Tidewater as a small base from which to expand its operations and did not have a substantial need to build upon the acquisition

(Continued)

demarcation is supported by the prior Commission cases, as noted, and is not inconsistent with the Department of Justice Merger Guidelines.[9]

In this case, the presumption is supported by the record which shows that the acquisition of Gindy by Budd engendered increased capacity and other procompetitive forces, the very effects the toehold doctrine was designed to elicit.

The record shows that to compete optimally in this industry, a producer of trailers must have a network of plants and sales and service facilities geographically dispersed throughout the country, a broad line of truck trailer products, and capability to provide financing of customers' purchases of trailers on competitive terms (Tr. 257-58, 372-73, 397, 752, 674-75, 1134, 1316, 1319, 1321-23, 1425, 1428-31, 1491-92, 1644, 1794). Geographic dispersion of plants and outlets is required for several reasons. Customers of trailer manufacturers have been getting larger and so have the size of their orders. Freight costs of delivering are substantial and it is difficult to compete in States which are far distant from a manufacturing plant (Tr. 1328-29, 1618-19, 1662, 1773-74). Branch factories and outlets provide greater capacity to fill large orders, take trades, and provide service and repair facilities (Tr. 1728, 1768-69, 1793).

We have already noted that at the time of acquisition Fruehauf and Trailmobile were the only producers of trailers and containers that operated on a nationwide basis. Their product lines were far broader than other producers of van trailers and chassis (Tr. 902, 1318, 1427-28, 1583, 1720, 1873). Fruehauf has been recognized as the dominant market factor in setting financing terms to customers (Tr. 502, 518-19, 675, and see *Fruehauf Trailer Co.*, [67] F.T.C. 878, 920-924 (1965)). Fruehauf, Trailmobile and Strick were offering more attractive finance terms than Gindy was able to obtain or offer.

In the opinion of Gindy officials, without the financial assistance Budd made available to Gindy subsequent to the acquisition it is doubtful that Gindy would have substantially augmented its preacquisition level of operations (Tr. 515, 274-75; 1228-29, 1242). Budd officials viewed Gindy as undercapitalized in comparison to Fruehauf and other major trailer companies, and that with Budd's help it could grow to become a more effective competitor, particularly in the area of financing trailer sales, and could be expanded from a regional to a national competitor (see, *e.g.* CX 10F, CX 69E, Tr. 1050-51).

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* * *" *id.* at 1258. As indicated in the discussion in the text the facts are quite different with respect to Budd's acquisition of Gindy.

[9] The Guidelines states in pertinent part (¶18): "[T]he Department will ordinarily challenge any merger between one of the most likely entrants into the market and; * * * (iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75% or more, provided the merging firm's share of the market amounts to approximately 10% or more." 1 CCH Trade Reg. Rep. ¶4510. Two refinements noted in subparagraph (iv)—that challenges will also be made (A) where the merging firm's share of the market is not insubstantial and there are no more than one or two likely entrants into the market or (B) the merging firm is a rapidly growing firm—are not applicable here. The record does not support a finding that there are no more than one or two likely entrants in the trailer business. And, as indicated in this opinion, there is substantial reason to believe that Gindy had reached a plateau in its growth absent a means of raising capital at a cost lower than was available to it in 1968.

Subsequent to the acquisition, Budd established a financial corporation to help finance the van trailers sold by Gindy as well as sales by other Budd divisions. By virtue of this finance subsidiary Gindy was able to finance trailer sales on more competitive terms. Furthermore, for the first time it was able to provide customer finance on container sales, which theretofore had been considered too risky by commercial banks. This enabled Gindy to compete in container sales and financing with Fruehauf and Trailmobile (Tr. 515, 1141-43, 1153, 1235, 1322-23, 1380-81). The amount of funds available to finance Gindy customers was increased by $32 million (I.D. finding 163).

In addition, Budd enlarged Gindy's Eagle plant and increased its capacity by 40 percent at a cost to Budd of $1.75 million. An addition to the Lebanon plant was made by Budd and a cost to it of $500,000. The record supports the ALJ's finding that these alterations made Gindy by 1971 "a more efficient van trailer producer than it was at the time of acquisition" (I.D. finding 164).

At the time of the hearing, Budd had also purchased land in Chicago for a new midwestern Gindy plant and had plans to erect two new van trailer plants (CX 99B). Since the acquisition, Gindy has also opened six additional branch outlets and had plans to open four more. Budd provided between $3 and $4 million to enable Gindy to open these factory branches (Tr. 1389). Under the direction of Budd, Gindy has broadened the types of trailers which it offers and has improved the design of the Gindy van trailer.

Gindy has been viewed by its competitors as being a stronger and more effective competitor subsequent to the acquisition. A former executive vice president of Fruehauf, who viewed Gindy prior to the acquisition as "just one of the smaller competitors on the east coast," testified:

> Q. Now, did this situation change after the acquisition of Budd-of Gindy by Budd?
>
> A. Yes. Gindy opened up some new plants—branches, built another plant, got into the container business, got into the freight business to a greater extent, got into the container chassis business; were just more of a factor. They introduced a broader line of—I think they started introducing open tops; a better line of and more competitive line of refrigerator trailers. About that time, as I recall, Gene Hindin came with them and he did a fine job of redesigning, taking some cost out of the trailer and changing their whole approach toward manufacturing—quality control and everything else when he came in.
>
> And as a result, they firmed up and broadened their scope. They moved into Chicago a little more strongly, out into the west coast. The first time we started feeling their sales ability was down in the Dallas area and St. Louis (1441-1442).

The law judge, relying on the foregoing and other post acquisition changes made by Budd in the Gindy Company, concluded that the acquisition also violated Section 7 because it entrenched Gindy and raised entry barriers. Contrary to the conclusions reached by the ALJ, there is nothing in the record to support the view that the acquisition has raised existing entry barriers or has otherwise "entrenched" Gindy. Between 1968 and 1972 Gindy's dollar sales of trailers increased from $35.7 million to $56.5 million, its share of that market increasing from 6.01 percent to 7.07 percent. But it appears that Gindy's gain was Fruehauf's loss. Fruehauf's market share dropped during the same period of time from 28.88 percent to 23.28 percent. (The aggregate share of the three leading firms also declined, from 52.47 percent to 47.61 percent.) Representatives of smaller firms testified that they did not believe the acquisition had made it more difficult for them to grow. For the most part the smaller trailer manufacturers increased their respective shares of the market after 1968.[10] Although these post-acquisition data do not conclusively settle the question, clearly these are not the trends of a less competitive market.

In view of our finding that the acquisition did not lessen competition, the initial decision will be vacated and the complaint dismissed.

FINAL ORDER

This matter having been heard by the Commission upon briefs and oral argument in support of and in opposition to the appeal of respondent from the administrative law judge's initial decision herein, and the Commission, for the reasons stated in the accompanying opinion, having concluded that the appeal should be granted.

It is ordered, That the administrative law judge's initial decision be, and it hereby is, vacated and the attached opinion be, and it hereby is, adopted as the decision of the Commission, and

It is further ordered, That the complaint in this matter be, and it hereby is, dismissed.

Commissioners Dixon and Hanford dissenting.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Order Aug. 29, 1975

Administrative law judge's order denying respondents' motions and related requests relying upon assertions of *res judicata* and collateral estoppel placed on Commission's docket for review, and upon review affirmed.

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[10] Market data discussed in this paragraph are in the record and are tabulated in respondent's *in camera* proposed findings, Table V.

Appearances

For the Commission: *Roger J. McClure, Rhett R. Krulla, Anne R. Schenof, Ira S. Nordlicht, James H. Thessin, Patrick J. Quinlan, David I. Haberman* and *Roger B. Pool.*

For the respondents: *John H. Chiles*, Houston, Tex. and *Benjamin T. Richards*, New York City, for Exxon Corporation. *William Weitzel, Ass't General Counsel* and *Milton Handler, Kaye, Scholer, Fierman, Hays & Handler*, New York City, for Texaco, Inc. *Jesse P. Luton, Assoc. General Counsel*, Houston, Tex. and *Frank R. O'Hara*, Pittsburgh, Pa., for Gulf Oil Corporation. *Thomas R. Trowbridge III, Vincent A. Moccio*, and *Charles F. Rice*, New York City, for Mobil Oil Corporation. *David McKean, McKean, Whitehead & Wilson*, Wash., D.C. and *Turner H. McBaine, Pillsbury, Madison & Sutro*, San Francisco, Calif., for Standard Oil of California. *M. J. Keating, William R. Jentes, Kirkland & Ellis, Robert C. Smith*, Chicago, Ill., for Standard Oil of Indiana. *Harold F. McGuire, Wickes, Riddell, Boomer, Jacobi, & McGuire*, New York City, for Shell Oil Co. *Francis X. McCormack, Edward E. Clark* and *Donald A. Bright*, Los Angeles, Calif., *Robert E. Jordan III, Steven H. Brose* and *F. Michael Kail, Steptoe & Johnson*, Wash., D.C., for Atlantic-Richfield Company.

ORDER AFFIRMING DENIAL OF RESPONDENTS' MOTIONS BASED ON ASSERTIONS OF RES JUDICATA AND COLLATERAL ESTOPPEL

By leave of the administrative law judge, respondents have filed four applications for review of his "Order Denying Respondents' Motions and Related Requests Relying Upon Assertions of Res Judicata and Collateral Estoppel" dated Mar. 5, 1975. Essentially, respondents argue that certain issues raised in this proceeding have already been conclusively determined against the Government in previous actions brought against them by the Antitrust Division of the Department of Justice. Although he denied the motions, the law judge determined that they raised issues which met the criteria for interlocutory review set forth in Section 3.23(b) of the Commission's Rules of Practice. The Commission agrees and has determined to place the order of Mar. 5, 1975 on its docket for review.

The law judge's order was based primarily on his conclusion that judicial determinations in actions brought by the Department of Justice under the antitrust laws are not binding in subsequent actions brought by the Federal Trade Commission. His analysis of the relevant statutes convinced him that Congress did not intend that the public interest in vigorous enforcement of the antitrust laws be thwarted by strict application of the doctrines of *res judicata* and collateral estoppel. Furthermore, he found respondents' contention that privity always exists between officers of the United States Government too simplistic, in that it ignores the plain fact that the Justice Department is not authorized to enforce the Federal Trade Commission Act, which is the basis for the instant proceeding.

For the reasons stated in the law judge's thorough analysis, we are inclined to agree with the above conclusions. However, there is no need to rest our decision in this matter solely on a novel question of statutory interpretation. Even assuming the conclusive effect of the Justice Department's antitrust actions on the Commission, the doctrines of *res judicata* and collateral estoppel are inapplicable since the specific cases upon which respondents rely do not involve the same issues and charges which are raised by the instant matter.

The consent settlements cited by respondents Standard Oil Company of California and Atlantic Richfield Company were, at most, determinations that the acquisitions in question, under the conditions set forth in the agreements with the Justice Department, did not significantly lessen competition within the meaning of Section 7 of the Clayton Act. This is entirely different from the questions raised in the instant matter as to whether these companies and six other respondents have pursued "a common course of action" which inhibited competition.

Similarly inapplicable to the instant matter is the provision contained in the agreement between the Justice Department and respondents Texaco, Inc., Exxon Corporation, and Gulf Oil Corporation,[1] settling the so-called *Cartel Cases.*[2] The provision purports to bar plaintiff, which respondents vigorously argue includes the entire United States Government, from reasserting "any claim or charge * * * made by plaintiff in the complaint or otherwise in this action." Assuming, *arguendo*, that the Justice Department has the authority to bargain away the statutory duty of the Commission to make a determination as to the public interest in challenging alleged illegal acts and practices, the two matters involve clearly different "claims and charges." The *Cartel Cases* charged the above companies and others with conspiracies to violate Sections 1 and 2 of the Sherman Act and Section 73 of the Wilson Tariff Act, whereas the instant matter, as noted above, charges a different group of companies with "pursuing a common course of action" in violation of Section 5 of the Federal Trade Commission Act.

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[1] These respondents are joined in appealing the law judge's decision regarding the *Cartel Cases* by respondent Standard Oil Company (Indiana).

[2] *United States* v. *Standard Oil Co.* (*New Jersey*), 60 Trade Cases ¶69,849 (S.D.N.Y. 1960), and *United States* v. *Gulf Oil Corp.*, 1960 Trade Cases ¶69,851 (S.D.N.Y. 1960), as superseded by *United States* v. *Standard Oil Co.* (*New Jersey*), 1969 Trade Cases ¶¶72,742, 72,743 (S.D.N.Y. 1968); *United States* v. *The Texas Co.*, 1963 Trade Cases ¶70,819 (S.D.N.Y. 1963).

Finally, respondents plead the conclusive effect of two litigated matters. However, *United States* v. *Arkansas Fuel Company*, 1960 Trade Cases ¶69,619 (N.D. Okla. 1960), charging all respondents except Atlantic Richfield with criminal conspiracy, is clearly inapplicable to the instant civil action. Aside from the different nature of the charges themselves, the standard of proof must be at least as great in the subsequent action as in the former in order for *res judicata* or collateral estoppel to be applicable. *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938). This requirement is not satisfied by the judge's remarks to the effect that the Government had failed to meet its burden by a wide margin, since such remarks are merely *dicta* and do not affect the standard of proof involved.

In the other litigated matter cited by respondents, *United States* v. *Standard Oil Company* (*Indiana*), 1964 Trade Cases ¶71,215 (N.D. Cal. 1964), the court dismissed a challenge to defendant's acquisition of Honolulu Oil Corporation. Respondent/defendant now argues that all of the court's findings of fact are binding upon the Commission, including those to the effect that the petroleum industry is highly competitive at all levels (Findings No. 109-150). However, it is well established that only the "ultimate facts" which are essential to the judgment are conclusive in subsequent actions. *Yates* v. *United States*, 354 U.S. 298, 337-38 (1957). It is difficult to determine to what extent, if any, the court based its decision on the broad conclusions asserted by respondent, but one fact which is clearly essential, and which could alone be the basis for the decision, is the conclusion in the memorandum accompanying the findings that the acquisition was "*de minimis* by any standard."

For the foregoing reasons,

It is ordered, That the administrative law judge's order of Mar. 5, 1975 be placed on the Commission's docket for review.

It is further ordered, That the aforesaid order be, and it hereby is, affirmed.

Commissioner Nye concurs in the result. He believes all respondents' motions are premature and should therefore be denied.

IN THE MATTER OF

LITTON INDUSTRIES, INC.

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8778. Substitute Order, Mar. 4, 1975–Modified Order, Sept. 3, 1975

Order modifying a substitute order dated March 4, 1975, 85 F.T.C. 332, 40 F.R. 18989, by striking the compliance paragraph requiring the filing of reports every sixty (60) days and substituting a new compliance paragraph requiring the filing of compliance reports on an annual basis after finality of the order.

Appearances

For the Commission: *Harold G. Munter, Lois E. Berge, Laurence O. Masson* and *Joseph J. O'Malley.*

For the respondents: *Theodore F. Craver,* Beverly Hills, Calif., *Howrey, Simon, Baker & Murchison,* Wash., D.C. and *Hammond, Schrieber,* New York City.

ORDER MODIFYING ORDER TO CEASE AND DESIST

Respondent, by letter dated July 25, 1975, which will be treated as a petition to reopen this proceeding, has requested that the requirement that it file compliance reports at 60-day intervals, contained in the order to cease and desist issued Mar. 4, 1975, be modified so as to require only annual reports. The Bureau of Competition has filed an answer wherein it advises that it does not oppose respondent's request.

The Commission has duly considered respondent's request and has determined that it should be granted.

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by striking the compliance paragraph and substituting therefor the following:

It is further ordered, That respondent shall, within 60 days after the date of service of this order, and on the anniversary of the date of finality of the order thereafter, until respondent shall have fully complied with the provisions of this order, submit, in writing, to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying, or has complied with this order.

IN THE MATTER OF

TV STEREO CITY FREIGHT LIQUIDATORS, INC., ET AL.

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9002. Complaint, Jan. 7, 1975–Decision, Sept. 3, 1975

Order requiring a former renter and seller of stereos, television sets, and other electronic equipment formerly located in Pennsauken, N.J., among other things to cease using price misrepresentations and other unfair and deceptive means to sell its merchandise; and violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Everette E. Thomas, Richard C. Donohue* and *Mitchell Paul.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that TV Stereo City Freight Liquidators, Inc., a corporation, and Dennis R. LaVine, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have engaged in acts and practices contrary to the Commission's Trade Regulation Rule Relating to Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets (16 CFR 410), as amended, in violation of the Federal Trade Commission Act, and have also engaged in acts and practices in violation of the provisions of the above-mentioned Acts, and the implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent TV Stereo City Freight Liquidators, Inc., is a corporation organized, existing and formerly doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business formerly located at 5245 Marlton Pike, Pennsauken, N.J.

Respondent Dennis R. LaVine is an individual and is the principal officer of the corporate respondent. He formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is 31 Kendall Blvd., Oaklyn, N.J.

PAR. 2. Respondents were engaged in the advertising, offering for rental or sale, rental or sale and distribution of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or other articles of merchandise to the public at retail.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two, hereof, are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have caused their said merchandise, when rented or sold, to be shipped from their place of business in the State of New Jersey to purchasers thereof located in various other States of the United States, and maintained a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the rental or purchase of certain television sets, radios, stereos, radio/television/stereo combinations, electric appliances or other articles of merchandise, the respondents made numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of their salesmen to prospective purchasers or renters with respect to their merchandise and services.

Typical and illustrative, but not all inclusive thereof, are the following:

Rent or Buy
Scott 300 Watts
Pay only $5.68 weekly
Rent/Buy
Comparative retail value $899.
Our price Only $699.
AM/FM Stereo
Olympic 150 Watts
Modular System
$3.66 weekly
Rent/Buy
Comparative retail value $899.

Our price $799.
Emerson Briarwood 25" Color
Model 25cc90w
Pay only $6.48 weekly
Rent/Buy
Comparative retail value $899.
Our price $799.
Sanyo Automatic 19" Color TV
Pay only $3.88 weekly Rent/Buy
Comparative retail value $529.
Our price $469.
Emerson Dorchester 25" Color,
Pay Only $5.68 weekly Rent/Buy.
Comparative retail value $899.
Our price only $699.
Emerson Automatic 19" Color TV,
Pay only $3.88 weekly Rent/Buy,
Comparative retail value $529.
Our price $469 with Free Stand.
Dumont Sheridan 25" Color,
Pay only $5.68 Weekly Rent/Buy,
Comparative retail value $899.
Our price only $699.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, the respondents have represented, directly or by implication, that:

1. By and through the use of the words "Comparative Retail Value $899.00. Our price only $699.00," and other words of similar import and meaning not set out specifically herein, that said comparative retail value was the price at which the same merchandise was being offered for sale by a substantial number of the principal outlets in respondents' trade area.

2. By and through the use of the terms "Rent or Buy," "Pay Only $5.68," and other terms of similar import or meaning, that purchasers or renters of respondents' merchandise were being given a bona fide option of renting said merchandise on a week-to-week basis at the advertised rate.

PAR. 6. In truth and in fact:

1. The same merchandise was not offered for sale at the compara-

tive price by a substantial number of the principal outlets in respondents' trade area.

2. Respondents did not offer to purchasers or renters of respondents' merchandise a bona fide option of renting the merchandise on a week-to-week basis at the advertised rate. To the contrary, the rental of any of respondents' merchandise required a $100 deposit and a minimum rental period of six months.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, respondents made representations, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, concerning the size of viewable pictures shown by television receiving sets bought and distributed by them and thereby represented, directly or by implication, that the indicated size so described was the actual size of the viewable picture area measured on a single plane basis.

PAR. 8. In representing, directly or indirectly, the actual size of the viewable pictures shown by television receiving sets, respondents have represented television picture sizes that did not represent the horizontal dimension of the actual viewable picture area of the television receiving set.

PAR. 9. On Apr. 21, 1971, after due notice and hearing, the Commission promulgated its amendment of the trade regulation rule relating to the deceptive advertising of television picture sizes (31 F.R. 3342), which rule became effective on Jan. 1, 1967. This amendment of the Trade Regulation Rule relating to the Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets (16 CFR 410), as amended, became effective on Dec. 10, 1971. On the basis of its findings, as set out in the "Accompanying Statement of Basis and Purpose" of the said Trade Regulation Rule, the Commission determined that it constitutes an unfair method of competition and an unfair and deceptive act or practice to:

> Use any figure or size designation to refer to the size of the picture shown by a television receiving set or the picture tube contained therein unless such indicated size is the actual size of the viewable picture area measured on a single plane basis. If the indicated size is other than the horizontal dimension of the actual viewable picture area such size designation shall be accompanied by a statement, in close connection and conjunction therewith, clearly and conspicuously showing the manner of measurement.

PAR. 10. Notice is hereby given that the presentation of evidence in the course of a hearing in this proceeding may be required to dispose of the issues that may arise as a result of the allegations contained in Paragraphs One through Four and Paragraphs Seven through Nine herein, and that if the issues presented as a result of the allegations contained in those paragraphs should be resolved in substantiation of such allegations, then the above trade regulation rule is relevant to the alleged practices of the respondents. Therefore, the respondents are given further notice that they may present evidence, according to Section 1.12(c) of the Commission's Procedures and Rules of Practice, to show that the above trade regulation rule is not applicable to the alleged acts or practices of respondents. If the Commission should find that the above rule is applicable to the alleged acts or practices of the respondents, then it will proceed to make its findings, conclusions, and final order in this proceeding on the basis of that rule. A copy of the rule and Accompanying Statement of Basis and Purpose, marked Appendix A, is attached hereto and made a part of this pleading.

PAR. 11. The aforesaid methods of competition and acts and practices of respondents, as alleged in Paragraph Seven hereof, were contrary to the provisions and requirements of the Commission's Trade Regulation Rule relating to Deceptive Advertising As To Sizes of Viewable Pictures Shown By Television Receiving Sets (16 CFR 410), as amended, and thereby constituted unfair methods of competition in commerce and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

PAR. 12. In the course and conduct of their business respondents were in substantial competition, in commerce, with corporations, firms and individuals in the sale or rental of television sets, radios, stereos, radio/television/stereo combinations, electric appliances and other articles of merchandise of the same general kind and nature as those sold by respondents.

PAR. 13. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations and practices has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and into the purchase or rental of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two, hereof, are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 15. Subsequent to July 1, 1969, respondents in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System, have caused customers to execute binding retail installment contracts, hereinafter referred to as the contracts. Respondents have not provided these customers with any other consumer credit cost disclosures.

By and through the use of these retail installment contracts, respondents in some instances:

1. Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

PAR. 16. In the ordinary course and conduct of their business as aforesaid, respondents caused to be published advertisements to aid, promote and assist credit sales as "advertisement" and "credit sale" are defined in Regulation Z.

By and through the use of certain of said advertisements respondents:

1. Failed to make disclosures clearly, conspicuously, and in a meaningful sequence, and in the form and manner prescribed under Section 226.6(a) of Regulation Z, as required by Section 226.10(d) of Regulation Z.

2. Disclosed in a number of instances the amount of weekly payments computed to the amount of monthly payments without disclosing whether such payments will have to be made weekly or monthly if credit is extended. Failure to disclose such information has the ability and tendency to mislead or confuse customers in violation of Section 226.6(c) of Regulation Z.

3. Stated the amount of installment payment or period of payment scheduled to repay the indebtedness without also stating all the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(i) the cash price;

(ii) the amount of the downpayment or that no downpayment is required, as applicable;

(iii) the number, amount and due dates or period of payments scheduled to repay the indebtedness if credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price.

PAR. 17. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z, constitute violations of that Act, and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY THOMAS F. HOWDER, ADMINISTRATIVE LAW JUDGE

JULY 17, 1975

PRELIMINARY STATEMENT

The Commission issued a complaint on Jan. 7, 1975, charging respondents TV Stereo City Freight Liquidators, Inc., a corporation, and Dennis R. LaVine, individually and as an officer of said corporation, with unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act. The complaint also charged respondents with violating the Truth in Lending Act and the implementing regulation promulgated thereunder, in violation of the Federal Trade Commission Act.

Said complaint and accompanying notice order were personally served on respondent LaVine on Feb. 21, 1975. Under Section 4.4(a)(1)(ii) of the Commission's Rules of Practice, service upon respondent LaVine constitutes valid service upon the respondent corporation. No answer or other response has been received, although answer was required within 30 days following service.

Section 3.12(c) of the Commission's Rules of Practice provides that failure to file answer within the time provided shall be deemed to constitute waiver of the right of appearance and to contest the allegations of the complaint. Further, this section authorizes the administrative law judge, without further notice to respondents, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

Pursuant to the above rule, complaint counsel on Apr. 8, 1975, moved that respondents be held in default for failure to answer the complaint. Complaint counsel's motion is hereby granted, and the following findings, conclusions and order are issued:

FINDINGS OF FACT

PARAGRAPH 1. Respondent TV Stereo City Freight Liquidators, Inc., is a corporation organized, existing and formerly doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business formerly located at 5245 Marlton Pike, Pennsauken, N.J.

Respondent Dennis R. LaVine is an individual and is the principal officer of the corporate respondent. He formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is 31 Kendall Blvd., Oaklyn, N.J.

PAR. 2. Respondents were engaged in the advertising, offering for rental or sale, rental or sale and distribution of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or other articles of merchandise to the public at retail.

I

The findings set forth in Paragraphs One and Two are incorporated by reference into the following findings set forth in Paragraphs Three through Fourteen, inclusive.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have caused their said merchandise, when rented or sold, to be shipped from their place of business in the State of New Jersey to purchasers thereof located in various other States of the United States, and maintained a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the rental or purchase of certain television sets, radios, stereos, radio/television/stereo combinations, electric appliances or other articles of merchandise, the respondents made numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of their salesmen to prospective purchasers or renters with respect to their merchandise and services.

Typical and illustrative, but not all inclusive thereof, are the following:

Rent or Buy
Scott 300 Watts
Pay only $5.68 weekly
Rent/Buy
Comparative retail value $899.

Our price Only $699.
AM/FM Stereo
Olympic 150 Watts
Modular System
$3.66 weekly
Rent/Buy
Comparative retail value $899.
Our price $799.
Emerson Briarwood 25" Color
Model 25cc90w
Pay only $6.48 weekly
Rent/Buy
Comparative retail value $899.
Our price $799.
Sanyo Automatic 19" Color TV
Pay only $3.88 weekly Rent/Buy
Comparative retail value $529.
Our price $469.
Emerson Dorchester 25" Color,
Pay Only $5.68 weekly Rent/Buy.
Comparative retail value $899.
Our price only $699.
Emerson Automatic 19" Color TV,
Pay only $3.88 weekly Rent/Buy,
Comparative retail value $529.
Our price $469 with Free Stand.
Dumont Sheridan 25" Color,
Pay only $5.68 Weekly Rent/Buy,
Comparative retail value $899.
Our price only $699.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, the respondents have represented, directly or by implication, that:

1. By and through the use of the words "Comparative Retail Value $899. Our price only $699," and other words of similar import and meaning not set out specifically herein, that said comparative retail value was the price at which the same merchandise was being offered for sale by a substantial number of the principal outlets in respondents' trade area.

2. By and through the use of the terms "Rent or Buy," "Pay Only

$5.68," and other terms of similar import or meaning, that purchasers or renters of respondents' merchandise were being given a bona fide option of renting said merchandise on a week-to-week basis at the advertised rate.

PAR. 6. In truth and in fact:

1. The same merchandise was not offered for sale at the comparative price by a substantial number of the principal outlets in respondents' trade area.

2. Respondents did not offer to purchasers or renters of respondents' merchandise a bona fide option of renting the merchandise on a week-to-week basis at the advertised rate. To the contrary, the rental of any of respondents' merchandise required a $100 deposit and a minimum rental period of six months.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, respondents made representations, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, concerning the size of viewable pictures shown by television receiving sets bought and distributed by them and thereby represented, directly or by implication, that the indicated size so described was the actual size of the viewable picture area measured on a single plane basis.

PAR. 8. In representing, directly or indirectly, the actual size of the viewable pictures shown by television receiving sets, respondents have represented television picture sizes that did not represent the horizontal dimension of the actual viewable picture area of the television receiving set.

PAR. 9. On Apr. 21, 1971, after due notice and hearing, the Commission promulgated its amendment of the trade regulation rule relating to the deceptive advertising of television picture sizes (31 F.R. 3342), which rule became effective on Jan. 1, 1967. This amendment of the trade regulation rule relating to the Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets (16 CFR 410), as amended, became effective on Dec. 10, 1971. On the basis of its findings, as set out in the "Accompanying Statement of Basis and Purpose" of the said trade regulation rule, the Commission determined that it constitutes an unfair method of competition and an unfair and deceptive act or practice to:

> Use any figure or size designation to refer to the size of the picture shown by a television receiving set or the picture tube contained therein unless such indicated size is the actual size of the viewable picture area measured on a single plane basis. If the indicated size is other than the horizontal dimension of the actual viewable picture area

such size designation shall be accompanied by a statement, in close connection and conjunction therewith, clearly and conspicuously showing the manner of measurement.

PAR. 10. Respondents were placed on notice by the complaint that they could present evidence in the course of a hearing in this proceeding as might be required to dispose of the issues that could arise as a result of the allegations contained in Paragraphs One through Four and Paragraphs Seven through Nine herein, and that if the issues presented as a result of the allegations contained in those Paragraphs should be resolved in substantiation of such allegations, then the above trade regulation rule would be relevant to the alleged practices of the respondents. The respondents were given further notice that they could present evidence, according to Section 1.12(c) of the Commission's Procedures and Rules of Practice, to show that the above trade regulation rule was not applicable to the alleged acts or practices of respondents, and that if the Commission should find that the above rule was applicable to the alleged acts or practices of the respondents, then it would proceed to make its findings, conclusions, and final order in this proceeding on the basis of that rule. A copy of the rule and Accompanying Statement of Basis and Purpose, marked Appendix A, was attached to the complaint and made a part of that pleading.

PAR. 11. The aforesaid methods of competition and acts and practices of respondents, as alleged in Paragraph Seven hereof, were contrary to the provisions and requirements of the Commission's trade regulation rule relating to Deceptive Advertising As To Sizes of Viewable Pictures Shown By Television Receiving Sets (16 CFR 410), as amended, and thereby constituted unfair methods of competition in commerce and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

PAR. 12. In the course and conduct of their business respondents were in substantial competition, in commerce, with corporations, firms and individuals in the sale or rental of television sets, radios, stereos, radio/television/stereo combinations, electric appliances and other articles of merchandise of the same general kind and nature as those sold by respondents.

PAR. 13. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations and practices has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and into the purchase or rental of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

II

The findings set forth in Paragraphs One and Two are incorporated by reference into the following findings set forth in Paragraphs Fifteen through Seventeen, inclusive.

PAR. 15. Subsequent to July 1, 1969, respondents in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System, have caused customers to execute binding retail installment contracts, hereinafter referred to as the contracts. Respondents have not provided these customers with any other consumer credit cost disclosures.

By and through the use of these retail installment contracts, respondents in some instances:

1. Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

PAR. 16. In the ordinary course and conduct of their business as aforesaid, respondents caused to be published advertisements to aid, promote and assist credit sales as "advertisement" and "credit sale" are defined in Regulation Z.

By and through the use of certain of said advertisements respondents:

1. Failed to make disclosures clearly, conspicuously, and in a meaningful sequence, and in the form and manner prescribed under Section 226.6(a) of Regulation Z, as required by Section 226.10(d) of Regulation Z.

2. Disclosed in a number of instances the amount of weekly payments computed to the amount of monthly payments without disclosing whether such payments will have to be made weekly or monthly if credit is extended. Failure to disclose such information has the ability and tendency to mislead or confuse customers in violation of Section 226.6(c) of Regulation Z.

3. Stated the amount of installment payment or period of payment scheduled to repay the indebtedness without also stating all the

following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(i) the cash price;

(ii) the amount of the downpayment or that no downpayment is required, as applicable;

(iii) the number, amount and due dates or period of payments scheduled to repay the indebtedness if credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price.

PAR. 17. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z, constitute violations of that Act, and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

ORDER

It is ordered, That respondents TV Stereo City Freight Liquidators, Inc., a corporation, its successors and assigns, and its officers, and Dennis R. LaVine, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or rental, sale or rental or distribution of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or any other articles of merchandise or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. (a) Representing, directly or indirectly, orally or in writing, that by purchasing any of respondents' merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise or services in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise or services at the compared price or some higher price.

(b) Representing, directly or indirectly, orally or in writing, that by purchasing any of respondents' merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which established the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise or services of like grade and quality.

(c) Representing, directly or indirectly, orally or in writing:

(1) that any amount is respondents' usual and customary retail price for merchandise unless such amount is the price at which the merchandise has been usually and customarily sold at retail by respondents in the recent regular course of business.

(2) that any saving is afforded in the purchase of merchandise from the respondents' retail price unless the price at which the merchandise is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold at retail by the respondents in the recent regular course of business.

2. Failing to maintain and produce for inspection or copying for a period of three (3) years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraph 1., of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

3. Representing, directly or indirectly, orally or in writing, that an individual can rent any of respondents' merchandise for any specified amount and any period of time without clearly and conspicuously disclosing in immediate conjunction with such offer, the terms, conditions or limitations of respondents' rental plans; or misrepresenting, in any manner, the advantages, amounts, sales, time period, terms, conditions or limitations of respondents' rental plans.

4. Using any figure or measurement to designate or describe, directly or by implication, the size of the picture tube with which their television receiving sets are equipped which is greater than the horizontal measurement of the viewable area of the tube on a single plane basis, unless it is conspicuously disclosed in immediate connection therewith that said figure or measurement is the diagonal measurement, when such is the fact; or an accurate specification of the viewable area of the tube, in square inches, is conspicuously disclosed in immediate connection with such figure or measurement.

It is further ordered, That respondents TV Stereo City Freight Liquidators, Inc., a corporation, its successors and assigns, and its officers, and Dennis R. LaVine, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as "deferred payment price" as required by Section 226.8(c)(8)(ii) of Regulation Z.

2. Failing in such advertising to make disclosures clearly, conspicuously, and in a meaningful sequence, and in the form and manner prescribed under Section 226.6(a) of Regulation Z, as required by Section 226.10(d) of Regulation Z.

3. Representing the amount of weekly payments computed to monthly payments, unless the customer is told whether he will have to make payments weekly or monthly; or stating, utilizing, or placing any additional information or explanations with any disclosure required by Regulation Z so as to mislead or confuse the customer or contradict, obscure, or detract attention from the required information, as required by Section 226.6(c) of Regulation Z.

4. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any installment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(i) the cash price;

(ii) the amount of the downpayment required or that no downpayment is required, as applicable;

(iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price.

5. Failing in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Section 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale or rental of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or any other articles of merchandise or services, utilized in the advertising, promotion or sale or rental of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or any other merchandise or services.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale or rental of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or any other merchandise or services, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale, sale of any product, consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on July 17, 1975, finding respondents to have engaged in the acts and practices as alleged in the complaint and entering a cease-and-desist order against respondents. A copy of the initial decision and order was served on the respondents on Aug. 7, 1975. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice,

It is ordered, That the initial decision and order contained therein shall become effective on Sept. 8, 1975; and

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a written report, signed by the respondents, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ASH GROVE CEMENT CO.

Docket 8785. Order, Sept. 9, 1975

Denial of respondents' petition for reconsideration of Commission's final order and opinion dated June 24, 1975.

Appearances

For the Commission: *Thomas F. McNerney, Paul N. Kane* and *Nancy P. Rosenfeld.*

For the respondent: *David J. McKean* and *Robert L. Williams, McKean, Whitehead & Wilson,* Wash., D.C.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent Ash Grove Cement Company ("Ash Grove") has moved, pursuant to Section 3.55 of the rules of practice, for reconsideration of the Commission's final order and opinion, dated June 24, 1975. [85 F.T.C. 1121]

Section 3.55 provides that a petition for reconsideration "* * * must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

Respondent claims that the Commission's order raises such a question:

> namely, conceding *arguendo* that Ash Grove's acquisition of Lee's Summit [Ready-Mixed Concrete & Materials Company] and Fordyce [Concrete, Inc.] violated the Clayton Act, whether an order of divestiture is appropriate and in the public interest in view of substantial evidence in the record which shows that the challenged acquisitions resulted in consumer benefits in the form of lower prices and a vigorous enhancement of price competition in the sale of portland cement and ready-mixed concrete in the "Kansas City" area.

Respondent, however, had an opportunity, which it exercised, to argue before the Commission its claim that the acquisitions benefited consumers and enhanced price competition. See respondent's brief on appeal at 30-38. The Commission ordered divestiture of Fordyce and Lee's Summit only after a full review of the record, including the extensive briefing and oral argument on appeal, and a consideration of all of respondent's contentions raised therein.

It is ordered, That respondent's petition for reconsideration be, and it hereby is, denied.

In the Matter of

HERTZ CORPORATION, ET AL.

Docket 9033. Order, Sept. 9, 1975

Denial of application of Investor Protective League, Inc., for review of administrative law judge's order denying its motion to intervene.

Appearances

For the Commission: *Thomas F. McNerney, William J. Murphy III* and *Charles G. Brown II.*

For the respondents: *Jerome Schestack, Schnader, Harrison, Segal & Lewis* and *Irving Kagan,* Philadelphia, Pa., for Hertz Corporation. *Alan S. Ward, Baker, Hostetler, Frost & Towers,* Wash., D.C. for Avis Rent-A-Car System, Inc. *Michael P. Sullivan, Gray, Plant, Mooty & Anderson,* Minneapolis, Minn., *J. Wallace Adair, Howery, Simon, Baker & Murchison,* Wash., D.C. and *Robert W. Bird,* Minneapolis, Minn., all for National Car Rental System, Inc.

Order Denying Application for Review

The administrative law judge, on July 23, 1975, denied a motion to intervene filed by Investor Protective League, Inc., ("Investor") pursuant to Section 3.14 of the rules of practice. On Aug. 6, 1975, Investor filed an application for review of the law judge's order under Section 3.23(a).

Before the Commission will permit intervention "it must be demonstrated that (1) the persons seeking such intervention desire to raise *substantial* issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case, when considered in light of other important matters pending before the Commission" *Firestone Tire [Rubber Co.*, 77 F.T.C. 1666, 1669 (1970).

Investor is apparently a membership corporation consisting of consumer renters of automobiles from respondents. In support of its motion before the administrative law judge, Investor claimed that it had filed a class action against respondents in the United States District Court for the Eastern District of New York (Docket No. 75 Civil 940) and that the Commission's determination will have a significant impact on Investor's lawsuit. Investor also noted that if it were made a party to the proceedings before the Commission it would have available evidence before the Commission for use in its private lawsuit. Finally, Investor suggested that it has an interest in "the type of relief granted."

Investor, however, has failed to show that it will raise before the Commission any issues, substantial or otherwise, that would not otherwise be properly raised or argued. The Commission, therefore, cannot see any reason why it should exercise its discretion to review the law judge's order. Accordingly,

It is ordered, That the application of Investor Protective League, Inc., for review of the order of the administrative law judge denying its motion to intervene be, and it hereby is, denied.

IN THE MATTER OF

LIFETIME FILTER EQUIPMENT CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8942. Complaint, Nov. 16, 1973-Decision, Sept. 10, 1975

Consent order requiring a Freeport, N.Y., seller and distributor of filters and other swimming pool products, among other things to cease using a misleading corporate name; misrepresenting the durability or permanence of its products; furnishing means and instrumentalities of misrepresentation or deception; and misrepresenting guarantees.

Appearances

For the Commission: *John A. Crowley* and *Alan F. Rubinstein.*

For the respondents: *George Maislen*, Freeport, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Lifetime Filter Equipment Corp., a corporation, and Peter A. Cattano, Sr., individually, and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Lifetime Filter Equipment Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 6 Brooklyn Ave., Freeport, N.Y.

Respondent Peter A. Cattano, Sr. is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution to dealers and the public of products used in connection with swimming pools, including, but not limited to filters, diving boards, handrails, steps, pumps, chemicals, piping, heaters and instruments.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products by dealers and consumers, respondents have made, and are now making, numerous statements and representations in advertising and promotional material with respect to the nature and limitations of their warranty, the durability of their products, and their business affiliations.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

LIFETIME is revolutionizing
the swimming pool market
THE DYNAMIC NEW
LIFETIME FILTER
HPF 1000

Unconditional
GUARANTEE
Lifetime Filter

PAR. 5. By and through the use of the aforesaid statements and representations and others of similar import and meaning, but not specifically set out herein, respondents have represented, and are now representing, directly or by implication, that:

1. Since the swimming pool filters manufactured and sold by respondents are the products of a corporation denominated Lifetime Filter Equipment Corp., said filters are designed to be operative for the lifetime of the original owner.

2. The swimming pool filters sold by respondents are unconditionally guaranteed.

PAR. 6. In truth and in fact:

1. The swimming pool filters sold by respondents are not lifetime filters since they are not designed to last for the lifetime of the purchaser and the guarantee offered by respondents is limited to a maximum duration of five years.

2. The swimming pool filters sold by respondents are not unconditionally guaranteed. The filters are guaranteed for a period of five years. The first year of the guarantee provides for replacement of parts at no charge to the user. The remaining four years of the guarantee provide for parts replacement on a sliding scale of charges. Therefore, the guarantee provided by respondents is subject to conditions and limitations.

Therefore, the statements and representations, as set forth in Paragraphs Four and Five hereof, were, and are, false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals in the sale of products used in connection with swimming pools, including, but not limited to, filters and other swimming pool accessories.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements and representations, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act and the respondents having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication for the purpose of considering settlement by the entry of a consent order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Lifetime Filter Equipment Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 140 E. Merrick Rd., in the Village of Freeport, State of New York.

Respondent Peter A. Cattano, Sr. is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Lifetime Filter Equipment Corp., a corporation, its successors and assigns, and its officers, and Peter A. Cattano, Sr., individually and as an officer of said corporation, and respondents' agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale and distribution of swimming pool products such as filters, diving boards, handrails, steps, pumps, chemicals, piping, heaters and instruments, or any other products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Lifetime" or any word or term denoting a definite period of time, in the corporate or trade name, to designate or describe any of the corporate respondent's products which is in excess of that for which said product is usually and customarily effective.

2. Representing, directly or by an implication, that any product sold by respondents will last or endure for a "lifetime" or for any other period beyond what can reasonably be expected for said product.

3. Using, in any manner, in conjunction with the model designations or specifications of any product sold by the respondents the word lifetime or any such word or phrase which exaggerates the life expectancy of the product.

4. Furnishing to dealers or any other persons, any written, printed, or photographic material in which the word lifetime is used in any manner in describing any product sold by the respondents.

5. Representing, directly or by implication, that any of respondents' products are warranted or guaranteed, unless:

(1) the nature and extent of the warranty or guarantee, the identity of the warrantor or guarantor and the manner in which the warrantor or guarantor will perform thereunder are clearly and conspicuously disclosed in immediate conjunction therewith, and,

(2) the guarantor does in fact perform all of the actual and represented obligations and requirements, directly or impliedly represented, under the terms of each such warranty or guarantee.

It is further ordered, That the prohibitions contained in provision 1. of this order shall become effective as of Oct. 1, 1975.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future personnel and distributors of respondents engaged in the advertising, offering for sale or sale of respondents' products, installations or services, and that respondents secure a signed statement acknowledging the receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

WINN-DIXIE STORES, INC.

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket C-1110. Modified Order, June 24, 1968-Modified Order, Sept. 10, 1975

Order modifying an earlier order dated Sept. 14, 1966, 70 F.T.C. 611, 31 F.R. 13080, modified June 24, 1968, 73 F.T.C. 1056, 33 F.R. 10205, pursuant to order of the United States District Court for the Middle District of Florida, 377 F.Supp. 733, 9 S.&D. 1016, by requiring prior Commission approval of food store acquisitions by respondent only in those States or subdivisions where respondent presently operates such stores or departments.

Appearances

For the Commission: *Mary L. Azcuenaga* and *William M. Sexton.*

For the respondent: *J. Shepard Bryan, Jr.*, Jacksonville, Fla., *Collier, Shannon, Rill & Edwards*, Wash., D.C.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

The Federal Trade Commission, having issued a consent order herein on Sept. 14, 1966, and having modified said consent order on June 24, 1968, and the United States District Court for the Middle District of Florida having enjoined the Commission from failing to reopen the consent order proceeding for the purpose of modifying the order in accordance with the order entered by the Commission against the Kroger Company in F.T.C. Docket No. C-2067; now therefore,

It is ordered, That this matter be, and it hereby is, reopened.

It is further ordered That the order issued in this matter on Sept. 14, 1966, as modified on June 24, 1968, be, and it hereby is, modified to read as follows:

It is ordered, That:

(A) For a period of ten (10) years from Sept. 14, 1966, to the extent specified in subparagraphs (B) and (C) below, Winn-Dixie Stores, Inc., shall not merge with or acquire, directly or indirectly, through subsidiaries or in any other manner, except with the prior approval of the Commission upon written application, the whole or any part of any grocery store (an establishment classified in Industry No. 5411, Standard Industrial Classification Manual, 1967 revision, or a grocery department in a nonfood store), where such acquisition involves:

(1) Five (5) or more grocery stores or grocery departments in nonfood stores, or

(2) Annual grocery store or grocery department sales of more than five million dollars ($5,000,000), or

(3) Combined (Winn-Dixie and the grocery stores or grocery departments to be merged or acquired) grocery store or grocery department sales of more than five percent (5%) of total grocery or food store sales in any city or county in the United States.

(B) The prohibition contained in subparagraph (A) shall apply to any merger or acquisition of grocery stores or grocery departments in nonfood stores located in the following described areas of the United States: The States of Alabama, Florida, Georgia, Kentucky, North Carolina and South Carolina; that portion of the State of Tennessee east of the 86th meridian; that portion of the Commonwealth of Virginia west of the 78th meridian and south of the 38th parallel; the Parish of Concordia in the State of Louisiana and the counties of Adams, Lincoln, Pike and Forrest in the State of Mississippi and those portions of the States of Louisiana and Mississippi south of the 31st parallel; and that portion of Mississippi east of the 89th meridian; and that portion of the State of Indiana south of the 39th parallel.

(C) The prohibition contained in subparagraph (A) shall also apply to any merger or acquisition of grocery stores or grocery departments in nonfood stores located in any city or county in those portions of the United States not described in subparagraph (B), if Winn-Dixie is then operating any grocery stores or grocery departments in nonfood stores in such city or county.

(D) For a period of ten (10) years from Sept. 14, 1966, Winn-Dixie shall not merge with or acquire, directly or indirectly, through subsidiaries or in any other manner, any grocery store or grocery department in a nonfood store for which prior approval is not required pursuant to subparagraphs (A)-(C) without providing sixty (60) days' prior notification to the Commission, or, when the time schedule does not permit such notification, without providing a letter to the Commission within ten (10) days after the agreement or understanding in principle is reached, stating that the time schedule does not permit sixty (60) days' prior notification and setting forth the reasons why such prior notification cannot be made; *Provided, however,* That for mergers or acquisitions involving not more than four (4) grocery stores or grocery departments in nonfood stores and representing annual grocery store or grocery department sales of not more than five million dollars ($5,000,000), notification to the Commission shall be provided within thirty (30) days following the consummation of such merger or acquisition.

It is further ordered, That within (30) days from the effective date of this Order, and annually thereafter until it has fully complied with this order, Winn-Dixie Stores, Inc., shall submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each person having authority to approve grocery store acquisitions and mergers.

IN THE MATTER OF

NORTH AMERICAN POOLS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2724. Complaint, Sept. 10, 1975–Decision, Sept. 10, 1975

Consent order requiring a Totowa, N.J., seller, distributor and installer of swimming pools, among other things to cease using unfair and deceptive sales practices including misrepresenting the availability of merchandise; misrepresenting prices; disparaging advertised products; misrepresenting guarantees and product durability.

Appearances

For the Commission: *John A. Crowley* and *Alan F. Rubinstein.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal

Trade Commission, having reason to believe that North American Pools, Inc., a corporation, and John Maione, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent North American Pools, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 547 Union Blvd., Totowa, N.J.

Respondent John Maione is an individual and is an officer of North American Pools, Inc. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His home address is 253 Fifth St., Palisades Park, N.J.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of swimming pools and swimming pool accessories.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, the aforementioned swimming pools and swimming pool accessories, when sold, to be shipped from the places of business of their supplier located in the United States to purchasers thereof located in States other than the State from which such shipments originate.

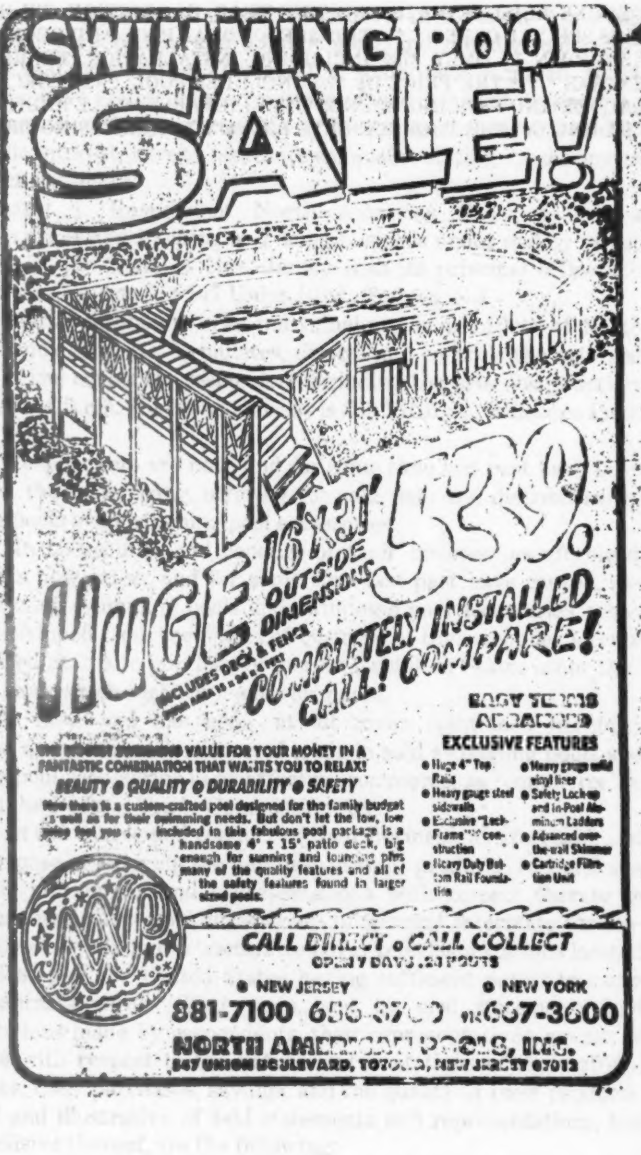
There is now, and has been, at all times mentioned herein a substantial and continuous course of trade in said swimming pools and swimming pool accessories in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their products, respondents have made statements and representations with respect thereto in advertisements inserted in newspapers of general interstate circulation, and by advertisements transmitted over television stations located in some States of the United States having sufficient power to carry such broadcasts across State lines, and by oral statements and representations made by respondents, their representatives, agents or employees with respect to the nature and limitations of their offers, their prices, their purchases, savings, and the quality of their products.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

> THIS IS IT * * * THIS IS WHAT OWNING YOUR OWN FAMILY POOL IS ALL ABOUT * * * NO BEACH CROWDS, NO TRAFFIC * * * JUST FUN IN THE SUN AND FAMILY TOGETHERNESS. OUR COMPLETE LINE INCLUDES THE

DELUXE LEISURE MATE AND THIS YEAR, IN ADDITION, WE CAN MAKE THIS SPECIAL OFFER * * * THIS 31 FOOT OVAL POOL AND DECK, EXACTLY AS SHOWN IS ONLY $789 INCLUDING INSTALLATION. THERE ARE NO EXTRAS * * * THE PRICE OF $789 INCLUDES POOL, PATIO DECK, FILTER, LADDER AND FENCING. SOUNDS UNBELIEVABLE? CALL RIGHT NOW AND LET ONE OF OUR POOL EXPERTS PROVE IT. THERE IS NO OBLIGATION.



SWIMMING POOL SALE!

HUGE 16'x31' OUTSIDE DIMENSIONS

INCLUDES DECK & FENCE

SWIM AREA 15 x 24 x 4 FEET

$539.

COMPLETELY INSTALLED

CALL! COMPARE!

EASY TERMS ARRANGED

THE HIGHEST SWIMMING VALUE FOR YOUR MONEY IN A FANTASTIC COMBINATION THAT WANTS YOU TO RELAX!

BEAUTY ● QUALITY ● DURABILITY ● SAFETY

Now there is a custom-crafted pool designed for the family budget as well as for their swimming needs. But don't let the low, low price fool you . . . included in this fabulous pool package is a handsome 4' x 15' patio deck, big enough for sunning and lounging plus many of the quality features and all of the safety features found in larger sized pools.

EXCLUSIVE FEATURES

- Huge 4" Top Rails
- Heavy gauge steel sidewalls
- Exclusive "Lock-Frame" construction
- Heavy Duty Bottom Rail Foundation
- Heavy gauge solid vinyl liner
- Safety Lock-up and In-Pool Aluminum Ladders
- Advanced over-the-wall Skimmer
- Cartridge Filtration Unit

CALL DIRECT ● CALL COLLECT

OPEN 7 DAYS . 24 HOURS

● NEW JERSEY ● NEW YORK

881-7100 656-3700 667-3600

NORTH AMERICAN POOLS, INC.

847 UNION BOULEVARD, TOTOWA, NEW JERSEY 07012

* * * Unconditionally guaranteed for 10 years * * * Swimming Pools are maintenance Free * * * Usual Selling Price * * * excess of $4000 * * * Reduced Prices * * * use of Pools as models or demonstrators.

PAR. 5. By and through the use of the aforesaid statements and representations and others of similar import and meaning, but not specifically set out herein, respondents have represented and are now representing, directly or by implication, that:

1. The offers set out in their advertisements are bona fide offers to sell swimming pools of the kind therein described and on the terms and conditions stated.

2. Their advertised offers of a swimming pool for $489, $589 or $789 is a special or sale price and respondents' purchasers or potential purchasers are being offered a price for said pool which would effect a savings amounting to the difference between the special or sale price and some higher price at which such pool is usually and customarily sold.

3. Swimming pools sold by respondents are maintenance free.

4. Some swimming pools sold by respondents are unconditionally guaranteed for a period of ten years.

5. Certain swimming pools sold by respondents are usually sold at prices higher than those offered to potential purchasers and therefore respondents' purchasers are being offered a special or bargain price for said pools which would effect a savings amounting to the difference between the usual and customary price and the price at which the pools are being sold.

6. After the installation of their pool is completed, some purchasers who permit their pools to be used for demonstration and advertising purposes by respondents in selling pools to other persons would receive an allowance or reduction in price.

PAR. 6. In truth and in fact:

1. The offers set out in respondents' advertisements are not bona fide offers to sell swimming pools of the kind therein described at the prices or on the terms and conditions stated but are made for the purpose of obtaining leads to persons interested in purchasing said pools. After obtaining such leads, respondents' salesmen or representatives call upon such persons and disparage respondents' advertised swimming pools and otherwise discourage the purchase thereof and attempt to sell and frequently do sell different and more expensive swimming pools.

2. The advertised swimming pools are not being offered for sale at special or reduced prices and savings are not thereby afforded to purchasers from respondents' usual and customary selling price.

3. The swimming pools sold by respondents are not maintenance free.

4. The swimming pools sold by respondents are not warranted in every respect without conditions or limitations for a period of ten years or any other period of time. Such warranty or guarantee as may be provided is subject to numerous terms, conditions and limitations with respect to the duration of the warranty or guarantee. The purchaser is not informed of the nature and extent of the warranty or guarantee, the identity of the warrantor or guarantor and the manner in which the warrantor or guarantor will perform thereunder until after the installation of the swimming pool.

5. Certain swimming pools sold by respondents have not usually been sold at prices higher than those offered to potential purchasers. Respondents use the stated higher price to mislead potential purchasers into the belief that they are receiving a special or discount price. Respondents do not have a usual and customary selling price for these pools and the prices at which these pools are sold is often substantially below the stated price and varies from purchaser to purchaser depending upon the resistance of the particular purchaser.

6. After the installation of the swimming pool sold by respondents is completed, the purchaser's pool will not, in most instances, be used for demonstration or advertising purposes by respondents. As a result of allowing, or agreeing to allow their pools to be used as demonstrators or models, purchasers are not granted reduced prices or allowances.

Therefore, the statements and representations as set forth in Paragraph Four hereof, were, and are, false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, and in furtherance of a sales program to induce the purchase of their swimming pools and swimming pool accessories, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Six above, respondents or their salesmen or representatives have induced purchasers to sign contracts upon initial contact by not giving the purchaser sufficient time to carefully consider the purchase and consequences thereof.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements were and are true and into the purchase of substantial quantities of respondents' swimming pools and swimming pool accessories by reason of said erroneous and mistaken belief.

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, with corporations, firms and individuals engaged in the sale of swimming pools and other products of the same general kind and nature as sold by respondents.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent North American Pools, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 547 Union Blvd., Totowa, N.J.

Respondent John Maione is an individual and is an officer of said corporation. He formulates, directs and controls the acts and practices of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, North American Pools, Inc., a corporation, its successors and assigns, and its officers, and John Maione, individually and as an officer of the aforesaid corporation and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, distribution or installation of swimming pools or any other product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising or offering for sale any products for the purpose of obtaining leads or prospects for the sale of different products unless the advertised products are capable of adequately performing the function for which they are offered, and respondents maintain an adequate and readily available stock of said products.

2. Using any advertising, sales plan or procedure involving the use of false, deceptive or misleading statements or representations designed to obtain leads or prospects for the sale of other merchandise.

3. Representing, directly or indirectly, that any products or services are offered for sale when such is not a bona fide offer to sell said products or services.

4. Disparaging, any product, installation or service which is advertised or offered for sale by respondents.

5. Representing, directly or by implication, that any price for a swimming pool or other product or service sold by respondents is a special, preseason or sale price, when such price does not constitute a significant reduction from an established selling price at which such swimming pool, product or service has been sold in substantial quantities by respondents in the recent, regular course of business.

6. Representing, in any manner, that the swimming pools or any other products sold by respondents are maintenance free or require no periodic servicing or inspection.

7. Representing, directly or indirectly, that any of the respondents' products, installations or services are warranted or guaranteed, unless the nature and extent of the warranty or guarantee, the identity of the warrantor or guarantor and the manner in which the warrantor or guarantor will perform thereunder are clearly and conspicuously

disclosed in immediate conjunction therewith; and unless respondents promptly and fully perform all of their obligations and requirements, directly or impliedly represented under the terms of each such warranty or guarantee.

8. Representing that by purchasing any merchandise, purchasers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise has been sold or offered for sale at retail in good faith for a reasonably substantial period of time in the recent, regular course of business.

9. Misrepresenting, in any manner, the amount of savings available to purchasers or prospective purchasers of any merchandise sold or offered for sale by respondents.

10. Representing, directly or indirectly, that any price is reduced from respondents' former price if records customarily maintained by respondents fail to establish that such price constitutes a significant reduction from the price at which such merchandise has sold in substantial quantities or offered for sale in good faith for a reasonably substantial period of time, by respondents in the recent, regular course of their business.

11. Misrepresenting, directly or indirectly, that the pool of any of respondents' purchasers or prospective purchasers will be used for any type of advertising, demonstration or model or that as a result of such use, respondents' purchasers or prospective purchasers will be granted reduced prices or will receive a discount on the purchase price of said pool.

12. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

13. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face

type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

(*enter date of transaction*)

____

(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO (*Name of seller*), AT (*address of seller's place of business*), NOT LATER THAN MIDNIGHT OF (*Date*).

I HEREBY CANCEL THIS TRANSACTION.

____

(Date)

____

(Buyer's signature)

14. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

15. Including in any door-to-door contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

16. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

17. Misrepresenting in any manner the buyer's right to cancel.

18. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

19. Negotiating, transferring, selling or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

20. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or abandon any shipped or delivered goods.

Provided, however, That nothing contained in this order shall relieve respondents of any additional obligations respecting contracts required by Federal law or the law of the State in which the contract is made. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the State in which such different obligations are required. The Commission, upon showing, shall make such modifications as may be warranted in the premises.

It is further ordered, That in any advertisement for swimming pools, respondents shall disclose the material composition of the major structural components of said swimming pool including pool walls, deck, supporting members, rails and liner. Where print advertisements are utilized by respondents, said disclosures shall be set forth in a type size sufficient to clearly and conspicuously disclose the material composition of the said components to a potential purchaser. Where a pool requires periodic painting to preserve or protect wooden components thereof, respondents shall clearly and conspicuously set forth said fact in type of the same size used to list the material composition of major structural components of said swimming pools.

It is further ordered, That respondents maintain records, to be furnished upon request of the Federal Trade Commission or its staff, which disclose the factual basis for any representations or statements made with respect to any prohibition or affirmative disclosure requirement of this order, including, but not limited to, a copy of each advertisement in which a swimming pool is offered for sale at a specified price, the volume of sales of such advertised pool at the advertised price and the name and address of each purchaser of such advertised pool.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall forthwith distribute a copy of this order to all operating personnel, agents or representatives concerned with the promotion, sale and distribution of swimming pools or any other article of merchandise and secure from such person a signed statement acknowledging receipt of said order.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

TONY EVANS MOTORS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2725. Complaint, Sept. 10, 1975-Decision, Sept. 10, 1975

Consent order requiring a Reno, Nev., mobile home dealer, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Jerome M. Steiner, Jr.*
For the respondents: *Wayne N. Capurro*, Reno, Nev.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Tony Evans Motors, Inc., a corporation, doing business as Tony Evans Mobile Home Show, Capital Mobile Home Show, Mobile Home Show, and Repo Information Center, and Anthony P. Evans, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Tony Evans Motors, Inc. is a corporation organized, existing, and doing business under and by the virtue of the laws of the State of Nevada, with its principal office and place of business located at 3290 Kietzke Lane, Reno, Nev.

Individual respondent Anthony P. Evans is an officer of the corporate respondent. He formulates, directs and controls the policy, acts and practices of the corporation, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising and sale to the public of mobile homes and furniture and accessories designed for use in mobile homes.

PAR. 3. In the ordinary course of their business as aforesaid, respondents regularly arrange for and offer to arrange for the extension of consumer credit as "consumer credit" and "arrange for the extension of credit" are defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of their business as aforesaid, have published and broadcast and are causing to be published and broadcast advertisements of their goods and services, as "advertisement" is defined in Regulation Z. These advertisements aid, promote, or assist directly or indirectly extensions of consumer credit in connection with the sale of these goods and services. By and through the use of the advertisements, respondents:

1. State the rate of finance charge without describing that rate as the "annual percentage rate," in violation of Section 226.10(d)(1) of Regulation Z.

2. State the amount of the downpayment required or that no downpayment is required and/or the amount of the monthly installment payments which can be arranged in connection with a consumer credit transaction, without, in all cases, also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(i) The cash price;

(ii) The amount of the downpayment required or that no downpayment is required, as applicable;

(iii) The number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iv) The amount of the finance charge expressed as an annual percentage rate; and

(v) The deferred payment price.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and pursuant to Section 108 thereof, respondents have thereby violated Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Truth in Lending Act and the implementing regulation promulgated thereunder; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Tony Evans Motors, Inc., doing business as Tony Evans Mobile Home Show, Capital Mobile Home Show, Mobile Home Show, and Repo Information Center, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its principal place of business and office located at 3290 Kietzke Lane, Reno, Nev.

Individual respondent Anthony P. Evans is the principal officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his business address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Tony Evans Motors, Inc., a corporation, doing business as Tony Evans Mobile Home Show, Capital Mobile Home Show, Mobile Home Show, and Repo Information Center, or by any other name, and its successors and assigns, and its officers, and Anthony P. Evans, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any extension or arrangement for the extension of consumer credit, or any advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Stating, in any advertising, the rate of any finance charge without stating the rate of that charge expressed as an "annual percentage rate," as required by Section 226.10(d)(1) of Regulation Z.

2. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any installment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price;

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount, and due dates or period of payment scheduled to repay the indebtedness if the credit is extended;

(d) the amount of the finance charge expressed as an annual percentage rate; and

(e) the deferred payment price.

3. Failing, in any advertisement, to make all disclosures, determined in accordance with Section 226.4 and 226.5 of Regulation Z, at the time and in the manner, form and amount prescribed by Section 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any sale or extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, to aid, promote, or assist any extension of consumer credit, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ORLANDO OF CALABRIA, INC., ETC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2726. Complaint, Sept. 15, 1975-Decision, Sept. 15, 1975

Consent order requiring a Bronx, N.Y., promoter of a hair implant system, among other things to cease misrepresenting the nature, appearance and other related characteristics of its system; and failing to disclose that their system involves surgical procedures and continually requires special care. Further, respondents are required to devote 15 percent of all of their advertisements to warning prospective customers of the inherent dangers associated with their system of hair implant replacement.

Appearances

For the Commission: *Lester G. Grey.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Orlando of Calabria, Inc., a corporation, trading also as Orlando of Italy, and Orlando Jiacinto, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Orlando of Calabria, Inc., trading also as Orlando of Italy, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 2 W. Fordham Road, Bronx, N.Y.

Respondent Orlando Jiacinto is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents operate the Orlando of Italy salon and promote on their own behalf, among others, the implant hair replacement system hereinafter sometimes referred to as the "system." The system involves a surgical procedure whereby synthetic sutures (prolene) or similar synthetic thread are stitched into the scalps of respondents' customers. Hairpieces are then attached to the suture loops. Respondents sell, install and maintain the system, except that the surgical procedure itself is performed by a medical doctor.

PAR. 3. In the course and conduct of their business, respondents promote the system by advertising in newspapers of general circulation which are distributed across State lines, and by mailing promotional literature to prospective customers who respond to such advertising. As a result of such newspaper advertising, and literature mailing, respondent has maintained a substantial course of trade in commerce, as "commerce" is used in Sections 5 and 12 of the Federal Trade Commission Act, and as a result of such newspaper advertising and mailing of promotional literature, have disseminated and caused to be disseminated false advertisements by United States mails, within the meaning of Section 12(a)(1) of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of the hair implant replacement system, respondents, directly have made numerous statements and representations in advertisements inserted in newspapers of general circulation and in other promotional literature. Typical of the statements and representations contained in said advertisements and promotional literature, but not all inclusive, are the following:

> Our new medical process gives you a full head of permanent hair.
> Permanence and the completely natural look.
> You can really shampoo, swim, dive, ski, etc.
> So natural a procedure that your friends will think you are growing new hair.
> You can participate in all activities!
> Your new hair looks, feels, and functions like your own.
> * * * Can be restyled easily with a pocket comb.
> * * * It won't come off.

PAR. 5. Through the use of the above advertisements, and others of similar import and meaning but not expressly set out herein, and by oral statements and representations made by employees and agents of the respondents, respondents have represented, directly or by implication, that:

1. The implant system does not involve wearing a hairpiece, or toupee.

2. The hairpiece applied becomes part of the anatomy like natural hair, and has characteristics of natural hair, including the following:

(a) The same appearance as natural hair upon normal observation and upon extreme close-up examination.

(b) It may be cared for like natural hair, particularly in that actions such as washing, combing, brushing and mussing may be performed on it in the same manner as might a person with natural hair.

(c) The wearer may engage in physical activities with as much disregard for his hairpiece as might a person with natural hair.

3. After the system has been applied, the wearer can care for it himself, and will not have to seek professional or skilled assistance in maintaining the system, and that the customer will not incur charges over and above the charge for installing the system.

PAR. 6. In truth and in fact:

1. The system does involve the wearing of a hairpiece or toupee.

2. The hairpiece applied does not become part of the anatomy like natural hair. The system involves the suturing of synthetic threads into the scalp of the recipient by a surgical procedure and which may be rejected by the body. The hairpiece differs from natural hair in many respects, including the following:

(a) It does not have the same appearance as natural hair in a substantial number of instances. It is often discernible as a hairpiece or toupee upon normal observation, and upon extreme close-up examination.

(b) It cannot be cared for like regular hair but requires special care and handling. Strong pulling on the hair, such as may be expected to occur in washing, combing, brushing, and mussing, can cause pain because of the pressure exerted on the sutures in the scalp, may cause bleeding, and may cause the sutures to pull out. As a consequence, washing the hair and scalp is difficult. Because washing is difficult, foreign particles and dead skin tissue tend to accumulate beneath the implant hair application and become a significant source of irritation. The hair styles into which the hairpiece may be combed or brushed without professional treatments are limited.

(c) The wearer may not engage in physical activities with as much disregard for his hairpiece as might a person with natural hair. The wearer must at all times be careful that the hair does not pull or get pulled, or become tangled, or strained. Discomfort and pain may be caused by common actions, such as rolling the head on a pillow during sleep.

3. The wearer cannot in most instances care for the hairpiece himself; he must seek professional or skilled assistance on many occasions. Medical problems associated with the surgery or the continuing presence of synthetic thread in the scalp may require subsequent visits to a medical doctor. A substantial additional charge for such service could be incurred. Respondents' applied hair is subject to bleaching in sunlight and other discoloration normally associated with hairpieces, and where the hairpiece has been color-dyed, loss of dye through washing and normal wear; thus replacement hairpieces are required at intervals in order to maintain a color match with any natural hair the wearer may have.

The statements and representations set forth in Paragraphs Four and Five were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, respondents, have represented in advertisements the asserted advantages of the system, as hereinbefore described. In many cases, respondents have represented their system to be painless and have not disclosed in such advertisements that a surgical procedure is a required step in the system. In no case have respondents' advertisements disclosed:

(a) that clients may experience discomfort and pain as a result of the surgical procedure, from the synthetic sutures themselves, and from pulling normally incident to wearing the hairpiece;

(b) that clients will be subject to the risk of irritation, infections, and skin diseases as a result of the surgical procedure and as a result of the synthetic sutures remaining in the scalp;

(c) that permanent scarring to the scalp may result from the required surgical procedures, and as a result of the synthetic sutures remaining in the scalp.

The consequences described in this paragraph have in fact occurred, and to a reasonable medical certainty can be expected to occur, and respondents knew, and had reason to know, that they could be expected to occur. Furthermore, the surgical procedure has not been used in conjunction with respondents' system for a sufficient experimental period to determine the extent of seriousness of the above side effects, and whether there are any other side effects, including but not limited to rejection of the synthetic sutures through the human body's natural rejection process.

Therefore, the advertisements referred to in Paragraph Seven are false and misleading and the acts and practices referred to in said paragraph are unfair and deceptive.

PAR. 8. For the purpose of inducing the purchase of the system, respondents entice members of the purchasing public to their salon with advertisements of "a permanent head of hair that will not come off" as a solution to baldness and like advertisements to attract members of the purchasing public concerned about their hair loss, and with offers of free information without any obligations. In most cases respondents do not disclose details of their system unless and until a prospect visits their salon. When members of the purchasing public have visited the salon, they have been subjected to emotional sales pressure, for the purpose of persuading them to sign a contract for the application of the implant system, and to make a substantial downpayment, without being afforded a reasonable opportunity to consider and comprehend the scope and extent of the contractual obligations involved, the seriousness of the surgical procedure and the possibilities of discomfort, pain, disease, or disfigurement related to the continued presence of the synthetic suture in the scalp. Persons are insistently urged to sign such contracts and make such down payments, through the use of persistent and emotionally forceful sales presentations employing the following tactics, among others:

1. Representing that the psychological benefit of having hair replaced is so significant as to be of immediate necessity and that, subconsciously, bald men are desperate for prompt relief.

2. Inducing prospects to sign contracts and/or make down payments before they have consulted a medical doctor and freely and openly discussed with such doctor the medical risks and consequences of the surgical procedure, and of the synthetic suture being embedded in their scalp. Such consultations typically occur immediately before the commencement of surgery, by which time the client is likely to feel pressured to go through with the application.

Therefore, the advertisements referred to in Paragraph Eight were and are false and misleading, and the acts and practices set forth in such paragraph were and are false and deceptive.

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms, and individuals, in the sale of cosmetics, devices and treatments for the concealment of baldness.

PAR. 10. The use by respondents of the above unfair and deceptive representations and practices has had, and now has, the capacity and tendency to mislead consumers, and to unfairly influence consumers to hurriedly and precipitately sign contracts for the application of the implant hair replacement system, and to make partial or full payment therefor, without affording them reasonable opportunity to consider and comprehend the scope and extent of the contractual obligations involved, or the seriousness of the surgical procedure, and the possibilities of discomfort, pain, disease or disfigurement related thereto, and related to the continual presence of the synthetic suture in the scalp, or to compare prices, techniques, and devices available from competing corporations, firms, and individuals selling baldness concealment cosmetics, devices, and treatments to the purchasing public.

PAR. 11. The respondents' acts and practices alleged herein are to the prejudice and injury of the purchasing public, and to respondents' competitors, and constitute unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, and false advertisements disseminated by United States mails, and in commerce, in violation of Section 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Orlando of Calabria, Inc., trading also as Orlando of Italy, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 2 W. Fordham Rd., Bronx, N.Y.

Respondent Orlando Jiacinto is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Orlando of Calabria, Inc., a corporation, trading also as Orlando of Italy or under any other name or names, its successors and assigns and its officers, and Orlando Jiacinto, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device or through franchisees or licensees, in connection with the advertising, offering for sale, sale, or distribution of the implant replacement system or other hair replacement product or process involving surgery (hereinafter sometimes referred to as the "system"), in commerce, as "commerce" is defined in the Federal Trade Commission Act, or by the United States mails within the meaning of Section 12(a)(1) of the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That the system does not involve wearing a device or cosmetic which is like a hairpiece or toupee;

2. That after the system has been applied, the hair applied becomes part of the anatomy like natural hair, and has the following characteristics of natural hair:

a. The same appearance in all applications as natural hair, upon normal observation, and upon extreme close-up examination;

b. it may be cared for like natural hair where care involves possible pulling on the hair;

c. the wearer may engage in physical activity and movement with the same disregard for his hair as he would if he had natural hair.

3. That after the system has been applied, the wearer can care for it himself, and will not have to seek professional or skilled assistance in maintaining the system, and that the customer will not incur maintenance costs over and above the cost of applying the system.

It is further ordered, That respondents, in advertising, offering for sale, selling or distributing the system, disclose clearly and conspicuously that:

1. The system involves a surgical procedure resulting in the implantation of synthetic sutures in the scalp, to which hair is affixed.

2. By virtue of the surgical procedure involving implantation of synthetic sutures in the scalp, and by virtue of the synthetic suture remaining in the scalp, there is a risk of discomfort, pain, infection, scarring, and other skin disorders.

3. Continuing special care of the system is necessary to minimize the probabilities and risks referred to in subparagraph two of this paragraph, and such care may involve additional costs for medications and assistance.

4. The purchaser is advised to consult with his personal physician about the system before deciding whether to purchase it.

Respondents shall set forth the above disclosures separately and conspicuously from the balance of each advertisement or presentation used in connection with the advertising, offering for sale, sale, or distribution of the system, and shall devote no less than 15 percent of each advertisement or presentation to such disclosures. *Provided, however*, That in advertisements which consist of less than ten column inches in newspapers and periodicals, and in radio and television advertisements with a running time of one minute or less, respondents may substitute the following statement, in lieu of the above requirements:

> Warning: This application involves surgery whereby synthetic sutures are placed in the scalp. Discomfort, pain, and medical problems may occur. Continuing care is necessary. Consult your own physician.

No less than 15 percent of such advertisements shall be devoted to this disclosure, such disclosure shall be set forth clearly and conspicuously from the balance of each of such advertisements, and if such disclosure is in a newspaper or periodical, it shall be in at least eleven point type.

It is further ordered, That respondents, in connection with the sale of the system, provide prospective purchasers with a separate disclosure sheet containing the information required in the immediately preceding paragraph of this order, subparagraphs one through four thereof, and that respondents require that, prior to executing any contract to purchase said system, such prospective purchasers, sign and date the disclosure sheet after the sentence, "I have read the foregoing disclosures and understand what they mean," and that Orlando of Calabria, Inc. provide a copy of said disclosure sheet to the customers and retain such signed disclosure sheet for at least three years.

It is further ordered, That, in connection with the sale of the system, no contract for application of the system shall become binding on the purchaser prior to midnight of the third day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed, and that:

1. Respondents shall clearly and conspicuously disclose, orally prior

to the time of sale, and in writing on any contract, promissory note or other instrument executed by the purchaser in connection with the sale of the system, that the purchaser may rescind or cancel any obligation incurred by mailing or delivering a notice of cancellation to the office responsible for the sale prior to midnight of the third day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed.

2. Respondents shall provide a separate and clearly understandable form which the purchaser may use as a notice of cancellation.

3. Respondents shall not negotiate any contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to midnight of the fifth day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed.

It is further ordered, That respondents, in connection with the advertising, offering for sale, sale, or distribution of the system, serve a copy of this order upon each present and every future licensee or franchisee, and upon each physician participating in application of respondents' system, and obtain written acknowledgment of the receipt thereof; and that respondents obtain from each present and future licensee or franchisee an agreement in writing, (1) to abide by the terms of this order, and (2) to cancellation of their license or franchise for failure to do so; and that respondents cancel the license or franchise of any licensee or franchisee that fails to abide by the terms of this order. Respondents shall retain such acknowledgments and agreements for so long as such persons or firms continue to participate in the application or sale of respondents' system.

It is further ordered, That respondents, in connection with the advertising, offering for sale, sale, or distribution of the system, forthwith distribute a copy of this order to each of their operating divisions or departments.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, licensees, or franchisees, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That in the event that the corporate respondent merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation or to any other person, said respondent shall require such successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; *Provided*, That if said respondent wishes to present to the Commission any reasons why said order should not apply in its present form to said successor or transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

It is further ordered, That the individual respondent Orlando Jiacinto promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further understood that nothing contained in this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies.

Nothing in this order shall be construed to imply that any past or future conduct of respondents is subject to and complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

HAIR REPLACEMENT CENTERS OF FLUSHING, INC., ETC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2727. Complaint, Sept. 15, 1975-Decision, Sept. 15, 1975

Consent order requiring a Flushing, N.Y., promoter of a hair implant system, among other things to cease misrepresenting the nature, appearance and other related characteristics of its system; and failing to disclose that their system involves surgical procedures and continually requires special care. Further respondents are required to devote 15 percent of all of their advertisements to warning prospective customers of the inherent dangers associated with their system of hair implant replacement.

Appearances

For the Commission: *Lester G. Grey.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hair Replacement Centers of Flushing, Inc., a corporation, trading also as American Hair Design Centers, and Jan Felson, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hair Replacement Centers of Flushing, Inc., trading also as American Hair Design Centers, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 33-21 Francis Lewis Blvd., Flushing, N.Y.

Respondent Jan Felson is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents operate the Hair Replacement Centers of Flushing salon and promote on their own behalf, among others, the implant hair replacement system hereinafter sometimes referred to as the "system." The system involves a surgical procedure whereby synthetic sutures (prolene) or similar synthetic thread are stitched into the scalps of respondents' customers. Hairpieces are then attached to the suture loops. Respondents sell, install and maintain the system, except that the surgical procedure itself is performed by a medical doctor.

PAR. 3. In the course and conduct of their business, respondents promote the system by advertising in newspapers of general circulation, and by classified telephone directories which are distributed across State lines, and by mailing promotional literature to prospective customers who respond to such advertising. As a result of such directory, newspaper advertising, and literature mailing, respondent has maintained a substantial course of trade in commerce, as "commerce" is used in Sections 5 and 12 of the Federal Trade Commission Act, and as a result of such directory, newspaper advertising and mailing of promotional literature, have disseminated and caused to be disseminated false advertisements by United States mails, within the meaning of Section 12(a)(1) of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of the hair implant replacement system, respondents, directly have made numerous statements and representations in advertisements inserted in newspapers of general circulation and in other promotional literature. Typical of the statements and representations contained in said advertisements and promotional literature, but not all inclusive, are the following:

IT IS A PATENTED TECHNIQUE OF PERMANENTLY IMPLANTING HAIR TO THE SCALP USED EXCLUSIVELY BY HAIR REPLACEMENT CENTERS.

* * * MEDICAL IMPLANTS DO NOT REQUIRE PERIODIC ADJUSTMENTS.

CAN A HAIR IMPLANT BE DETECTED? NO, BECAUSE IT IS PERFECTLY MATCHED TO YOUR HAIR, REGARDLESS OF COLOR, TEXTURE AND TYPE.

YOU CAN SWIM, SHAMPOO, SKI OR PARTICIPATE IN ALL SPORTS WITHOUT FEAR OF EMBARRASSMENT.

* * * LESS THAN IF YOU OWNED TOUPEES.

PAR. 5. Through the use of the above advertisements, and others of similar import and meaning but not expressly set out herein, and by oral statements and representations made by employees and agents of the respondents, respondents have represented, directly or by implication, that:

1. The implant system does not involve wearing a hairpiece, or toupee.
2. The hairpiece applied becomes part of the anatomy like natural hair, and has characteristics of natural hair, including the following:

(a) The same appearance as natural hair upon normal observation and upon extreme close-up examination.

(b) It may be cared for like natural hair, particularly in that actions such as washing, combing, brushing and mussing may be performed on it in the same manner as might a person with natural hair.

(c) The wearer may engage in physical activities with as much disregard for his hairpiece as might a person with natural hair.

3. After the system has been applied, the wearer can care for it himself, and will not have to seek professional or skilled assistance in maintaining the system, and that the customer will not incur charges over and above the charge for installing the system.

PAR. 6. In truth and in fact:

1. The system does involve the wearing of a hairpiece or toupee.
2. The hairpiece applied does not become part of the anatomy like natural hair. The system involves the suturing of synthetic threads into the scalp of the recipient by a surgical procedure and which may be

rejected by the body. The hairpiece differs from natural hair in many respects, including the following:

(a) It does not have the same appearance as natural hair in a substantial number of instances. It is often discernible as a hairpiece or toupee upon normal observation, and upon extreme closeup examination.

(b) It cannot be cared for like regular hair but requires special care and handling. Strong pulling on the hair, such as may be expected to occur in washing, combing, brushing, and mussing, can cause pain because of the pressure exerted on the sutures in the scalp, may cause bleeding, and may cause the sutures to pull out. As a consequence, washing the hair and scalp is difficult. Because washing is difficult, foreign particles and dead skin tissue tend to accumulate beneath the implant hair application and become a significant source of irritation. The hair styles into which the hairpiece may be combed or brushed without professional treatments are limited.

(c) The wearer may not engage in physical activities with as much disregard for his hairpiece as might a person with natural hair. The wearer must at all times be careful that the hair does not pull or get pulled, or become tangled, or strained. Discomfort and pain may be caused by common actions, such as rolling the head on a pillow during sleep.

3. The wearer cannot in most instances care for the hairpiece himself; he must seek professional or skilled assistance on many occasions. Medical problems associated with the surgery or the continuing presence of synthetic thread in the scalp may require subsequent visits to a medical doctor. A substantial additional charge for such service could be incurred. Respondents' applied hair is subject to bleaching in sunlight and other discoloration normally associated with hairpieces, and where the hairpiece has been color-dyed, loss of dye through washing and normal wear; thus replacement hairpieces are required at intervals in order to maintain a color match with any natural hair the wearer may have.

The statements and representations set forth in Paragraphs Four and Five were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, respondents, have represented in advertisements the asserted advantages of the system, as hereinbefore described. In many cases, respondents have represented their system to be painless and have not disclosed in such advertisements that a surgical procedure is a required step in the system. In no case have respondents' advertisements disclosed:

(a) that clients may experience discomfort and pain as a result of the surgical procedure, from the synthetic sutures themselves, and from pulling normally incident to wearing the hairpiece;

(b) that clients will be subject to the risk of irritation, infections, and skin diseases as a result of the surgical procedure and as a result of the synthetic sutures remaining in the scalp;

(c) that permanent scarring to the scalp may result from the required surgical procedures, and as a result of the synthetic sutures remaining in the scalp.

The consequences described in this paragraph have in fact occurred, and to a reasonable medical certainty can be expected to occur, and respondents knew, and had reason to know, that they could be expected to occur. Furthermore, the surgical procedure has not been used in conjunction with respondents' system for a sufficient experimental period to determine the extent of seriousness of the above side effects, and whether there are any other side effects, including but not limited to rejection of the synthetic sutures through the human body's natural rejection process.

Therefore, the advertisements referred to in Paragraph Seven are false and misleading and the acts and practices referred to in said paragraph are unfair and deceptive.

PAR. 8. For the purpose of inducing the purchase of the system, respondents entice members of the purchasing public to their salon with advertisements of "It is a patented technique of permanently implanting hair to the scalp used exclusively by Hair Replacement Centers." as a solution to baldness and like advertisements to attract members of the purchasing public concerned about their hair loss, and with offers of free information without any obligations. In most cases respondents do not disclose details of their system unless and until a prospect visits their salon. When members of the purchasing public have visited the salon, they have been subjected to emotional sales pressure, for the purpose of persuading them to sign a contract for the application of the implant system, and to make a substantial downpayment, without being afforded a reasonable opportunity to consider and comprehend the scope and extent of the contractual obligations involved, the seriousness of the surgical procedure and the possibilities of discomfort, pain, disease, or disfigurement related to the continued presence of the synthetic suture in the scalp. Persons are insistently urged to sign such contracts and make such down payments, through the use of persistent and emotionally forceful sales presentations employing the following tactics, among others:

1. Representing that the psychological benefit of having hair replaced is so significant as to be of immediate necessity and that, subconsciously, bald men are desperate for prompt relief.

2. Inducing prospects to sign contracts and/or make down payments before they have consulted a medical doctor and freely and openly discussed with such doctor the medical risks and consequences of the surgical procedure, and of the synthetic suture being embedded in their scalp. Such consultations typically occur immediately before the commencement of surgery, by which time the client is likely to feel pressured to go through with the application.

Therefore, the advertisements referred to in Paragraph Eight were and are false and misleading, and the acts and practices set forth in such paragraph were and are false and deceptive.

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms, and individuals, in the sale of cosmetics, devices and treatments for the concealment of baldness.

PAR. 10. The use by respondents of the above unfair and deceptive representations and practices has had, and now has, the capacity and tendency to mislead consumers, and to unfairly influence consumers to hurriedly and precipitately sign contracts for the application of the implant hair replacement system, and to make partial or full payment therefor, without affording them reasonable opportunity to consider and comprehend the scope and extent of the contractual obligations involved, or the seriousness of the surgical procedure, and the possibilities of discomfort, pain, disease or disfigurement related thereto, and related to the continual presence of the synthetic suture in the scalp, or to compare prices, techniques, and devices available from competing corporations, firms, and individuals selling baldness concealment cosmetics, devices, and treatments to the purchasing public.

PAR. 11. The respondents' acts and practices alleged herein are to the prejudice and injury of the purchasing public, and to respondents' competitors, and constitute unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, and false advertisements disseminated by United States mails, and in commerce, in violation of Section 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hair Replacement Centers of Flushing, Inc., trading also as American Hair Design Centers, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 33-21 Francis Lewis Blvd., Flushing, N.Y. 11358.

Respondent Jan Felson is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Hair Replacement Centers of Flushing, Inc., a corporation, trading also as American Hair Design Centers, and/or under any other name or names, its successors and assigns and its officers, and Jan Felson, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device or through franchisees or licensees, in connection with the advertising, offering for sale, sale, or distribution of the implant replacement system or other hair replacement product or process involving surgery (hereinafter sometimes referred to as the "system"), in commerce, as "commerce" is defined in the Federal Trade Commission Act, or by the United States mails within the meaning of Section 12(a)(1) of the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That the system does not involve wearing a device or cosmetic which is like a hairpiece or toupee;

2. That after the system has been applied, the hair applied becomes part of the anatomy like natural hair, and has the following characteristics of natural hair:

a. The same appearance in all applications as natural hair, upon normal observation, and upon extreme closeup examination;

b. it may be cared for like natural hair where care involves possible pulling on the hair;

c. the wearer may engage in physical activity and movement with the same disregard for his hair as he would if he had natural hair.

3. That after the system has been applied, the wearer can care for it himself, and will not have to seek professional or skilled assistance in maintaining the system, and that the customer will not incur maintenance costs over and above the cost of applying the system.

It is further ordered, That respondents, in advertising, offering for sale, selling or distributing the system, disclose clearly and conspicuously that:

1. The system involves a surgical procedure resulting in the implantation of synthetic sutures in the scalp, to which hair is affixed.

2. By virtue of the surgical procedure involving implantation of synthetic sutures in the scalp, and by virtue of the synthetic suture remaining in the scalp, there is a risk of discomfort, pain, infection, scarring, and other skin disorders.

3. Continuing special care of the system is necessary to minimize the probabilities and risks referred to in subparagraph two of this paragraph, and such care may involve additional costs for medications and assistance.

4. The purchaser is advised to consult with his personal physician about the system before deciding whether to purchase it.

Respondents shall set forth the above disclosures separately and conspicuously from the balance of each advertisement or presentation used in connection with the advertising, offering for sale, sale, or distribution of the system, and shall devote no less than 15 percent of each advertisement or presentation to such disclosures. *Provided, however*, That in advertisements which consist of less than ten column inches in newspapers and periodicals, and in radio and television advertisements with a running time of one minute or less, respondents may substitute the following statement, in lieu of the above requirements:

> Warning: This application involves surgery whereby synthetic sutures are placed in the scalp. Discomfort, pain, and medical problems may occur. Continuing care is necessary. Consult your own physician.

No less than 15 percent of such advertisements shall be devoted to this disclosure, such disclosure shall be set forth clearly and conspicuously from the balance of each of such advertisements, and if such disclosure is in a newspaper or periodical, it shall be in at least eleven point type.

It is further ordered, That respondents, in connection with the sale of the system, provide prospective purchasers with a separate disclosure sheet containing the information required in the immediately preceding paragraph of this order, subparagraphs one through four thereof, and that respondents require that, prior to executing any contract to purchase said system, such prospective purchasers, sign and date the disclosure sheet after the sentence, "I have read the foregoing disclosures and understand what they mean," and that Hair Replacement Centers of Flushing, Inc. provide a copy of said disclosure sheet to the customers and retain such signed disclosure sheet for at least three years.

It is further ordered, That, in connection with the sale of the system, no contract for application of the system shall become binding on the purchaser prior to midnight of the third day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed, and that:

1. Respondents shall clearly and conspicuously disclose, orally prior to the time of sale, and in writing on any contract, promissory note or other instrument executed by the purchaser in connection with the sale of the system, that the purchaser may rescind or cancel any obligation incurred by mailing or delivering a notice of cancellation to the office responsible for the sale prior to midnight of the third day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed.
2. Respondents shall provide a separate and clearly understandable form which the purchaser may use as a notice of cancellation.
3. Respondents shall not negotiate any contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to midnight of the fifth day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed.

It is further ordered, That respondents, in connection with the advertising, offering for sale, sale, or distribution of the system, serve a copy of this order upon each present and every future licensee or franchisee, and upon each physician participating in application of respondents' system, and obtain written acknowledgment of the receipt thereof; and that respondents obtain from each present and future licensee or franchisee an agreement in writing, (1) to abide by the terms of this order, and (2) to cancellation of their license or franchise for failure to do so; and that respondents cancel the license or franchise of any licensee or franchisee that fails to abide by the terms of this order. Respondents shall retain such acknowledgments and agreements for so long as such persons or firms continue to participate in the application or sale of respondents' system.

It is further ordered, That respondents, in connection with the advertising, offering for sale, sale, or distribution of the system, forthwith distribute a copy of this order to each of their operating divisions or departments.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, licensees, or franchisees, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That in the event that the corporate respondent merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation or to any other person, said respondent shall require such successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; *Provided*, That if said respondent wishes to present to the Commission any reasons why said order should not apply in its present form to said successor or transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

It is further ordered, That the individual respondent Jan Felson promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further understood that nothing contained in this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies.

Nothing in this order shall be construed to imply that any past or future conduct of respondents is subject to and complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Order Sept. 16, 1975

Denial of respondents' joint application for review of administrative law judge's order of July 15, 1975, denying their joint motion to nullify his order of June 19, 1975, granting complaint counsel's application for taking of depositions. Administrative law judge directed, after consultation with parties, promptly to establish schedule for trial with certification to Commission of report on status of matter in 30 days.

Appearances

For the Commission: *Catherine A. Winer, Anthony L. Joseph, David M. Malone, Lawrence B. Bernard, Edward M. Shumsky, Richard F. Silvestri, Noel W. Kane* and *Robert W. Doyle, Jr.*

For the respondents: *Edwin Rockefeller, Bierbower & Rockefeller,* Wash., D.C., *A.R. Connelly* and *Robert D. Jaffe, Cravath, Swaine & Moore,* New York City, for Kellogg Company. *Edward F. Howrey, David Murchison* and *Ralph Savarese, Howrey, Simon, Baker & Murchison,* Wash., D.C., *R.R. Heer* and *J.F. Finn, C.L. Whitehill & J.J. Jenko,* Minneapolis, Minn., *Robert L. Fulgency,* Minneapolis, Minn., for General Mills. *R. MacCrate* and *Jeffrey I. Zuckerman, Sullivan & Cromwell,* New York City, *Clifford, Warnke, Glass, McIlwain & Finney,* Wash., D.C., *Peter J. DeLuca* and *Bruce L. Bozeman,* White Plains, N.Y. for General Foods. *L.C. McKinney, Mark M. Fefatwole* and *Peter Sonderby, Chadwell, Kayser, Ruggles, McGee & Hastings,* Chicago, Ill., and *Barnett P. Ruttenberg,* Chicago, Ill., for Quaker Oats. *J. Robert O'Brian,* Battle Creek, Mich.

ORDER DENYING JOINT APPLICATION FOR REVIEW

The administrative law judge, by order dated July 15, 1975, denied respondents' joint motion to nullify his order of June 19, 1975, granting complaint counsel's application for the taking of depositions. On July 25, 1975, the Commission denied an application by General Mills, Inc., for a stay of the commencement of complaint counsel's deposition program pending respondents' appeal from the discovery order of July 15, 1975. On Aug. 1, 1975, the law judge denied respondents' joint request for a determination that the order raised issues which met the criteria for interlocutory review set forth in Section 3.23(b) of the rules of practice.

Respondents claim that the law judge's refusal to grant their request for a determination under Section 3.23(b) was an abuse of discretion and that the Commission has the inherent power to review any ruling by an administrative law judge. However, as the Commission has already ruled in this case, "the Administrative Law Judge has broad discretion in controlling the conduct of adjudicative proceedings, and his rulings will be reviewed only in cases of clear abuse." Order Denying Applications for Review, May 29, 1974, p. 3. Respondents have not made such a showing.

Complaint counsel's deposition schedule is undoubtedly extensive, but the law judge has found that the information sought is "highly relevant" to the allegations in the complaint and that the depositions may facilitate the trial of this matter. He has also found that "[d]iscovery of the information known to individual employees of respondents is available only through personal confrontation with these individuals," and that the discovery could not be accomplished by voluntary methods order denying respondents' joint motion to nullify the order of June 19, 1975, for the taking of depositions requested by complaint counsel, July 15, 1975, p. 3. We cannot find that the law judge abused his discretion in making these determinations.

However we do not overlook respondents' unanswered assertion that at initial pretrial hearings in August 1972 complaint counsel indicated a need for only limited further discovery. We are concerned that more than three years have elapsed since the complaint issued in this matter. Under these circumstances, measures must be taken to assure that any remaining discovery is completed as expeditiously as possible.

It is ordered, That respondents' joint application for review of the order of the administrative law judge, dated July 15, 1975, be, and it hereby is, denied;

It is further ordered, That the administrative law judge, after consultation with the parties, promptly establish a schedule for trial and that he certify to the Commission a report on the status of this matter in 30 days.

IN THE MATTER OF

RETAIL CREDIT COMPANY

Docket 8954. Order, Sept. 16, 1975

Directions issued to administrative law judge on disposition of *ex parte* communication.

Appearances

For the Commission: *Virginia M. Conway, Robert W. Russell* and *David G. Grimes, Jr.*

For the respondent: *E. D. DeVaney, Jr.*, Atlanta, Ga., and *Sutherland, Asbill & Brennan*, Wash., D.C.

ORDER TO ADMINISTRATIVE LAW JUDGE DIRECTING DISPOSITION OF EX PARTE COMMUNICATION

The administrative law judge has certified to the Commission pursuant to Section 4.7(c) of the rules of practice, a letter he received on July 14, 1975, addressed to "Administrative Law Judge, Federal Trade Commission, Washington, D.C."

The letter clearly constitutes an *ex parte* communication under Section 4.7(a) and, ordinarily, should be placed on the public record rules of practice, Section 4.7(c). However, although the letter is unsigned, the writer, an employee of respondent, apparently fearing that details are revealed in the letter which would disclose his identity, states his belief that, unless the letter's confidentiality is preserved, he will lose his job.[1] Accordingly,

It is ordered, That the administrative law judge advise counsel of the substance of the communication and that, upon request, counsel be permitted to examine the communication, with instructions that they not disclose any identifying details to respondent or others;

It is further ordered, That the communication not be considered by the administrative law judge in the decision of this case.

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[1] The Commission does not lightly assume that adverse action would be taken against an employee who presented information in connection with an adjudicative proceeding.

IN THE MATTER OF

AMWAY CORPORATION, INC., ET AL.

Docket 9023. Order, Sept. 16, 1975

Denial of respondents' motion to dismiss the complaint or in alternative to withdraw matter from adjudication for settlement purposes.

Appearances

For the Commission: *Joseph S. Brownman* and *D. Stuart Cameron.*
For the respondents: *Lee Leovinger, Hogan & Hartson,* Wash., D.C.

ORDER DENYING RESPONDENTS' MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, TO WITHDRAW FROM ADJUDICATION

Respondents move to dismiss the complaint, or in alternative, to withdraw the matter from adjudication until the Commission has afforded respondents an opportunity "fully to exercise their rights" to negotiate a settlement. Their motion was certified to the Commission by the administrative law judge pursuant to Section 3.22(a) of the rules of practice.

Respondents claim that (1) evidence was obtained by staff during the course of the pre-complaint investigation in an improper fashion and (2) respondents were not afforded an opportunity to negotiate a settlement prior to the issuance of the Part III complaint.

The first claim must be rejected. Respondents contend that during the course of the pre-complaint investigation Commission staff sent letters seeking information from individual Amway distributors which falsely purported to be compulsory process and which misrepresented that Amway distributors were not under investigation.

We have, however, previously rejected challenges to the sufficiency and propriety of pre-complaint investigations. E.g., *Food Fair Stores, Inc.*, Docket No. 8935, order denying motion for reconsideration, Apr. 23, 1974 [83 F.T.C. 1578]; *All-State Industries of North Carolina*, supplemental clarifying opinion of the Commission, 74 F.T.C. 1591, 1592 (1968).

If a complaint were to be open to challenge on the ground that there was inadequate or incompetent evidence before the Commission or the staff prior to issuance of the complaint, "* * * the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a [respondent] could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence" presented by the staff to the Commission. *Lawn* v. *United*

States, 355 U.S. 339, 349 (1958); *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (indictment not subject to challenge on the ground that incompetent evidence presented to grand jury).[1]

Our ruling is, of course, without prejudice to any attempts by respondents to move the administrative law judge to suppress evidence they claim to have been improperly obtained.

Finally, the Commission rejects respondents' claim that they had a right under Part II of the Commission's Rules of Practice to negotiate a settlement. The rules in effect prior to Apr. 4, 1975, like those presently in effect, afforded the Commission broad discretion to determine whether persons should be afforded an opportunity to have a matter disposed of without resort to Part III adjudicative procedures. There has been no showing that this discretion was abused.

It should be noted that under the amended rules respondents can still seek a settlement by filing a motion before the administrative law judge to withdraw the matter from adjudication. Even if the motion is opposed by complaint counsel, the law judge may certify the matter to the Commission with his recommendation if it appears that there is a "likelihood of settlement" rules of practice, Section 3.25(b). Accordingly,

It is ordered, That the aforesaid motion to dismiss the complaint or, in the alternative, to withdraw the matter from adjudication be, and it hereby is, denied.

Chairman Engman not participating.

IN THE MATTER OF

AMERICAN TRACTOR TRAILER TRAINING, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9025. Complaint, Apr. 8, 1975-Decision, Sept. 17, 1975

Consent order requiring an East Hartford, Conn., truck driving school and its wholly-owned subsidiary in Foxboro, Mass., among other things to cease using unfair and deceptive sales tactics in promoting their services.

Appearances

For the Commission: *Martin J. Dolan, Jr., David W. DiNardi* and *Charles M. LaDue.*

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[1] An indictment valid on its face is not subject to challenge even on the ground that the grand jury acted on the basis of information obtained in violation of a defendant's Fifth Amendment privilege. *United States* v. *Blue*, 384 U.S. 251, 255 (1966).

For the respondents: *Gerald R. Lublin, Lublin & Lublin,* East Hartford, Conn.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Tractor Trailer Training, Inc., American Tractor Trailer Training School, Inc., corporations, and Charles R. Schwab, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent American Tractor Trailer Training, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at 178 Burnside Ave., in the City of East Hartford, Conn.

Respondent American Tractor Trailer Training School, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at U.S. Route 1, in the town of Foxboro, Mass. It is a wholly-owned subsidiary of respondent American Tractor Trailer Training, Inc.

Respondent Charles R. Schwab is an officer of the corporate respondents. He formulates, directs and controls the policies, acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. His business address is the same as that of respondent American Tractor Trailer Training, Inc.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of training courses purporting to prepare graduates thereof for employment as truck drivers. Said courses, when pursued to completion, consist of a series of lessons presented during a period of in-residence training at places designated by respondents.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the training courses by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of general interstate circulation and by means of commercial announcements over television and radio transmitted across State lines, and by means of brochures, pamphlets and other promotional materials disseminated through the United States mails, for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose of inducing the purchase of such training courses.

Respondents, from their principal places of business located in Massachusetts and Connecticut, utilize the services of salesmen and cause said salesmen to visit prospective purchasers located in various other States who respond to the respondents' advertisements and commercial announcements for the purpose of inducing the purchase of such training courses by such prospective purchasers.

Respondents transmit and receive, and cause to be transmitted and received, in the course of advertising, offering for sale, sale and distribution of such training courses, advertising and promotional materials, sales contracts, invoices, billing statements, checks, monies and other business papers and documents, to and from the several places of business operated by the respondents located as aforesaid and to prospective purchasers and purchasers thereof, located in various other States of the United States, other than the State of origination. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said training courses in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose of inducing the purchase of such training courses, respondents have made numerous statements and representations in newspaper advertisements, television and radio commercials, business reply cards, brochures and other printed materials regarding job opportunities, wages, the qualifications of respondents' students who complete respondents' training courses, the nature of the training provided in respondents' training courses, the placement assistance furnished to respondents' graduates in obtaining employment, and other matters. Certain of the statements and representations have been placed by respondents in the "Help Wanted" columns of newspaper advertisements.

In the further course and conduct of their business as aforesaid, respondents cause persons who respond to their newspaper advertisements, television and radio commercials and business reply cards to be visited by respondents' salesmen in the homes of such persons.

For the purpose of inducing the sale of respondents' training courses, such salesmen make to prospective purchasers many statements and representations, directly or by implication, regarding job opportunities, wages, the qualifications of respondents' students who complete respondents' training courses, the nature of the training provided in respondents' training courses, the placement assistance furnished to respondents' graduates in obtaining employment, and other matters. Some of the aforesaid statements and representations appear in brochures, pamphlets and other printed material furnished to said salesmen by respondents, and other statements and representations are made orally by said salesmen.

Typical and illustrative, but not all inclusive, of said statements and representations relating to the hereinafter described truck driver training courses are the following:

A. Newspaper Advertisements.

MEN NEEDED

To learn to drive tractor trailer. Full or part-time training. Earn up to $314 per week with O.T. American Tractor Trailer Training, East Hartford, Connecticut, is approved for training veterans. Call 1-257-0111. No experience necessary, drive gas and diesel trucks. Budget plan available.

* * * * *

Learn To Drive Tractor Trailer

1. **Earn $205 to $282 union scale with overtime.**
2. **Free pension plan, optical, dental and medical program.**
3. **10 paid holidays.**
4. **Up to 4 weeks paid vacation.**

Attend American Tractor Trailer School full or part time on a short training program.

APPROVED FOR VETERANS CALL ANYTIME 447-9776.

LEARN TO DRIVE TRACTOR TRAILER
You can Earn High Wages
You Receive Placement Assistance
You Train for Class 3 License
Call AMERICAN TRACTOR TRAINING SCHOOL 1-603-889-4471

* * * * *

NEED A FUTURE?
DRIVE TRACTOR TRAILERS

1. **Earn over $300 weekly with O.T.**
2. **Earn your Class 1 license**
3. **Attend full or part time days or evenings**
4. **Let American help you get a job after graduating**

AMERICAN TRACTOR TRAILER TRAINING, HARTFORD, CONNECTICUT
Call Schenectady 439-4982 ANYTIME

B. Business Reply Cards.

MEN! Get That Job Operating Tractor Trailers. Big Demand for Professional Drivers. Experienced Men Are Earning Up To $275 Per Week! American Tractor Trailer Training, Inc. Can Train You To Operate This Equipment:

Tractors	*Transmissions*
Mack	15 Speed Tri-Plex
GMC	5 Speed-2 Speed Axle
White	8-10 Speed Road Ranger
Mack	Du-Plex
International	5 Speeds

* * * Mail Card or Write * * * Find Out How You Can Qualify For A Top Job in the Trucking Industry!

* * * * *

TRACTOR TRAILER TRAINING

Professionally trained, highly skilled Tractor Trailer drivers are needed as never before. Drivers are currently earning $12,000 a year and up, and are protected by a multitude of benefits, including free optical, dental, and medical care. You can look forward to a secure, progressive future in a career that offers new horizons, challenges, and accomplishments * * *

Professional Placement Assistance * * *

American Tractor Trailer Training School, Inc.,
U.S. Route 1, Foxboro, Massachusetts 02023

C. Statements from Brochures.

The ever expanding use of Tractor-Trailers by both private industry and the transportation industry, creates a constant demand for better trained drivers. These drivers have an excellent income to provide their families with the pleasures of modern living * * * the policy of "American Tractor Trailer Training, Inc." has always been to personally interview all applicants in their homes to ascertain their qualifications and fitness for such training. Our local representative will contact you shortly to arrange a personal interview.

THE ENCLOSED QUALIFICATION SHEET MUST BE COMPLETED BEFORE OUR REPRESENTATIVE ARRIVES AT YOUR HOME. THE EXTRA TIME THIS SAVES WILL ENABLE HIM TO BETTER EVALUATE YOUR QUALIFICATIONS FOR TRACTOR-TRAILER TRAINING.

* * * * *

Why do you want to establish yourself in the heavy trucking industry? * * * If accepted, can you devote a number of hours to your training? * * * After graduation would you prefer local employment, or if the conditions and locations were satisfactory, would you be willing to relocate? * * * Can you accept employment immediately after completion of the training course? * * *

* * * * *

Course Outline* * *

G. Road Instruction (No Traffic)	4 hours
H. Road Instruction (Traffic)	14 hours
I. Final Road Test (In Traffic)	2 hours

D. Oral Statements by Sales Representatives.

Truck drivers are making $14,000 to $22,000 a year.

After graduating, you can walk in anywhere and get a truck driver's job.

The trucking field is crying for truck drivers.

There are over 190 trucking companies who hire their truck drivers through American Tractor Trailer.

The course takes one month, and you'll be driving the second month.

I only want to talk to individuals who are seriously interested in driving tractor trailers.

The school accepts only four out of every ten applicants.

PAR. 5. By and through the use of the above statements and representations and others of similar import and meaning, but not expressly set out herein, respondents have represented, directly or by implication, that:

1. The corporate respondents operate, represent or are affiliated with, trucking companies.

2. Respondents offer employment to qualified applicants who will be trained as truck drivers.

3. Respondents have been requested by trucking companies to train drivers for jobs as truck drivers with such companies upon completion of said training.

4. Graduates of respondents' training courses will be qualified thereby for employment as truck drivers without further training or experience.

5. Respondents had a reasonable basis from which to conclude that there is now or will be an urgent need or demand for persons who complete respondents' training courses.

6. Respondents had a reasonable basis from which to conclude that persons who complete respondents' training courses earn such amounts as $300 per week, or over $12,000 per year and other stated amounts as truck drivers.

7. Respondents provide a placement service which will secure jobs as truck drivers for graduates of said courses who want to work in that capacity.

8. Graduates of respondents' training courses who want to work are assured jobs as truck drivers as a consequence of graduating from said courses.

9. Respondents' sales representatives are trained or qualified vocational counselors.

10. Respondents accept only qualified candidates for enrollment in said training courses.

11. Respondents' training courses provide a minimum of 20 hours of road-driving instruction.

PAR. 6. In truth and in fact:

1. The corporate respondents do not operate or represent, and are not affiliated with trucking companies.

2. Respondents do not offer employment to persons who will be trained as truck drivers. The real purpose of such advertisements is to obtain leads to prospective purchasers of respondents' training courses.

3. Respondents have not been requested by trucking companies to train persons for jobs as truck drivers with such companies upon completion of said training.

4. Graduates of respondents' training courses are not thereby qualified for employment as truck drivers without further training or experience.

5. Respondents had no reasonable basis from which to conclude that there is now or will be an urgent need or demand for persons who complete respondents' training courses.

6. Respondents had no reasonable basis from which to conclude that persons who complete respondents' training courses earn amounts such as $300 per week, over $12,000 per year and other stated amounts as truck drivers as a result of such training.

7. Respondents do not provide a placement service which will secure jobs as truck drivers for graduates of said courses who want to work in that capacity.

8. Graduates of said courses who want to work are not assured jobs as truck drivers as a consequence of graduating from said courses.

9. Respondents' sales representatives are not trained or qualified vocational counselors. Respondents' representatives are commissioned salesmen who possess no special training, experience, title, qualifications or status.

10. Respondents accept all candidates for enrollment in said training courses. Respondents impose no qualifications on prospective enrollees and accept any person for enrollment in such courses who is willing to execute a contract and pay the required tuition for the training courses.

11. Respondents' training courses do not provide a minimum of 20 hours of road-driving instruction. To the contrary, students receive substantially less road-driving instruction.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were, and are, false, misleading, unfair, or deceptive acts or practices.

PAR. 7. Through the use of the aforesaid advertisements, television and radio commercials, business reply cards, brochures and otherwise, respondents have represented, directly or by implication, that there is or will be an urgent need or demand for respondents' graduates in positions for which respondents train them and that respondents' graduates earn such amounts as $300 per week, over $12,000 per year and other stated amounts as truck drivers. Respondents had at the time of said representations no reasonable basis adequate to support the representations. Therefore, the aforesaid acts and practices were, and are, unfair acts or practices.

PAR. 8. (a) In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have offered, and are now offering, for sale training courses purporting to prepare purchasers thereof for employment as truck drivers without disclosing in advertising or through their sales representatives: (1) the recent percentage of persons who have completed the training course who were able to obtain the employment for which they were trained; (2) the employers that hired any such persons; (3) the initial salary any such persons received; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Knowledge of such facts by prospective purchasers of respondents' training courses would indicate the possibility of securing future employment upon completion of the training courses, and the nature of such employment. Thus, respondents have failed to disclose a material fact which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such training courses. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

(b) Respondents have offered, and are now offering, for sale training courses purporting to prepare purchasers thereof for employment as truck drivers without disclosing in advertising or through their sales representatives that:

1. Many employers of truck drivers prescribe a minimum age of twenty-one years of age for drivers;

2. Many employers of truck drivers give preferential consideration in hiring to driver-applicants who are twenty-five years of age or more because of insurance cost savings; and

3. Many employers of truck drivers give preferential consideration in hiring to driver-applicants with actual truck-driving experience.

Knowledge of such facts by prospective purchasers of respondents' training courses would indicate the possibility of securing future employment upon completion of the training courses, and the nature of such employment. Thus, respondents have failed to disclose material facts which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such training courses. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. In the further course and conduct of their business and in the furtherance of their purpose of inducing prospective enrollees to execute enrollment contracts for their training course, respondents and their employees, salesmen, and representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices.

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Eight, respondents or their representatives have been able to induce prospective enrollees into executing enrollment contracts upon initial contact without affording the enrollee sufficient time to carefully consider the purchase of the training course and the consequences thereof.

PAR. 10. Respondents have been and are now failing to disclose material facts while using the aforesaid unfair, false, misleading or deceptive acts and practices, to induce persons to pay or to contract to pay over to them substantial sums of money to purchase or pay for courses of instruction whose value was virtually worthless to said persons for purposes of obtaining future employment in the jobs for which they were provided training.

Respondents have received the said sums and have failed to offer refunds and have failed to refund such sums to, or to rescind such contractual obligations of, substantial numbers of enrollees and participants in such training courses who were unable to secure employment in the positions and fields for which they have been purportedly trained by respondents.

The use by respondents of the aforesaid acts and practices, their continued retention of said sums and their continued failure to rescind such contractual obligations of their customers, as aforesaid, are unfair acts or practices.

The effect of using the aforesaid acts and practices to secure substantial sums of money is or may be to substantially hinder, lessen, restrain, or prevent competition between respondents and the aforesaid competitors.

Therefore, the said acts and practices constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. By and through the use of the aforesaid acts and practices, respondents place in the hands of others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 12. In the course and conduct of their business, and at all times mentioned herein respondents have been, and now are, in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of training courses covering the same or similar subjects.

PAR. 13. The use by respondents of the aforesaid false, misleading, unfair or deceptive statements, representations, acts and practices and their failure to disclose material facts as aforesaid has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and to induce a substantial number thereof to purchase respondents' training courses by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW JUDGE

JULY 28, 1975

PRELIMINARY STATEMENT

The Commission issued a complaint in this matter on Apr. 8, 1975, charging American Tractor Trailer Training, Inc., American Tractor Trailer Training School, Inc. and Charles R. Schwab, individually and as an officer of said corporations, with unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

The complaint and the accompanying notice order were served on American Tractor Trailer Training School, Inc. on May 14, 1975, and on American Tractor Trailer Training, Inc. and Charles R. Schwab on May 15, 1975.

No answer or other response was received from any of the respondents within thirty (30) days following service of the complaint as required by the Commission's Rules of Practice for Adjudicative Proceedings, nor by the later date of July 9, 1975, set by the administrative law judge (see order providing for reconsideration of default if answer is filed by July 9, 1975, issued June 27, 1975, and order confirming default issued July 18, 1975).

Respondents are, therefore, in default and the undersigned so finds. Section 3.12(c) of the Commission's Rules of Practice provides that failure to file answer within the time provided shall be deemed to constitute waiver of the right of appearance and to contest the allegations of the complaint. Further, this Section authorizes the administrative law judge, without further notice to respondents, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order. Accordingly, the following findings, conclusions and order are issued:

FINDINGS OF FACT

PARAGRAPH 1. Respondent American Tractor Trailer Training, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at 178 Burnside Ave., in the City of East Hartford, Conn.

Respondent American Tractor Trailer Training School, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at U.S. Route 1, in the town of Foxboro, Mass. It is a wholly-owned subsidiary of respondent American Tractor Trailer Training, Inc.

Respondent Charles R. Schwab is an officer of the corporate respondents. He formulates, directs and controls the policies, acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. His business address is the same as that of respondent American Tractor Trailer Training, Inc.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of training courses purporting to prepare graduates thereof for employment as truck drivers. Said courses, when pursued to completion, consist of a series of lessons presented during a period of in-residence training at places designated by respondents.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the training courses by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of general interstate circulation and by means of commercial announcements over television and radio transmitted across State lines, and by means of brochures, pamphlets and other promotional materials disseminated through the United States mails, for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose of inducing the purchase of such training courses.

Respondents, from their principal places of business located in Massachusetts and Connecticut, utilize the services of salesmen and cause said salesmen to visit prospective purchasers located in various other States who respond to the respondents' advertisements and commercial announcements for the purpose of inducing the purchase of such training courses by such prospective purchasers.

Respondents transmit and receive, and cause to be transmitted and received, in the course of advertising, offering for sale, sale and distribution of such training courses, advertising and promotional materials, sales contracts, invoices, billing statements, checks, monies and other business papers and documents, to and from the several places of business operated by the respondents located as aforesaid and to prospective purchasers and purchasers thereof, located in various other States of the United States, other than the State of origination. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said training courses in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose of inducing the purchase of such training courses, respondents have made numerous statements and representations in newspaper advertisements, television and radio commercials, business reply cards, brochures and other printed materials regarding job opportunities, wages, the qualifications of respondents' students who complete respondents' training courses, the nature of the training provided in respondents' training courses, the placement assistance furnished to respondents' graduates in obtaining employment, and other matters. Certain of the statements and representations have been placed by respondents in the "Help Wanted" columns of newspaper advertisements.

In the further course and conduct of their business as aforesaid, respondents cause persons who respond to their newspaper advertisements, television and radio commercials, and business reply cards to be visited by respondents' salesmen in the homes of such persons.

For the purpose of inducing the sale of respondents' training courses, such salesmen make to prospective purchasers many statements and representations, directly or by implication, regarding job opportunities, wages, the qualifications of respondents' students who complete respondents' training courses, the nature of the training provided in respondents' training courses, the placement assistance furnished to respondents' graduates in obtaining employment, and other matters. Some of the aforesaid statements and representations appear in brochures, pamphlets and other printed material furnished to said salesmen by respondents, and other statements and representations are made orally by said salesmen.

Typical and illustrative, but not all inclusive, of said statements and representations relating to the hereinafter described truck driver training courses are the following:

A. Newspaper Advertisements.

MEN NEEDED

To learn to drive tractor trailer. Full or part-time training. Earn up to $314 per week with O.T. American Tractor Trailer Training, East Hartford, Connecticut, is approved for training veterans. Call 1-257-0111. No experience necessary, drive gas and diesel trucks. Budget plan available.

* * * * *

Learn To Drive Tractor Trailer

1. Earn $205 to $282 union scale with overtime.
2. Free pension plan, optical, dental and medical program.
3. 10 paid holidays.
4. Up to 4 weeks paid vacation.

Attend American Tractor Trailer School full or part time on a short training program.

APPROVED FOR VETERANS CALL ANYTIME 447-9776.

LEARN TO DRIVE TRACTOR TRAILER
You can Earn High Wages
You Receive Placement Assistance
You Train for Class 3 License
CALL AMERICAN TRACTOR TRAINING SCHOOL 1-603-889-4471

* * * * *

NEED A FUTURE?
DRIVE TRACTOR TRAILERS

1. Earn over $300 weekly with O.T.
2. Earn your Class 1 license
3. Attend full or part time days or evenings
4. Let American help you get a job after graduating

AMERICAN TRACTOR TRAILER TRAINING, HARTFORD, CONNECTICUT
Call Schenectady 439-4982 ANYTIME

B. Business Reply Cards.

MEN! Get That Job Operating Tractor Trailers. Big Demand for Professional Drivers. Experienced Men Are Earning Up To $275 Per Week! American Tractor Trailer Training, Inc. Can Train You To Operate This Equipment:

Tractors	*Transmissions*
Mack	15 Speed Tri-Plex
GMC	5 Speed-2 Speed Axle

White	**8-10 Speed Road Ranger**
Mack	**Du-Plex**
International	**5 Speeds**

*** * * Mail Card or Write * * * Find Out How You Can Qualify For A Top Job in the Trucking Industry!**

* * * * *

TRACTOR TRAILER TRAINING

Professionally trained, highly skilled Tractor Trailer drivers are needed as never before. Drivers are currently earning $12,000 a year and up, and are protected by a multitude of benefits, including free optical, dental, and medical care. You can look forward to a secure, progressive future in a career that offers new horizons, challenges, and accomplishments * * *

Professional Placement Assistance * * *

American Tractor Trailer Training School, Inc.,
U.S. Route 1, Foxboro, Massachusetts 02023

C. Statements from Brochures.

The ever expanding use of Tractor-Trailers by both private industry and the transportation industry, creates a constant demand for better trained drivers. These drivers have an excellent income to provide their families with the pleasures of modern living * * * the policy of "American Tractor Trailer Training, Inc." has always been to personally interview all applicants in their homes to ascertain their qualifications and fitness for such training. Our local representative will contact you shortly to arrange a personal interview.

THE ENCLOSED QUALIFICATION SHEET MUST BE COMPLETED BEFORE OUR REPRESENTATIVE ARRIVES AT YOUR HOME. THE EXTRA TIME THIS SAVES WILL ENABLE HIM TO BETTER EVALUATE YOUR QUALIFICATIONS FOR TRACTOR-TRAILER TRAINING.

* * * * *

Why do you want to establish yourself in the heavy trucking industry? * * * If accepted, can you devote a number of hours to your training? * * * After graduation would you prefer local employment, or if the conditions and locations were satisfactory, would you be willing to relocate? * * * Can you accept employment immediately after completion of the training course? * * *

* * * * *

Course Outline* * *

G. Road Instruction (No Traffic)	**4 hours**
H. Road Instruction (Traffic)	**14 hours**
I. Final Road Test (In Traffic)	**2 hours**

D. Oral Statements by Sales Representatives.

Truck drivers are making $14,000 to $22,000 a year.

After graduating, you can walk in anywhere and get a truck driver's job.

The trucking field is crying for truck drivers.

There are over 190 trucking companies who hire their truck drivers through American Tractor Trailer.

The course takes one month, and you'll be driving the second month.

I only want to talk to individuals who are seriously interested in driving tractor trailers.

The school accepts only four out of every ten applicants.

PAR. 5. By and through the use of the above statements and representations and others of similar import and meaning, but not expressly set out herein, respondents have represented, directly or by implication, that:

1. The corporate respondents operate, represent or are affiliated with, trucking companies.

2. Respondents offer employment to qualified applicants who will be trained as truck drivers.

3. Respondents have been requested by trucking companies to train drivers for jobs as truck drivers with such companies upon completion of said training.

4. Graduates of respondents' training courses will be qualified thereby for employment as truck drivers without further training or experience.

5. Respondents had a reasonable basis from which to conclude that there is now or will be an urgent need or demand for persons who complete respondents' training courses.

6. Respondents had a reasonable basis from which to conclude that persons who complete respondents' training courses earn such amounts as $300 per week, or over $12,000 per year and other stated amounts as truck drivers.

7. Respondents provide a placement service which will secure jobs as truck drivers for graduates of said courses who want to work in that capacity.

8. Graduates of respondents' training courses who want to work are assured jobs as truck drivers as a consequence of graduating from said courses.

9. Respondents' sales representatives are trained or qualified vocational counselors.

10. Respondents accept only qualified candidates for enrollment in said training courses.

11. Respondents' training courses provide a minimum of 20 hours of road-driving instruction.

PAR. 6. In truth and in fact:

1. The corporate respondents do not operate or represent, and are not affiliated with trucking companies.

2. Respondents do not offer employment to persons who will be

trained as truck drivers. The real purpose of such advertisements is to obtain leads to prospective purchasers of respondents' training courses.

3. Respondents have not been requested by trucking companies to train persons for jobs as truck drivers with such companies upon completion of said training.

4. Graduates of respondents' training courses are not thereby qualified for employment as truck drivers without further training or experience.

5. Respondents had no reasonable basis from which to conclude that there is now or will be an urgent need or demand for persons who complete respondents' training courses.

6. Respondents had no reasonable basis from which to conclude that persons who complete respondents' training courses earn amounts such as $300 per week, over $12,000 per year and other stated amounts as truck drivers as a result of such training.

7. Respondents do not provide a placement service which will secure jobs as truck drivers for graduates of said courses who want to work in that capacity.

8. Graduates of said courses who want to work are not assured jobs as truck drivers as a consequence of graduating from said courses.

9. Respondents' sales representatives are not trained or qualified vocational counselors. Respondents' representatives are commissioned salesmen who possess no special training, experience, title, qualifications or status.

10. Respondents accept all candidates for enrollment in said training courses. Respondents impose no qualifications on prospective enrollees and accept any person for enrollment in such courses who is willing to execute a contract and pay the required tuition for the training courses.

11. Respondents' training courses do not provide a minimum of 20 hours of road-driving instruction. To the contrary, students receive substantially less road-driving instruction.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were, and are, false, misleading, unfair, or deceptive acts or practices.

PAR. 7. Through the use of the aforesaid advertisements, television and radio commercials, business reply cards, brochures and otherwise, respondents have represented, directly or by implication, that there is or will be an urgent need or demand for respondents' graduates in positions for which respondents train them and that respondents' graduates earn such amounts as $300 per week, over $12,000 per year and other stated amounts as truck drivers. Respondents had at the time of said representations no reasonable basis adequate to support the representations. Therefore, the aforesaid acts and practices were, and are, unfair acts or practices.

PAR. 8. (a) In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have offered, and are now offering, for sale training courses purporting to prepare purchasers thereof for employment as truck drivers without disclosing in advertising or through their sales representatives: (1) the recent percentage of persons who have completed the training course who were able to obtain the employment for which they were trained; (2) the employers that hired any such persons; (3) the initial salary any such persons received; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Knowledge of such facts by prospective purchasers of respondents' training courses would indicate the possibility of securing future employment upon completion of the training courses, and the nature of such employment. Thus, respondents have failed to disclose a material fact which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such training courses. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

(b) Respondents have offered, and are now offering, for sale training courses purporting to prepare purchasers thereof for employment as truck drivers without disclosing in advertising or through their sales representatives that:

1. Many employers of truck drivers prescribe a minimum age of twenty-one years for drivers;

2. Many employers of truck drivers give preferential consideration in hiring to driver-applicants who are twenty-five years of age or more because of insurance cost savings; and

3. Many employers of truck drivers give preferential consideration in hiring to driver-applicants with actual truck-driving experience.

Knowledge of such facts by prospective purchasers of respondents' training courses would indicate the possibility of securing future employment upon completion of the training courses, and the nature of such employment. Thus, respondents have failed to disclose material facts which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such training courses. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. In the further course and conduct of their business and in the furtherance of their purpose of inducing prospective enrollees to execute enrollment contracts for their training course, respondents and their employees, salesmen, and representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices.

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Eight, respondents or their representatives have been able to induce prospective enrollees into executing enrollment contracts upon initial contact without affording the enrollee sufficient time to carefully consider the purchase of the training course and the consequences thereof.

PAR. 10. Respondents have been and are now failing to disclose material facts while using the aforesaid unfair, false, misleading or deceptive acts and practices, to induce persons to pay or to contract to pay over to them substantial sums of money to purchase or pay for courses of instruction whose value was virtually worthless to said persons for purposes of obtaining future employment in the jobs for which they were provided training. Respondents have received the said sums and have failed to offer refunds and have failed to refund such sums to, or to rescind such contractual obligations of, substantial numbers of enrollees and participants in such training courses who were unable to secure employment in the positions and fields for which they have been purportedly trained by respondents.

The use by respondents of the aforesaid acts and practices, their continued retention of said sums and their continued failure to rescind such contractual obligations of their customers, as aforesaid, are unfair acts or practices.

The effect of using the aforesaid acts and practices to secure substantial sums of money is or may be to substantially hinder, lessen, restrain, or prevent competition between respondents and the aforesaid competitors.

Therefore, the said acts and practices constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. By and through the use of the aforesaid acts and practices, respondents place in the hands of others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 12. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of training courses covering the same or similar subjects.

PAR. 13. The use by respondents of the aforesaid false, misleading, unfair or deceptive statements, representations, acts and practices and their failure to disclose material facts as aforesaid have had, and now have, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and to induce a substantial number thereof to purchase respondents' training courses by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

I

It is ordered, That respondents American Tractor Trailer Training, Inc., American Tractor Trailer Training School, Inc., corporations, their successors and assigns, and their officers, and Charles R. Schwab, individually and as an officer of said corporations, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of courses of study, training or instruction in the field of truck driving or any other subject, trade or vocation, or of any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing orally, visually, in writing or in any other manner, directly or by implication, that:

(a) Respondents operate, represent or are affiliated with trucking companies, employers of truck drivers, or any industry for which enrollees of any course are being trained; or misrepresenting, in any manner, the nature of respondents' business.

(b) Employment is being offered when the purpose of such offer is to obtain leads to prospective purchasers of such training courses.

(c) Respondents have been requested by trucking companies or any other business or organization to train persons for specific jobs; or misrepresenting, in any manner, respondents' connection or affiliation with any industry or any member thereof.

(d) Graduates of said courses will be qualified thereby for employment as truck drivers without further training or experience.

(e) There is a need or demand of any size, proportion or magnitude for persons completing any of the courses offered by the respondents, or otherwise representing that opportunities for employment, or opportunities of any size, figure or number are available to such persons, or that persons completing said courses will or may earn any specified amount of money, or otherwise representing by any means the prospective earnings of such persons except as hereafter provided in Paragraph 6 of the order.

(f) Respondents or others provide a placement service which will or may secure a job for graduates of said courses.

(g) Graduates of said courses are assured of placement in the positions for which they have been trained; or representing that graduates of said courses will easily attain employment or that said courses are effective in preparing or qualifying any graduate for employment.

(h) Any person engaged in the promotion, offering for sale, sale, distribution or other use of said courses is a trained admissions counselor or vocational counselor; or misrepresenting the training, experience, title, qualifications or status of such person or the import or meaning of any advice given by or any other statement made by any such person.

(i) Respondents accept only qualified candidates for enrollment in said courses.

(j) Said courses provide a minimum of 20 hours of road-driving instruction, when such representations do not accurately disclose the actual number of hours of behind-the-wheel road-driving instruction furnished to enrollees; or misrepresenting, in any manner, the number of actual hours of behind-the-wheel road-driving instruction furnished to enrollees.

2. Placing advertisements in "Help Wanted" columns, or failing to specify, clearly and conspicuously, as a condition to the publication of classified advertisements seeking leads to prospective purchasers, that such advertisements be published only in the education, instruction or similar columns of classified advertising.

3. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any truck driver training course offered by respondents, the following information:

(a) The title "IMPORTANT INFORMATION" printed in ten (10) point bold face type across the top of the form.

(b) Paragraphs providing the following information:

(1) Many employers of truck drivers prescribe a minimum age of twenty-one (21) years for drivers.

(2) Many employers of truck drivers give preferential consideration in hiring to driver-applicants who are twenty-five (25) years of age.

(3) Many employers of truck drivers give preferential consideration in hiring to driver-applicants with actual truck-driving experience.

4. Failing to disclose, clearly and conspicuously, in advertisements, in catalogs, brochures and on letterheads, that respondents' business is solely and exclusively that of a private school, not affiliated with any members of the trucking industry or any member of any other industry.

5. Failing to keep adequate records which may be inspected by Commission staff members upon reasonable notice which substantiate the data and information required to be disclosed by Paragraph 6 of this order and prescribed in Appendix A hereto.

6. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any course of instruction offered by respondents, the following information in the format prescribed in Appendix A and for a base period designated as described in Appendix B hereto:

(1) The number and percentage of enrollees who have failed to complete their course of instruction, such percentage to be computed separately for each course of instruction offered by respondents at each school, location or facility;

(2) The placement rate, ratio or percentage for enrollees and graduates, and also the numbers upon which such rates, ratios or percentages are based; such rate or percentage to be computed separately for each course of instruction offered by respondents at each school, location or facility;

(3) The salary range of respondents' graduates as to the same graduates used to compute the placement percentage in (2) above; and

(4) A list of firms or employers which are currently hiring graduates of said courses in substantial numbers and in the positions for which such graduates have been trained, and the number of such graduates hired, as to the same graduates used to compute the placement percentage in (2) above.

Provided, however, This paragraph shall be inapplicable to any school newly established by respondents in a metropolitan area or county, whichever is larger, where they previously did not operate a school, or to any course newly introduced by respondents, until such time as the new school or course has been in operation for the base period established pursuant to Appendix B as prescribed in this paragraph. However, during such period the following statement, and no other, shall be made in lieu of the Appendix A disclosure form required by this paragraph:

DISCLOSURE NOTICE

This school [or course, as the case may be] has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this school [course].

7. (a) Contracting for the sale of any course of instruction in the form of a sales contract or any other agreement which does not contain in immediate proximity to the space reserved in the contract for the signature of the prospective enrollee in bold face type of a minimum size of ten (10) points, a statement in the following form:

You, the prospective enrollee, may cancel this transaction at any time prior to midnight of the tenth business day after the date of this transaction. See attached notice of cancellation form for an explanation of this right.

(b) Failing to furnish each prospective enrollee, at the time he signs the sales contract or otherwise agrees to enroll in a course of instruction offered by respondents, a complete form in duplicate, which shall be attached to the contract or agreement, and easily detachable, and which shall contain in ten (10) point bold face type the following information and statements:

NOTICE OF CANCELLATION

(enter date of transaction)

____

(date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN TEN (10) BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN (10) BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND

ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY, IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN TWENTY (20) DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PAYMENT FOR SAID GOODS.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [*Name of seller*], AT ______

[*address of seller's place of business*] NOT LATER THAN MIDNIGHT OF (*date*).

I HEREBY CANCEL THIS TRANSACTION.

____

(Date)

____

(Buyer's signature)

(c) Failing to orally inform each prospective enrollee of his right to cancel at the time he signs a contract or agreement for the sale of any course of instruction.

(d) Misrepresenting in any manner the prospective enrollee's right to cancel.

(e) Failing or refusing to honor any valid notice of cancellation by a prospective enrollee and within ten (10) business days after the receipt of such notice, to: (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by respondents; (iii) cancel and return any negotiable instrument executed by the prospective enrollee in connection with the contract or sale.

(f) During the cancellation period described herein, respondents shall not initiate contacts with such contracting persons other than contacts permitted by this paragraph.

8. Making any representations of any kind whatsoever, which are not already proscribed by other provisions of this order, in connection with the advertising, promoting, offering for sale, sale or distribution of courses of study, training or instruction in the field of truckdriver training or any other course offered to the public in any field in commerce, for which respondents have no reasonable basis prior to the making or dissemination thereof.

9. Furnishing or otherwise placing in the hands of others the means and instrumentalities by and through which the public may be misled or deceived in the manner, or by the acts and practices prohibited by this order.

II

It is further ordered, That:

(a) Respondents herein deliver, by registered mail, a copy of this decision and order to each of their present and future franchisees, licensees, employees, sales representatives, agents, solicitors, brokers, independent contractors or to any other person who promotes, offers for sale, sells or distributes any course of instruction included within the scope of this order.

(b) Respondents herein provide each person or entity so described in subparagraph (a) of this paragraph with a form returnable to the respondents clearly stating his or her intention to be bound by and to conform his or her business practices to the requirements of this order; retain said statement during the period said person or entity is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request.

(c) Respondents herein inform each person or entity described in subparagraph (a) of this paragraph that the respondents will not use or engage or will terminate the use or engagement of any such party, unless such party agrees to and does file notice with the respondents that he or she will be bound by the provisions contained in this order.

(d) If such party as described in subparagraph (a) of this paragraph will not agree to file the notice set forth in subparagraph (b) above with the respondents and be bound by the provisions of this order, the respondents shall not use or engage or continue the use or engagement of such party to promote, offer for sale, sell or distribute any course of instruction included within the scope of this order.

(e) Respondents herein inform the persons or entities described in subparagraph (a) above that the respondents are obligated by this order to discontinue dealing with or to terminate the use or engagement of persons or entities who continue on their own the deceptive acts or practices prohibited by this order.

(f) Respondents herein institute a program of continuing surveillance adequate to reveal whether the business practices of each said person or entity described in subparagraph (a) above conform to the requirements of this order.

(g) Respondents herein discontinue dealing with or terminate the use or engagement of any person described in subparagraph (a) above, who continues on his or her own any act or practice prohibited by this order as revealed by the aforesaid program of surveillance.

(h) Respondents herein maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for examination by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business for inspection and copying.

It is further ordered, That respondents herein present to each interested applicant or prospective student, immediately prior to the commencement of any interview or sales presentation, during which the purchase of or enrollment in any course of instruction offered by respondents herein is discussed or solicited, a 5" x 7" card containing only the following language:

YOU WILL BE TALKING TO A SALESPERSON

It is further ordered, That respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That the respondent corporations shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondents which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent, Charles R. Schwab, promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

APPENDIX A

DISCLOSURE FORM

(NAME OF SCHOOL)
DROP OUT AND PLACEMENT RECORD FOR (NAME OF COURSE) FOR THE PERIOD OF (DATE) TO (DATE)

1. TOTAL ENROLLEES	[Number]
2. TOTAL WHO FAILED TO COMPLETE THE COURSE	[Number]
3. PERCENTAGE WHO FAILED TO COMPLETE THE COURSE	[%]
4. TOTAL NUMBER OF STUDENTS WHO OBTAINED EMPLOYMENT IN THE POSITION FOR WHICH THIS COURSE OF STUDY PREPARED THEM	[Number]
5. PERCENTAGE OF STUDENTS WHO OBTAINED EMPLOYMENT IN THE POSITION FOR WHICH THIS COURSE OF STUDY PREPARED THEM	[% of Enrollees]
6. PERCENTAGE OF GRADUATES WHO OBTAINED EMPLOYMENT IN THE POSITION FOR WHICH THIS COURSE OF STUDY TRAINED THEM	[% of Graduates]

7. NUMBER AND PERCENTAGE OF TOTAL ENROLLEES AND GRADUATES WHO OBTAINED EMPLOYMENT IN THE FOLLOWING SALARY RANGES:

Less than $2.50 Per Hour	[Number] Students which is [%] of Total Graduates
$2.50—$3.99 Per Hour	" "
$4.00—$5.50 Per Hour	" "
$5.51—$7.00 Per Hour	" "
More Than $7.00 Per Hour	" "

8. EMPLOYERS HIRING PERSONS WHO GRADUATE FROM [NAME OF COURSE] FROM (DATE) TO (DATE) AS TRACTOR TRAILER DRIVERS

Names of Employers	Total Number of Graduates Hired

APPENDIX B

"Base period" shall mean that period of time that begins with the entrance and ends with the graduation of respondents' most recent graduating class, provided that the class graduated at least three (3) months prior to the date on which respondents must begin to disseminate the necessary statistics with respect to the base period.

The three (3) month period immediately following the close of the base period shall be used by respondents to monitor and record the employment success of all enrollees whose enrollment terminated during the base period. Respondents may not include in the computation of statistics for the base period persons whose enrollment terminated during the three (3) month recordation period. Such persons will be included in the statistics for the base period that covers their graduating class.

On the first business day falling more than three (3) months after the graduation of the most recent graduating class respondents shall begin to disseminate statistics for that base period. Respondents shall continue to distribute said statistics until the first business day falling three (3) months after the graduation of the next graduating class.

The following example describes how base periods will be utilized by respondents:

Base period 1 will cover the period that begins with the entrance and ends with the graduation of the first class whose graduation date occurs after the effective date of this order. Therefore if a class began on Jan. 1, 1975 and graduated on Mar. 1, 1975 then from Mar. 1, 1975 until June 1, 1975 respondents would monitor and record the employment experience of all enrollees whose enrollment terminated during the base period, Jan. 1, 1975 to Mar. 1, 1975. Respondents would begin disseminating these statistics on the first business day after June 1, 1975.

Base period number two (2) would begin with entrance and end with the graduation of the next graduating class. If that class began on Feb. 1, 1975 and graduated on Apr. 1, 1975 then from Apr. 1, 1975 to July 1, 1975 respondents would monitor and record the employment experience of all enrollees whose enrollment terminated during base period number two (2) Feb. 1, 1975 to Apr. 1, 1975. Respondents would begin disseminating these statistics on the first business day after July 1, 1975.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on July 28, 1975, finding respondents to have engaged in the acts and practices as alleged in the complaint and entering a cease and desist order against respondents. That initial decision was entered after the default of respondents in filing an answer to the complaint and to the administrative law judge's subsequent order providing for reconsideration of default if answer is filed by July 9, 1975. A copy of the initial decision and order was served on the respondents American Tractor Trailer Training, Inc. and Charles R. Schwab on Aug. 14, 1975 and respondent American Tractor Trailer Training School, Inc. on Aug. 18, 1975. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice, *It is ordered*, That the initial decision and order contained therein shall become effective on Sept. 17, 1975; and

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a written report, signed by the respondents, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

CHECKMATE INQUIRY SERVICE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR CREDIT REPORTING ACTS

Docket C-2728. Complaint, Sept. 22, 1975-Decision, Sept. 22, 1975

Consent order requiring a New York City consumer credit reporting agency, among other things to cease failing to comply with the requirements of the Fair Credit Reporting Act pertaining to the reporting of information disputed by the consumer. Respondents are further required to retain evidence of compliance for a period of two years.

Appearances

For the Commission: *Salvatore F. Sangiorgi.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Checkmate Inquiry Service, Inc., a corporation, and Samuel Berke, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Checkmate Inquiry Service, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 29 E. 10th St., New York, N.Y.

Respondent Samuel Berke is an individual and is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including those hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time in the past have been, for monetary fees and/or dues, regularly engaged in the practice of assembling or evaluating consumer credit information for the purpose of furnishing to third parties consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act. Respondents regularly use a means or facility of interstate commerce for the purpose of preparing and furnishing said consumer reports. Therefore, respondents are a consumer reporting agency, as "consumer reporting agency" is defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. Respondents in the ordinary course and conduct of their business as aforesaid are now, and subsequent to Apr. 25, 1971 have been, engaged in the preparation, offering for sale, sale and distribution of information on consumers, including consumer reports, as defined in Section 603(d) of the Fair Credit Reporting Act.

PAR. 4. Respondents fail to:

A. Clearly and conspicuously disclose to the consumer his or her right to request that a consumer statement, codification, or summary thereof with respect to disputed information, be sent by respondents to persons designated by the consumer and who have received the disputed information within the previous two years for employment purposes or within the previous six months for any other purpose;

B. Furnish the consumer statement, codification or summary thereof to any persons specifically designated by the consumer and qualified under Section 611(d) of the Fair Credit Reporting Act to receive such information.

Therefore, respondents are in violation of Section 611(d) of the Fair Credit Reporting Act.

PAR. 5. When a dispute cannot be resolved and the consumer submits a brief statement of his or her version of the nature of the dispute, respondents fail to clearly note in subsequent consumer reports containing the information in question that it is disputed by the consumer and provide either the consumer statement or a clear and accurate codification or summary thereof.

Therefore, respondents are in violation of Section 611(c) of the Fair Credit Reporting Act.

PAR. 6. The acts and practices and omissions set forth in Paragraphs Four and Five are in violation of the Fair Credit Reporting Act and, pursuant to Section 621(a) of that Act, respondents have thereby violated Section 5(a) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Fair Credit Reporting Act and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Checkmate Inquiry Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 29 E. 10th St., New York, N.Y.

Respondent Samuel Berke is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporate respondent. His principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Checkmate Inquiry Service, Inc., a corporation, its successors and assigns, and its officer Samuel Berke, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collecting, assembling or furnishing of consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act (Pub. L. No. 91-508, 15 U.S.C. §1601, *et seq.*), shall forthwith cease and desist from:

1. Failing to explicitly disclose in writing to the consumer his or her right to request that a consumer statement with respect to disputed information be sent by respondents to persons designated by the consumer who have received the deleted or disputed information within two years for employment purposes or within six months for any other purpose. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.
2. Failing to furnish any consumer statement, codification or summary thereof to any person designated by the consumer and qualified under Section 611(d) of the Fair Credit Reporting Act to receive such information. Such notification shall take place within five business days after the deletion or receipt of the consumer's request that the statement, codification or summary be sent.
3. Failing, whenever a statement of dispute has been filed, unless there are reasonable grounds to believe that the statement of dispute is frivolous or irrelevant, to clearly note in any subsequent consumer report containing the information in question that it is disputed by the consumer, and to provide either the consumer's statement or a clear and accurate codification or summary thereof.

It is further ordered, That respondents shall, at all times subsequent to the effective date of this order, maintain complete business records relative to the manner and form of their compliance with this order during the immediately preceding two-year period. Such records shall include all correspondence with consumers and consumer report applicants, policy directives, completely filled out interview reports, complaints from consumers and consumer report applicants, and other pertinent documents. Such records shall be kept in chronological order separate from the consumer files and shall be made available for inspection and photocopying by any authorized representative of the Federal Trade Commission upon reasonable notice at respondents' place of business or other properly designated location.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all employees now or thereafter engaged in the collecting, assembling, evaluating or furnishing of consumer information to third parties and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Order, Sept. 23, 1975

Commission directs chief administrative law judge, or his designee, to certify status report to the Commission no later than Oct. 20, 1975.

*Appearances**

ORDER

The administrative law judge has filed a motion to modify the Commission's order denying joint application for review, dated Sept. 16, 1975, to provide more time for the filing of the status report required by the order.

Although, under other circumstances, the reasons stated in the motion may have justified an extension of time, our concern that the case proceed to trial as expeditiously as possible requires that these matters be handled by the chief administrative law judge, or his designee, rather than delay them. Accordingly,

It is ordered, That the chief administrative law judge, or his designee, after consultation with the parties, schedule a trial as promptly as possible and certify to the Commission a report on the status of this matter no later than Oct. 20, 1975.

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* For appearances, see p. 650, herein.

IN THE MATTER OF

WARNER-LAMBERT COMPANY

Docket 8891. Order, Sept. 23, 1975

Genuine and authentic copies admitted into the record to replace exhibits entered into evidence at trial before administrative law judge but which are presently missing from official exhibit binders.

Appearances

For the Commission: *Wallace S. Snyder* and *William S. Busker.*

For the respondents: *Mudge, Rose, Guthrie & Alexander,* New York City and *S. Sharp, Bergson, Borkland, Margolis & Adler,* Wash., D.C.

ORDER GRANTING MOTION TO REPLACE EXHIBITS IN THE RECORD

Respondent and counsel supporting the complaint having jointly moved, by motion received Sept. 15, 1975, that the Commission place into the record of this case certain genuine and authentic copies of documents which were admitted as exhibits during the trial of this matter before the administrative law judge, but which exhibits are missing from the official exhibit binders,

It is ordered, That the genuine and authentic copies submitted by the parties pursuant to their joint motion received Sept. 15, 1975, and described therein, be admitted to replace exhibits entered into evidence at the trial before the administrative law judge but which exhibits are presently missing from the official exhibit binders.

IN THE MATTER OF

GENERAL MILLS, INC.

Docket C-1501. Order, Sept. 23, 1975

Denial of respondent's petition to reopen proceedings for purpose of setting aside the consent order.

Appearances

For the Commission: *Robert E. Liedquist.*

For the respondents: *Davis, Polk, Wardwell,* New York City and *Robert L. Fulgency,* Minneapolis, Minn.

ORDER DENYING PETITION TO REOPEN PROCEEDINGS

On July 25, 1975, respondent petitioned, pursuant to Section 3.72(b) of the Commission's Rules of Practice, to reopen the proceedings in this matter for the purpose of setting aside the consent order entered on Mar. 11, 1969. That consent order attempted to remedy an alleged violation of Section 7 of the Clayton Act through General Mills' acquisition of Morton Foods and Tom Huston Peanut Company (Tom's). The Commission's charge was that those acquisitions substantially lessened competition in the "manufacture, distribution and sales of potato chips and corn chips."

The order required respondent, for a period of ten years, to secure Commission approval prior to acquiring any firm engaged in the manufacture or wholesale distribution of any consumer products of the type manufactured by General Mills as of the date of the order and its subsidiaries (including Morton Foods and Tom's).

Several months after the order was entered, General Mills sold Morton Foods. General Mills now claims this sale has changed the facts sufficiently to make the order an "undue hardship for General Mills to continue to be burdened with * * *."

The arguments in support of this proposition do not explain what hardship is being suffered by General Mills, nor is there described any change in facts sufficient to justify modifications of a Commission order.

On review, the order is found to continue to be reasonably related to the conduct complained of and fairly calculated to assist in the restoration of competitive conditions in the marketplace.

It is ordered, That the aforesaid petition be, and it hereby is, denied.

IN THE MATTER OF

GENERAL MILLS, INC.

Docket C-1501. Order, Sept. 23, 1975

Denial of extension of time to Bureau of Competition to file answer to petition to reopen these proceedings.

*Appearances**

ORDER DENYING MOTION FOR AN EXTENSION OF TIME

By motion filed with the Secretary of the Commission on Sept. 11,

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* For appearances, see p. 686, herein.

1975, the Bureau of Competition has applied to the Commission for an extension of time to answer the petition to reopen these proceedings filed by General Mills, Inc. on July 25, 1975.

The time to file a response to petitioner's motion expired, pursuant to subsection 3.72(b) of the Commission's Rules of Practice, on Aug. 24, 1975. The Bureau of Competition does not adequately explain its failure to file a timely response by the bare statement that the petition "having apparently been mislaid, was not received by the Compliance Division of the Bureau of Competition until Sept. 9, 1975." While the Commission may, on sufficient showing,[1] grant an extension of time to file a response to a motion to reopen proceedings, no such showing has been made in this case. Therefore,

It is ordered, That this motion be, and the same hereby is, denied.

IN THE MATTER OF

PAY 'N SAVE CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2729. Complaint, Sept. 23, 1975-Decision, Sept. 23, 1975

Consent order requiring a Seattle, Wash., retailer of drugs and toiletries, wearing apparel, hardware, garden supplies and sporting goods, in connection with its debt collection activities, among other things to cease failing to honor agreements it has made to refrain from further legal action in collecting debts from allegedly delinquent debtors. Where debtor violates the agreement, respondent still must give the debtor notice before taking further legal action. Further, respondent is required to inform the court of the existence of any such agreements or any other response to the summons made by debtor.

Appearances

For the Commission: *Randall H. Brooks.*

For the respondents: *Michael R. Rayton, Ryan, Bush, Swanson & Hendel*, Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that Pay 'N Save Corporation, a corporation, and Donald Thoreson, an individual, hereinafter collectively referred to as respondents, have violated

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[1] Including a demonstration of excusable neglect and substantial prejudice resulting from denial of the opportunity to file a response.

Section 5 of the Federal Trade Commission Act, and that a proceeding by it would be in the public interest, issues this complaint:

PARAGRAPH 1. Pay 'N Save Corporation (hereinafter referred to as Pay 'N Save) is a Washington corporation, with its principal place of business located at 1511 Sixth Ave., Seattle, Wash.

Donald Thoreson is an attorney admitted to practice in the state of Washington. He formulates, directs and controls, together with the officers of Pay 'N Save, policies, acts and practices of Pay 'N Save related to legal actions, active and threatened, and is directly and personally responsible for the execution of payment agreements as set forth below. He maintains his principal office at 610 Fourth and Pike Bldg., 1424 Fourth Ave., Seattle, Wash.

Allegations below of respondents' present acts and practices include past acts and practices.

PAR. 2. Pay 'N Save is engaged primarily in the business of retail sales of drugs and toiletries, wearing apparel, hardware, garden supplies and sporting goods through stores in the States of Washington, Oregon, Alaska and California, and through outlets of its subsidiaries including Ernst, Malmo, Lamonts Apparel, Incorporated, Seattle Wholesale Nurseries, Incorporated and Seattle Sporting Goods, Incorporated.

PAR. 3. In the course of its business, Pay 'N Save extends credit to consumers in several states through retail installment and revolving charge card agreements (hereinafter "consumer credit obligations"). Pay 'N Save also engages in the collection of alleged debts based on the above consumer credit obligations in several states. Thus, these activities are in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Pay 'N Save regularly resorts to use of judicial process to collect debts. The defendant debtors in such cases are predominantly low-income and middle-income persons not represented by counsel.

PAR. 5. In the course of using judicial process to collect debts, Pay 'N Save causes the service of summonses and complaints upon alleged debtors. Following the service of the summons and complaint, but before entry of any judgment, respondent Thoreson often enters into written or oral agreements with the alleged debtors which provide for the periodic payment of specific amounts of money until the alleged debt is satisfied. Pursuant to the making of such agreements, respondents send or cause letters to be sent to the alleged debtors. Typical, but not all inclusive, of the content of such letters are the following statements and representations:

1. This will acknowledge receipt of your recent payment in the sum of \$———. We shall expect you to make monthly payments of \$———

for the next ——— months until the balance is paid in full. If you follow through with these payments we shall work with you.

2. In line with our agreement we shall expect you to send us a check of $——— by ————— and we shall also expect you to send us $——— on the ——— of each month thereafter until the account is paid in full. If these checks are sent as scheduled we will work with you. If not, we will proceed with additional legal steps.

PAR. 6. Through the use of the foregoing statements, and other similar statements, representations, and agreements, respondents have represented, either directly or by implication, that no further legal action would be taken in the cases involved as long as the alleged debtor complied with the payment agreement.

PAR. 7. The statements and representations described in Paragraphs Five and Six have the tendency and capacity to cause alleged debtors, in reliance on these statements and representations, to make substantial payments to Pay 'N Save prior to any final judicial determination of liability and without the protection of statutory garnishment limitations or exemptions to post-judgment executions, and to fail to make a legal appearance in the lawsuit, to obtain counsel, or otherwise take steps to defend or protect their interests.

PAR. 8. In truth and in fact, respondents proceed to take further legal action, including obtaining default judgment without prior notice to the alleged debtor, in cases where the debtor is complying with the terms of the agreement and without regard to the debtor's compliance with the payment agreements. Furthermore, respondents fail to inform the court of the existence of such agreements or of the fact of the debtor's appearance or other response to the summons, whether formal or informal, written or oral, and thus are able to, and do, obtain default judgments without any prior notice to debtor.

Therefore, the statements, representations and practices described above are unfair, false, misleading and deceptive.

PAR. 9. The acts and practices alleged above are all to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Pay 'N Save Corporation is a Washington corporation with its principal place of business located at 1511 Sixth Ave., Seattle, Wash.

Respondent Donald Thoreson is an attorney admitted to practice in the State of Washington. He formulates, directs and controls, together with officers of said corporation, the policies, acts and practices of said corporation related to legal actions, active and threatened. His principal office is at 610 Fourth and Pike Bldg., 1424 Fourth Ave., Seattle, Wash.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Pay 'N Save Corporation (hereinafter Pay 'N Save), a corporation, its successors, assigns, officers, agents, representatives and employees, and Donald Thoreson, an individual, directly or through any other device, in connection with the collection of consumer credit obligations in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Filing any motion for default judgment against an alleged debtor with whom they have entered an agreement, either written or oral, regarding the payment of a consumer credit obligation, subsequent to

service of summons and complaint upon the alleged debtor, unless the alleged debtor is given at least 10 days notice prior to entry of the default judgment.

2. Taking a default judgment in any lawsuit instituted to collect a consumer credit obligation when subsequent to service of summons and complaint upon the alleged debtor

a. the respondents have agreed, either orally or in writing, to a method of payment, and

b. the alleged debtor is complying with the terms of such agreement.

3. Failing to inform the court of any timely appearance or response to the summons, formal or informal, written or oral, made by the alleged debtor subsequent to service of summons and complaint, prior to obtaining a default judgment.

It is further ordered, That where respondents learn subsequent to the filing of a motion for default judgment that the preceding paragraph has not been complied with, they shall forthwith terminate the lawsuit and vacate any default judgment entered therein.

It is further ordered, That Pay 'N Save prepare and maintain records of suits instituted by Pay 'N Save or any of its divisions or subsidiaries, agents or assignees for the collection of consumer credit obligations in which default judgments have been granted which shall include copies of all legal papers relating to the default judgment, copies of all written communication, and summaries of all oral communication between respondents and defendants in such suits during the period of time between service of summons and complaint and the granting of default judgment. Such records shall be maintained for a period of one year after the granting of default judgment and shall be made available to representatives of the Federal Trade Commission for inspection and copying at all times upon reasonable request therefor.

It is further ordered, That Pay 'N Save shall forthwith deliver a copy of this order to each of its subsidiaries, operating divisions and employees engaged in the collection of consumer credit obligations or enforcement of judgments based on consumer credit obligations.

It is further ordered, That Pay 'N Save notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent promptly notify the Commission of the discontinuance of his present business affiliation with Pay 'N Save and/or of any new affiliation with, or representation of, a business, where such new affiliation or representation involves substantial collections of consumer credit obligations. Such notice shall include respondent's current business address and a statement as to the nature of the new business with which he is affiliated or which he is representing.

It is further ordered, That the respondents herein shall within sixty days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

GUILD INDUSTRIES CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2730. Complaint, Sept. 26, 1975-Decision, Sept. 26, 1975

Consent order requiring a St. Petersburg, Fla., manufacturer and seller of baby furniture, among other things to cease misrepresenting endorsements by the medical profession; misrepresenting savings and prices; misrepresenting the status and/or qualifications of its employees; and using scare tactics to secure merchandise orders.

Appearances

For the Commission: *Sandra L. Bird.*
For the respondents: *Stephen E. Samnick*, Parsippany, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Guild Industries Corp., a corporation, and Martin Byrd, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Guild Industries Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 230 - 23rd St. S., St. Petersburg, Fla.

Respondent Martin Byrd is an individual and officer of said corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the manufacture, offering for sale, sale and distribution of infant feeding tables and cribs to franchisees and distributors who sell them to the public. The feeding tables are sold under the trade name "Baby Butler" and the cribs under the trade names "Converta-Crib" and "Starlighter."

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, said merchandise when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their business as aforesaid, respondents have sold and distributed in commerce to franchisees and distributors who sell respondents' products to the public, various types of advertising and promotional materials including, but not limited to, flip-chart sales presentations, audio-visual demonstration materials, brochures and reprints of magazine and newspaper articles. Said promotional materials are designed to assist in and induce the sale of respondents' products. Some franchisees and distributors have added promotional materials of their own which follow the same general pattern of the materials supplied by the respondents.

Typical and illustrative of statements and representations contained in respondents' promotional materials, but not all inclusive thereof, are the following:

1. Baby Butler products are recommended by leading hospitals, doctors, nurses and pediatricians.
2. Respondents' products are being sold at less than normal retail prices; *i.e.*, at "direct factory discounts to 65%."
3. The salesmen who sell respondents' products to the consuming public are factory demonstrators or representatives.
4. The salesmen who sell respondents' products to the public are "Safety Specialists" and have had special training in safety and safety procedures.
5. Infant fatalities caused by structural defects in conventional high chairs are a frequent occurrence.

6. The life of the prospect's child is endangered by the use of conventional high chairs.

PAR. 5. In truth and in fact:

1. Respondents' products are not, and never have been, recommended or endorsed by leading hospitals, doctors, nurses and pediatricians.

2. Respondents' products are not sold at less than normal retail or discount prices. To the contrary, their products are sold to consumers at prices approximately 100 percent higher than the prices paid by the franchisees or distributors who purchase the products direct from the respondents and therefore such products are sold to consumers at normal or above normal markups.

3. The salesmen are not employed by respondents as factory demonstrators or representatives, but are either franchisees or distributors of respondents or are salesmen for such franchisees or distributors.

4. The salesmen have no special training which would entitle them to be called "Safety Specialists."

5. Infant fatalities caused by structural defects in conventional high chairs are a relatively infrequent occurrence.

6. The life of the prospect's child is not endangered by the use of all conventional high chairs.

Therefore, the statements and representations as set forth in Paragraph Four hereof were and are false, misleading and deceptive.

PAR. 6. Respondents by furnishing their franchisees and distributors with sales and promotional materials have thereby placed in the hands of such franchisees and distributors, the means and instrumentalities by and through which they may mislead the public in the manner and as to the things hereinabove alleged. Respondents' franchisees and distributors have used said promotional materials in the course of sales presentations in the homes of prospective purchasers of respondents' products.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by the respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Guild Industries Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 230-23rd St. S., St. Petersburg, Fla.

Respondent Martin Byrd is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Guild Industries Corp., a corporation, its successors and assigns, and its officers, and Martin Byrd, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, or through franchisees or licensees, in connection with the advertising, offering for sale, sale or distribution of baby furniture or other articles of merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, directly or by implication, orally or in writing that:

a. Their products have been recommended by leading hospitals, doctors, nurses and pediatricians; or misrepresenting in any manner the endorsement of their products.

b. Respondents' products are sold at direct factory discounts or at less than normal retail prices or at discount prices; or misrepresenting in any manner the savings that consumers will obtain by purchasing respondents' products.

c. Their franchisees and distributors and the agents, representatives and salesmen thereof are direct factory demonstrators or representatives; or misrepresenting in any manner the employment status of persons selling respondents' products to the consuming public.

d. Their franchisees and distributors and the agents, representatives and salesmen thereof are safety specialists and have had special training in safety procedures; or misrepresenting in any manner the qualifications of persons engaged in the sale of respondents' products to the consuming public.

e. Infant fatalities caused by structural defects in conventional high chairs are a relatively frequent occurrence.

f. The lives of children are endangered by the use of conventional high chairs.

2. Inducing the purchase of respondents' products by employing scare tactics through the preparation and dissemination of sales and promotional materials, newspaper clippings and accident pictures which may tend to or do unduly instill fear in members of the purchasing public as to the dangers of the use of conventional high chairs; or misrepresenting in any manner the safety of competitors' products.

Provided, however, That respondents may make available to prospective customers reports or publications of Federal, State or local government agencies or other official and recognized organizations devoted to consumer safety, and which publications and reports are not more than three (3) years old when used.

3. Supplying to or placing in the hands of respondents' distributors, franchisees or salesmen, brochures, sales materials, flip-charts, slides or any other advertising or promotional materials which are intended for use or which may be used in connection with the sales of respondents' products to the consuming public and which contain any of the representations prohibited in Paragraphs 1 and 2 hereof.

It is further ordered, That respondents herein shall forthwith distribute a copy of this order to each of their officers and to respondents' present and future representatives, distributors, franchisees and dealers engaged in the sale of respondents' products, and secure from each of such persons a signed statement acknowledging receipt of said order.

It is further ordered, That the respondents herein shall direct all of their distributors, franchisees or dealers, to remove and destroy or return to respondents all brochures, sales manuals, flip-charts, or any other advertising materials disseminated to them by the respondents, as described in Paragraph 3 above, of this order and which contain any of the representations prohibited in Paragraphs 1 and 2 above of this order; and in the event any such distributor, franchisee or dealer refuses to comply therewith respondents shall in that event cease to furnish and supply their products to such distributor, franchisee or dealer for resale to the public until such time as compliance with this requirement is obtained.

It is further ordered, That:

(a) Respondents herein shall notify all of their distributors, franchisees, or dealers that respondents are obligated by this order to cease to furnish and supply their products for resale to the public by any distributor, franchisee, or dealer who fails to comply with the requirements of the Federal Trade Commission's Trade Regulation Rule concerning a Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. §429, 37 Fed. Reg. 22934, which is herein incorporated by reference;

(b) In the event that any such distributor, franchisee, or dealer refuses or fails to comply with the requirements of the aforesaid Trade Regulation Rule, respondents shall in that event cease to furnish and supply their products to such distributor, franchisee, or dealer for resale to the public until such time as compliance with the requirements of said Trade Regulation Rule is obtained.

It is further ordered, That respondents shall maintain, for at least a two (2) year period, copies of all literature, brochures, visual aids and any other sales or promotional materials used in connection with the promotion or sale of respondents' products, to include copies of any materials made available or distributed to consumers in the course of such promotion or sale; and such materials shall be made available to

Federal Trade Commission representatives for inspection upon request in writing or by visitation during respondents' regular business hours.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

S. SCHEINFELD & SON, INCORPORATED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, TEXTILE FIBER PRODUCTS IDENTIFICATION AND WOOL PRODUCTS LABELING ACTS

Docket C-2731. Complaint, Sept. 29, 1975-Decision, Sept. 29, 1975

Consent order requiring a South Kearny, N.J., wholesale dealer in wool blend and textile fabrics, among other things to cease falsely and deceptively labeling wool and textile products; and to notify those that purchased subject products that they were mislabeled. Further, respondents are required to discontinue substituting their labels for those on textile fabrics they purchase for resale unless they comply with provisions of the Textile Fiber Products Identification Act.

Appearances

For the Commission: *James Manos.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the

Wool Products Labeling Act of 1939, and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that S. Scheinfeld and Son, Incorporated, a corporation and Joseph Scheinfeld, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and the Textile Fiber Products Identification Act, and it now appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent S. Scheinfeld and Son, Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at Jacobus Ave., Tompkins Terminal Bldg. #10, South Kearny, N.J.

Respondent Joseph Scheinfeld is an officer of said corporation. He formulates, directs and controls the acts and practices of the corporate respondent, including those hereinafter set forth. His business address is the same as that of the corporate respondent.

Respondents are engaged in the business of purchasing fabrics from various sources and selling such fabrics in the various States.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely fabrics, which contain substantially different types of fibers than those represented.

PAR. 4. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely fabrics, with labels which failed to disclose:

1. The true generic names of the fibers present therein.
2. The true percentages of the fibers present by weight.

PAR. 5. Respondents, in violation of Section 5(a) of the Textile Fiber Products Identification Act, have caused and participated in the removal of, prior to the time textile fiber products subject to the provisions of the Textile Fiber Products Identification Act were sold and delivered to the ultimate consumer, labels required by the Textile Fiber Products Identification Act to be affixed to such products, without substituting therefor labels conforming to Section 4 of said Act and in the manner prescribed by Section 5(b) of said Act.

PAR. 6. Respondents, in substituting a stamp, tag, label, or other identification pursuant to Section 5(b) of the Textile Fiber Products Identification Act, have not kept such records as would show the information set forth on the stamp, tag, label, or other identification that was removed, and the name or names of the person or persons from whom such textile fiber products were purchased in violation of Section 6(b) of said Act.

PAR. 7. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

PAR. 8. Respondents, now and for some time last past, have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 9. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were wool fabrics stamped, tagged, labeled or otherwise identified by respondents as "100% wool," whereas in truth and in fact, said products contained substantially different fibers and amounts of fiber than represented.

PAR. 10. Certain of said products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products with labels affixed thereto which failed to disclose the percentage of the total fiber weight of said wool products, exclusive of ornamentation not exceeding five percent of the total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool, when said percentage by weight of such fiber was 5 percent or more; and (5) the aggregate of all other fibers.

PAR. 11. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, within the meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, the Textile Fiber Products Identification Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent S. Scheinfeld and Son, Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey with its principal place of business located at Jacobus Ave., Tompkins Terminal Bldg. #10, South Kearny, N.J.

Respondent Joseph Scheinfeld is an officer of said corporation. He formulates, directs and controls the acts, practices and policies of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents S. Scheinfeld and Son, Incorporated, a corporation, its successors and assigns, and its officers, and Joseph Scheinfeld, individually and as an officer of said corporation and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, manufacture for introduction, sale, advertising or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original State or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

2. Failing to affix a stamp, tag, label or other means of identification to each such product showing in a clear, legible and conspicuous

manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

B. Removing or mutilating, or causing or participating in the removal or mutilation of, the stamp, tag, label or other identification required by the Textile Fiber Products Identification Act to be affixed to any textile fiber product, after such textile fiber product has been shipped in commerce, and prior to the time such textile fiber product is sold and delivered to the ultimate consumer without substituting therefor labels conforming to Section 4 of said Act and the rules and regulations promulgated thereunder and in the manner prescribed by Section 5(b) of the Act.

C. Failing to maintain and preserve, as required by Section 6(b) of the Textile Fiber Products Identification Act, such records of the fiber content of textile fiber products as will show the information set forth on the stamps, tags, labels or other identification removed by respondents, together with the name or names of the person or persons from whom such textile fiber products were received, when substituting stamps, tags, labels or other identification pursuant to Section 5(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondents S. Scheinfeld and Son, Incorporated, a corporation, its successors and assigns, and its officers, and Joseph Scheinfeld, individually and as an officer of said corporation and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents notify by delivery of a copy of this order by registered mail, each of their customers that purchased the textile and wool products which gave rise to this complaint of the fact that such products were misbranded.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

ANTONOVICH BROS., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FUR PRODUCTS LABELING ACTS

Docket C-2732. Complaint, Sept. 29, 1975-Decision, Sept. 29, 1975

Consent order requiring a New York City manufacturer, wholesaler and retailer of fur coats and other fur garments, among other things to cease misbranding and mislabeling their fur products in violation of the Fur Products Labeling Act.

Appearances

For the Commission: *Jerry R. McDonald.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Antonovich Bros., Inc., a corporation, and Daniel Antonovich and David Antonovich, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Antonovich Bros., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents Daniel Antonovich and David Antonovich are officers of the corporate respondent. They formulate, direct and control the policies, acts and practices of the corporate respondent including those hereinafter set forth.

Respondents are manufacturers, wholesalers and retailers of fur products with their office and principal place of business located at 333 Seventh Ave., New York, N.Y.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce" "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the rules and regulations promulgated thereunder. Among such misbranded fur products, but not limited thereto, were fur products without labels as required by said Act.

PAR. 4. Certain of said products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with rules and regulations promulgated thereunder in the following respects:

(a) The term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said rules and regulations.

(b) Required item numbers were not set forth on labels, in violation of Rule 40 of said rules and regulations.

(c) The true animal name of the fur used in such fur products was not shown on labels in violation of Rule 5 of said rules and regulations.

(d) Required information on labels was described in abbreviated form and not spelled out fully, in violation of Rule 4 of said rules and regulations.

(e) Required information on labels was entered in handwriting in violation of Rule 29 of said regulations.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Antonovich Bros., Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its principal place of business located at 333 Seventh Ave., New York, N.Y.

Respondents Daniel Antonovich and David Antonovich are officers of said corporation. They formulate, direct and control the acts, practices and policies of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That the respondents Antonovich Bros., Inc., a corporation, its successors and assigns, and its officers, and Daniel Antonovich and David Antonovich, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary or other device in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce; or in connection with the introduction into commerce, or the transportation or distribution in commerce, of any fur, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding any fur product by:

1. Failing to affix a label to such fur product showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Failing to set forth the term "natural" as part of the information required to be disclosed on a label under the Fur Products Labeling Act and the rules and regulations promulgated thereunder to describe such fur product which is not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

3. Failing to set forth on a label the item number or mark assigned to such fur product.

4. Failing to set forth on a label the true animal name of the fur used in such fur product.

5. Setting forth information required under the Fur Products Labeling Act and the rules and regulations promulgated thereunder in abbreviated form on a label pertaining to such fur product.

6. Setting forth required information on a label in handwriting.

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include each individual respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

FOOD FAIR STORES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8935. Complaint, July 30, 1973-Decision, Sept. 30, 1975.

Consent order requiring Amterre Development, Inc., a Bala-Cynwyd, Pa., shopping center developer, among other things to cease maintaining resale prices, discouraging discount advertising and selling, and denying competitive prices to the public through the insertion of restrictive provisions in leases and agreements with shopping center tenants.

Appearances

For the Commission: *Jonathan E. Gaines* and *Maynard F. Thompson.*

For the respondents: *Alex Akerman, Shipley, Akerman, Stein & Kaps*, Wash., D.C. *Warren J. Kaps, Stein & Rosen*, New York City. *Glenn A. Mitchell, Stein, Mitchell & Mezines*, Wash., D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), and it appearing to this Commission that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint stating its charges with respect thereto as follows:

1. A. Respondent Food Fair Stores, Inc., (Food Fair) is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 3175 John F. Kennedy Blvd., Philadelphia, Pa.

Food Fair is engaged in, among other things, the management and operation of a retail food chain, the retail sale of food and other merchandise and, through its subsidiary Amterre Development, Inc. (formerly Food Fair Properties, Inc.,) and other subsidiaries, the development, construction and management of shopping centers. In 1971 Food Fair was the fourth largest retail food chain in the United States with sales of approximately $2 billion.

B. Respondent Amterre Development, Inc. (Amterre) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 2 Decker Square, Bala-Cynwyd, Pa.

Amterre was formed by and is controlled by Food Fair for the purpose of developing, constructing and managing shopping centers. Food Fair has the exclusive right to the space set aside for a supermarket in each shopping center developed by Amterre. No other supermarket is permitted in these shopping centers without Food Fair's consent.

Amterre, with assets in 1971 of $230 million and a total income of $18 million, is the largest publicly-held shopping center development company in the United States. Through Amterre, Food Fair is presently operating 48 shopping centers throughout the Eastern portion of the United States and 36 free-standing commercial properties with total gross leasable area in excess of 9,000,000 square feet.

2. In the course and conduct of their business, respondents maintain and have maintained a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent Food Fair owns and operates in excess of six hundred food store units and department stores located in sixteen different States for which it purchases for resale, and through which, it sells goods in interstate commerce. Amterre, on its own behalf, and on behalf of Food Fair, owns and operates shopping centers in nine different States. In so doing Amterre has been, and is now, engaged in interstate lease negotiations and transactions with its tenants and prospective tenants.

3. Except to the extent that competition has been hindered, lessened and eliminated as set forth in this complaint, respondents Food Fair and Amterre, in the course and conduct of their business of selling, at retail, food and other merchandise, and of developing, constructing, and managing shopping centers, have been and are now in substantial competition with other corporations, individuals and partnerships.

4. In the course and conduct of their business, respondents are and have been engaged in unfair methods of competition and unfair acts and practices in commerce in that they have negotiated, executed and enforced and are now negotiating, executing and enforcing leases which control or eliminate discount sales, exclude discount stores and tend to establish and maintain prices at which or the price ranges within which shopping center tenants and their competitors must sell their merchandise. Additionally, respondents' lease provisions encourage each tenant to enforce price restrictions against its competitors. Pursuant to such lease provisions, respondents' tenant, The Felsway Corporation, has brought suit to enjoin price cutting competitors and eliminate price competition.

5. Through the negotiation, utilization and enforcement of these lease provisions, among others, respondents have entered into agreements which tend to fix prices and which otherwise restrain trade and have engaged in unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint which charges respondents Food Fair Stores, Inc. and Amterre Development Inc., with violating the Federal Trade Commission Act, and

The respondent Amterre Development Inc., and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Amterre Development Inc. of all the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in said complaint, and waivers and other provisions as required by the Commission's rules, and

The Commission having thereafter accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Amterre Development Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business in Bala-Cynwyd, Pa.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent Amterre Development Inc., and the proceeding is in the public interest.

ORDER

I

For the purposes of this order the following definitions shall apply:

A. The term "respondent" refers to Amterre and its subsidiaries, officers, agents, representatives, employees, successors, and assigns, in their capacities as such. "Subsidiary" means a person, entity or corporation in which Amterre has voting control.

B. The term "shopping center" refers to a planned development of retail outlets, managed as a unit in relation to a trade area, which the development is intended to serve, and providing on-site parking in some definite relationship to the types and sizes of stores in the development.

C. The term "tenant" refers to any occupant or potential occupant of retail space in any of respondent's shopping centers, whether as a lessee or owner of such space.

D. The term "retailer" refers to a tenant which sells merchandise or services to the public.

E. The terms "range of prices" and "price range" refer to such descriptive words as "popular priced," "medium priced," "high priced," "merchandise ranging in price from $90 to $190," and "the sale of merchandise at prices less than $15." The terms "range of prices" and "price range" do not include references to the general quality of merchandise or services, explicitly characterized as such, that the tenant principally will offer.

F. The term "price line" refers to descriptive words identifying a particular retailer as an example of a category of merchants selling merchandise within a generally identifiable range of prices.

II

A. *It is ordered*, That respondent cease and desist from making, carrying out, or enforcing, directly or indirectly, an agreement or provision of an agreement which:

1. specifies that any retailer in any of respondent's shopping

centers shall or shall not sell or offer to sell merchandise or services at any particular price or within any range of prices;

2. specifies that any retailer in any of respondent's shopping centers shall or shall not sell or offer to sell designated price lines of merchandise;

3. specifies that any retailer in any of respondent's shopping centers shall not be a discounter or sell or offer to sell merchandise or services at discount prices;

4. specifies the content of or prohibits any type of advertising by a retailer, other than advertising within any of respondent's shopping centers, except that respondent may require a tenant to include the name, insignia, or other identifying mark of any of respondent's shopping centers in advertising pertaining to the tenant's store in any of respondent's shopping centers.

B. *It is further ordered*, That respondent will within thirty (30) days after service of this order mail a copy of Letter "A," attached hereto, to all tenants of its shopping centers whose leases make reference in the use clauses to the price or quality of the merchandise or services to be sold.

C. *It is further ordered*, That respondent cease and desist from entering into any agreement, directly or indirectly, with any tenant that said tenant may:

1. specify or control or may require respondent to specify or control prices, price ranges, or price lines of merchandise or services sold by any other retailer;

2. control or may require respondent to control discounting by any other retailer; or

3. exclude any retailer from any of respondent's shopping centers by reason of such retailer's discount selling or discount advertising.

D. *It is further ordered*, That respondent advise the Commission in writing within sixty (60) days of any occasion that:

1. a tenant disapproves the admission into any of respondent's shopping centers of any other retailer;

2. a tenant refuses to approve the renewal of another retailer's lease in any of respondent's shopping centers;

3. a tenant approves the admission of another retailer into any of respondent's shopping centers subject to conditions imposed by the tenant relating to the pricing, price ranges, price lines, trade names, store names, trademarks, brands or lines of merchandise, or the discounting practices or methods of such other retailer; or

4. a tenant enters into an agreement with respondent to become a tenant in any of respondent's shopping centers on condition that respondent refuse to renew the lease of another retailer.

III

It is further ordered, That respondent shall:

A. within thirty (30) days after service of this order upon respondent, notify each of its tenants of this order by providing each tenant with a copy thereof by registered or certified mail;

B. within sixty (60) days after service of this order upon respondent, file with the Commission a report showing the manner and form in which it has complied and is complying with each and every specific provision of this order; and

C. notify the Commission at least thirty (30) days prior to any change in the corporate respondent which may affect compliance obligations arising out of this order.

IV

It is further ordered, That the complaint in this proceeding be, and it hereby is, dismissed with respect to respondent Food Fair Stores, Inc.

LETTER "A"

[On Official Amterre Development Inc. stationery]

Gentlemen:

Amterre Development Inc. has consented to the issuance by the Federal Trade Commission of an order which, among other things, prohibits Amterre from specifying that its tenants shall or shall not sell merchandise or services at any particular price or within any range of prices, and that its tenants shall or shall not sell designated price lines of merchandise. A copy of the order is enclosed.

Your lease describes the merchandise or services you are to sell in terms such as "popular priced," "medium priced," "high priced," "Medium to better quality," or the like. Please be advised that such language is intended only as a description of the general quality of the merchandise or services you sell. It is not intended and will not be enforced to affect the retail selling price of your merchandise or services. Pursuant to the terms of the order you are free to set the prices for your merchandise and services and are not required to adhere to any particular price, range of prices, or price lines expressed or implied in your lease or in any other agreement with the shopping center.

This letter shall not operate as a waiver of any rights which Amterre may now have to require you, except as your lease otherwise provides, to sell merchandise or services at a general quality level or levels.

IN THE MATTER OF

TRAVEL KING, INC., ET AL.

OPINION, ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8949. Amended Complaint, May 17, 1974-Order, Sept. 30, 1975*

Order requiring four west coast travel agencies located in Seattle, Wash., and San Francisco, Calif., among other things to cease making false claims about "psychic surgery" and promoting tours for such surgery, which has been misrepresented as an actual surgical operation by which diseased tissue or disease-causing material is removed from the body using only the bare hands. The order further requires respondents to send notices to past purchasers and to those who inquire about such tours in the future warning them of the serious danger involved.

Appearances

For the Commission: *Gregory L. Colvin, Randall H. Brook, Barry E. Barnes* and *Rachel P. Goodisman.*

For the respondent: *David C. Stewart, DeGarmo, Leedy, Oles & Morrison*, Seattle, Wash., *Michael W. Palmer, Baker & McKenzie*, San Francisco, Calif., *Richard Kelleher* and *Douglas A. Baum, Kelleher, Murphy & Nelson, Jerry Kindinger, Ryan, Bush, Swanson & Hendel* and *Albert Hanan*, Seattle, Wash.

AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that Travel King, Inc., d/b/a Travel King, Inc. & Ramble Tours, Phil-Am Travel Agency, Inc., Gem Travel Service, Inc., and Ramble Travel and Tours, Inc., corporations; Yuda Galazan and Nyla Ford, individually and as officers and directors of Ramble Travel and Tours, Inc.; Ronald Brown, individually and as an officer of Travel King, Inc.; Adeline C. Heredia and Emile H. Heredia, individually and as officers of Phil-Am Travel Agency, Inc.; and Laurence C. Marquez and Marian E. Butterfield, individually and as officers of Gem Travel Service, Inc., hereinafter referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint:

PARAGRAPH 1. Travel King, Inc., d/b/a Travel King, Inc. & Ramble Tours (hereinafter "Travel King"), is a Washington corporation, with its corporate office at 1200 - 153rd N.E., Bellevue, Wash., and a branch office at 1401 Seattle Tower Bldg., Seattle, Wash.

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* Reported as amended by order of May 31, 1974 of the administrative law judge.

Phil-Am Travel Agency, Inc. (hereinafter "Phil-Am") is a California corporation, with its corporate office at 210 Post St., Suite 205, San Francisco, Calif. and another place of business at 407 Alaska Bldg., Seattle, Wash.

Gem Travel Service, Inc. (hereinafter "Gem") is a California corporation, with its office and principal place of business at 703 Market St., Room 405, San Francisco, Calif.

Ramble Travel and Tours, Inc. (hereinafter "Ramble"), is a Washington Corporation, with its corporate office at 1401 Seattle Tower Bldg., Seattle, Wash. Ramble was formed in December 1973 to succeed Travel King in the operation of the business located at that address.

Yuda Galazan is an individual and is presently managing and purchasing the business of the Travel King branch office located at 1401 Seattle Tower Bldg. He also is an officer, director, and the sole shareholder of Ramble Travel and Tours, Inc. He formulates, directs and controls the policies, acts and practices of Ramble and the aforementioned Travel King branch office, including those hereinafter set forth, and his business address is 1401 Seattle Tower Bldg., Seattle, Wash.

Nyla Ford is an individual and a former officer and principal shareholder of Travel King, and a present officer and director of Ramble. Together with Yuda Galazan, she formulates, directs and controls the policies, acts and practices of Ramble and the Travel King branch office including those hereinafter set forth, and her business address is 1401 Seattle Tower Bldg., Seattle, Wash.

Ronald Brown is an individual and an officer and principal shareholder of Travel King. He formulates, directs and controls the policies, acts and practices of Travel King, including those hereinafter set forth. His business address is 1200 - 153rd N.E., Bellevue, Wash.

Adeline C. Heredia and Emile H. Heredia are individuals and officers and the principal shareholders of Phil-Am. They formulate, direct and control the policies, acts and practices of Phil-Am, including those hereinafter set forth, and their business address is 210 Post Street, Suite 205, San Francisco, Calif.

Laurence C. Marquez and Marian E. Butterfield are individuals and officers and principal shareholders of Gem Travel Service, Inc. They formulate, direct and control the policies, acts and practices of Gem, including those hereinafter set forth, and their business address is 703 Market St., Room 405, San Francisco, Calif.

PAR. 2. Respondents Travel King, Phil-Am, and Gem each operate a general travel agency business, including the sale or arrangement of transportation, accommodations, and other services for travelers.

Allegations below of respondents' present acts or practices include past acts or practices.

PAR. 3. In the course of their businesses, respondents make arrangements for residents of Washington and other states to travel to the Philippines on the tours described below. Promotional materials, letters, contracts, business correspondence, monies and other documents are transmitted between respondents' offices and agents who refer customers to them, customers, common carriers, and other business organizations located in various States of the United States and in other nations of the world. Accordingly, respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents Travel King, Phil-Am, and Gem advertise, offer for sale and sell to the general public package tours to the Philippines so that customers may undergo "psychic surgery," purported to be a treatment by which the body is entered without surgical instruments, using only the bare hands. The treatment is also known as "psychic healing," "faith healing," and "spiritual" or "spirit healing" and is performed by persons not licensed in the Philippines or elsewhere to practice medicine.

PAR. 5. Respondents engage in written, oral and visual representations which have the tendency and capacity, directly or by implication, to lead members of the general public to believe that the "psychic surgery" performed in the Philippines is an actual surgical operation, that the body is thereby opened, and that diseased tissue or disease-causing material is thereby removed from the human body. Respondents do so by using, or causing to be used, some means of promotion, including but not limited to one or more of the following:

A. Public dissemination of brochures prepared, printed and paid for with the assistance of certain major international airline companies, specifically Northwest Airlines, Inc. and Pan American World Airways, Inc.

B. Public dissemination of other materials.

C. Newspaper advertisements.

D. Showing of films at public meetings.

PAR. 6. In truth and in fact:

A. The so-called "psychic surgery" performed in the Philippines is not an actual surgical operation, the body is not thereby opened, and neither diseased tissue nor disease-causing material is thereby removed from the human body.

B. Respondents lack a reasonable basis for representations leading members of the general public to believe that the "psychic surgery" performed in the Philippines is an actual surgical operation, that the body is thereby opened, and that diseased tissue or disease-causing material is thereby removed from the human body.

Therefore, the acts and practices referred to in Paragraphs Four and Five are deceptive and unfair.

PAR. 7. Persons suffering from many types of ailments, including cancer, heart disease, multiple sclerosis, blindness, deafness, paralysis, diabetes and arthritis may be led to believe by respondents' promotions that "psychic surgery" is an actual surgical operation, that the body is thereby opened, and that diseased tissue or disease-causing material is thereby removed from the human body. Thus, respondents' promotions of Philippine psychic surgery prey upon and exploit the frustrations and hopes of people who are seriously ill, and their families. Respondents are travel agents, not licensed physicians, and therefore are not qualified to diagnose, advise or select patients for any operation. Further, respondents disclaim responsibility for any medical consequences to their customers during their travel to the Philippine Islands or afterwards. People who are seriously ill, and their families, are vulnerable to the influence of respondents' promotions which hold out a tantalizing hope which the medical profession, by contrast, cannot offer. Therefore, the acts and practices referred to in Paragraphs Four and Five are unfair.

PAR. 8. The result of the respondents' aforesaid misleading, deceptive and unfair acts and practices is that people who are seriously ill may be and are induced to forego conventional medical treatment, thereby worsening their condition and, in some cases, hastening death. Further, the aforesaid acts and practices cause people who are seriously ill and their families to spend large amounts of money and be subjected to the inconvenience of traveling for a nonexistent "operation."

PAR. 9. The respondents' acts and practices are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW JUDGE

FEBRUARY 28, 1975

ALLEGATIONS OF COMPLAINT

An amended complaint issued May 17, 1974,[1] charging respondents with promoting, offering for sale and selling package tours to the

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[1] The original complaint was issued Jan. 8, 1974, naming as respondents only the corporate travel agencies, Travel

(*Continued*)

Philippines so that customers could undergo "psychic surgery," purporting to be a treatment by which the body is entered without surgical instruments "using only the bare hands." According to the complaint, respondents engaged in written, oral and visual representations which had the tendency and capacity to lead members of the public to believe that "psychic surgery" performed in the Philippines is an actual surgical operation, that the body is opened, and that disease-causing material is thereby removed. The complaint further alleged that respondents had no reasonable basis for the representations made, and that persons suffering from many types of ailments including cancer, heart disease, multiple sclerosis, blindness, deafness, paralysis, diabetes and arthritis may be led to believe that "psychic surgery" is an actual surgical operation, that the body is opened and diseased tissue removed. According to the complaint, the frustrations and hopes of the seriously ill and their families were exploited, and the representations had the tendency and capacity to induce the seriously ill to forego conventional medical treatment worsening their condition and in some cases hastening death, or to cause them to spend large amounts of money and to undergo the inconvenience of traveling for a nonexistent "operation." The acts and practices of respondents were challenged as unfair, misleading and deceptive, and violative of Section 5 of the Federal Trade Commission Act.[2]

ANSWERS

The answers denied any violation of the Federal Trade Commission Act, denied the material allegations of the complaint, denied that respondents made any representations, directly or by implication, that "psychic surgery" was an actual surgical operation by which diseased tissue or disease-causing material was removed from the human body, and denied that respondents lacked a reasonable basis for any representations that were made. Most respondents raised affirmative defenses that the tours arranged to visit "psychic healers," "faith healers" or "spiritual healers" in the Philippines, insofar as the

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King, Inc., Phil-Am Travel Agency, Inc., and Gem Travel Service, Inc. At a prehearing conference held Mar. 6, 1974, in Seattle, Wash., complaint counsel advised of their intention to amend the complaint to add a number of individual respondents, one additional corporate respondent, Ramble Travel and Tours, Inc., and to make certain substantive changes in the allegations. The motion to amend was certified to the Commission together with respondents' opposition on Apr. 5, 1974. The Commission granted the motion to amend and on May 17, 1974, issued an amended complaint which was served on all individual and corporate respondents between May 23 and June 3, 1974. Answers to the amended complaint were filed between June 18 and 26. A timetable for pretrial proceedings was issued by the undersigned on June 24, 1974, setting dates for the completion of discovery, exchange of lists of witnesses and documents, and setting Sept. 9, 1974, for commencement of hearings on the merits.

[2] In addition to a cease and desist order, and certain other relief, restitution for persons purchasing package tours from respondents was sought by complaint counsel. Restitution was not included in the "Notice Order" issued either with the original or the amended complaint. Complaint counsel advised of their intention to seek restitution at the pretrial conference of Mar. 6, 1974, and subsequently filed a "Notice of Intent to Seek Restitution from Corporate and Individual Respondents" on Mar. 22, 1974.

customer and the healers were concerned, were basically religious experiences or activities "imbedded in the religious doctrine of the Christian religion," and that the complaint amounted to an attempted regulation of religious action involving the "testing of the truth or falsity of the religious beliefs" of customers and "faith healers," "spiritual healers," or "psychic healers" in violation of the First Amendment. Travel King, Inc., further alleged that it had nothing to do with what took place between the "customers and the healers." Individual respondent Ronald Brown denied that he was ever actively involved in the operation of Travel King, Inc., and denied any responsibility for the "formulation, direction, arrangement, or administration" of package tours by that corporate respondent.

PROCEEDINGS

Hearings were held between Sept. 9, 1974, and Sept. 24, 1974. Forty-eight witnesses testified, 33 being called by complaint counsel and 15 by respondents. The exhibits received numbered 134, 131 being introduced by complaint counsel and the balance by respondents. The exhibits include promotional literature, advertisements, films, TV scripts, respondents' correspondence with tour members and prospective members, internal memoranda, newspaper articles and clippings which were reproduced and distributed by one or another of respondents, medical reports, and similar materials. The transcript numbers 2,388 pages.

The briefing schedule issued requiring proposed findings to be filed by Nov. 15, 1974, and replies by Nov. 27, 1974. On Nov. 6, 1974, complaint counsel requested an extension of time for findings to Dec. 13, 1974, and to Jan. 10, 1975, for replies. This was granted by the undersigned as to all parties provided an extension of time for filing the initial decision to Feb. 28, 1975, was granted by the Commission. Such an extension was granted on Dec. 17, 1974.

BASIS OF DECISION

This matter is now before the undersigned for initial decision based on the allegations of the complaint, answers, evidence, and the proposed findings of fact, conclusions and briefs filed by respondents and complaint counsel. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record, and all the contentions of both sides, makes the following findings and conclusions, and issues the order set out at the end hereof:

FINDINGS OF FACT

RESPONDENTS

Travel King, et al.

1. Travel King, Inc., was incorporated in 1969 in the State of Washington. From September 1972 to February 1974, Travel King had its main office in Bellevue, Washington, a suburb of Seattle. From April 1973 to May 1974, a branch office was maintained in downtown Seattle which did business as Travel King, Inc. & Ramble Tours. Although Travel King still exists as a corporate entity, it has had no place of business since May 1974 and, according to its answer and that of Nyla Ford, it is no longer doing business.

2. Ramble Travel & Tours, Inc. (hereinafter "Ramble") was incorporated in the State of Washington on Dec. 7, 1973. Ramble's corporate offices were located in downtown Seattle, Wash., where Ramble did business from Dec. 7, 1973, until May 1974, using the trade names Travel King and Travel King & Ramble Tours. The business purpose of the formulation of Ramble was to operate a travel agency and to succeed Travel King in the operation of the downtown Seattle business. Ramble continued using the same name as its predecessor in order to maintain name identification with its customers and also continued using the same travel brochures.

3. In 1971, Nyla Ford began purchasing the business of Travel King. In September 1972, Ronald Brown became half-owner of the business, Nyla Ford remaining owner of the other half. This dual ownership continued until February 1973, when Ronald Brown acquired Nyla Ford's interest, corporate respondent Travel King being in financial difficulties. Since Feb. 1, 1973, individual respondent Ronald Brown has been the sole owner of Travel King, Inc. Nyla Ford has been president of Travel King from September 1972 until the present. She was an incorporator. She also served as vice president and a director of Ramble Travel & Tours, Inc., from Dec. 7, 1973, until February 1974. However, she held no stock in Ramble.

4. Yuda Galazan has been president of Ramble Travel & Tours, Inc., from its incorporation on Dec. 7, 1973, to the present, owning 100 percent of its stock. Prior to the formation of Ramble, Mr. Galazan was active during the fall of 1973 in the management of the downtown Seattle office of Travel King, Inc., and engaged in the promotion of "psychic surgery" tours to the Philippines as later set out herein.

For the above see admissions and answers to interrogatories of Travel King, Inc., and individual respondents connected therewith; see also, CX 1, 3-4; Galazan, Tr. 882-83; Ford, Tr. 1786-1793, 1786-91.

Phil-Am, et al.

5. Phil-Am Travel Agency, Inc. is incorporated in the State of California with its corporate office and principal place of business in San Francisco. A branch office is located in Seattle, Wash., and is managed by Jesus Ma. (Jesse) Jose. Other branches are located in Los Angeles, San Diego, Stockton, San Jose, and Honolulu. Adeline C. Heredia and Emile H. Heredia each own 50 percent of the stock in Phil-Am. Adeline Heredia is the president of the corporation, and Emile Heredia is the secretary. Together they have authority over Phil-Am and its employees, and formulate, direct and control the policies, acts and practices of Phil-Am. See admissions and answers to interrogatories of Phil-Am and Emile H. and Adeline Heredia; see also Adeline Heredia, Tr. 1534.

Gem, et al.

7. Gem Travel Service, Inc., is a California corporation with its office and principal place of business in San Francisco. Laurence C. Marquez is president and chief executive officer, holding 50 percent of the outstanding stock. Marian E. Butterfield is secretary-treasurer of Gem and also owns 50 percent of the outstanding stock. Together they formulate, direct and control the policies, acts and practices of Gem. See admissions and answers to interrogatories of Gem, Laurence C. Marquez and Marian E. Butterfield.

Representations to the Public by Travel King

8. Travel King, Inc. disseminated travel brochures, advertisements and promotional literature, and sponsored promotional meetings, including film showings in hotels and similar places in the Seattle metropolitan area, to market tours to the Philippines. Representations were made to members of the public in connection with the promotion of such tours that "healers" in the Philippines, variously known as "psychic surgeons," "psychic healers," "faith healers" and "spiritual" or "spirit healers," or the like, would open bodies with their bare hands, remove diseased tissue or disease-causing material, and that thereby many persons were cured of serious, even terminal illnesses, as well as of chronic conditions of a troublesome, painful, or incapacitating nature.

9. "RAMBLE TOURS TO THE PHILIPPINES" is the tour brochure used by Travel King to describe the Philippine tour. Travel King requested Northwest Orient Airlines to distribute this brochure widely. The schedule provides for "Visit to Famous Spiritualist of The Philippines," and contains a release to be signed by the tour member for any "responsibility regarding any treatment or treatments administered by the Faith Healers" (CX 2). "TOUR TO THE PHILIPPINES" (CX 5) is a single sheet which sets out the cost of the tour, and also contains a summary of the basic information provided in CX 2. The reservation application form (CX 6), which Travel King, and

also Mr. Galazan, used for a time during the beginning of these group tours, likewise provides for a release for any treatment or treatments by "Faith Healers." Mr. Galazan testified that CX 2, 5 and 6 were sent in the mail to interested customers and to past tour customers for them to pass on to other people (see admissions of Travel King and Galazan; Galazan, Tr. 820, 830-35, 867-68).

10. "QUESTIONS YOU MAY HAVE" (CX 7A-B) is a description issued by Travel King and Mr. Galazan in the promotion of its tours to the Philippines describing "psychic surgery," stating that it is not connected with any one church but that "people of all faiths" are healed, that "anyone" can be helped, and that "upward of 70% are happy with the results." The leaflet lists major and minor ailments which may be treated, guarantees appointments, and states that many doctors go to the Philippines "for treatment themselves," and that other doctors are "researching" the phenomenon. The leaflet was prepared in the fall of 1973 when the travel agency became involved in answering questions about health, so that those who worked in the office could answer questions. It was distributed to those inquiring about the tours, and was mailed to those who signed up as tour members prior to departure. The printing was paid for either by Mr. Galazan directly or by Travel King, Inc., with Mr. Galazan eventually reimbursing the travel agency (Galazan, Tr. 815-18; Tr. 1830-31).

11. "QUESTIONS YOU MAY HAVE" was distributed to the public, as stated, in connection with the promotion of tours to the Philippines by Travel King. Among other statements in this leaflet were the following (CX 7A-B): There are men in the Philippines who have (or claim to have) the powers to heal and/or operate on persons without instruments of any kind. They do this with no sanitation, and no pain, entering the body with their hands, operating in a matter of minutes, and with prayer closing the body leaving no scar.

* * * * * * *

> WHAT TYPE OF CURES? Cancer, coronary, multiple sclerosis, blindness, deafness, tumors, diabetes, blood clots, arthritis, etc.; these are some ailments people have claimed were cured. Some have been told they only have months to live and others who have minor ailments.

* * * * * * *

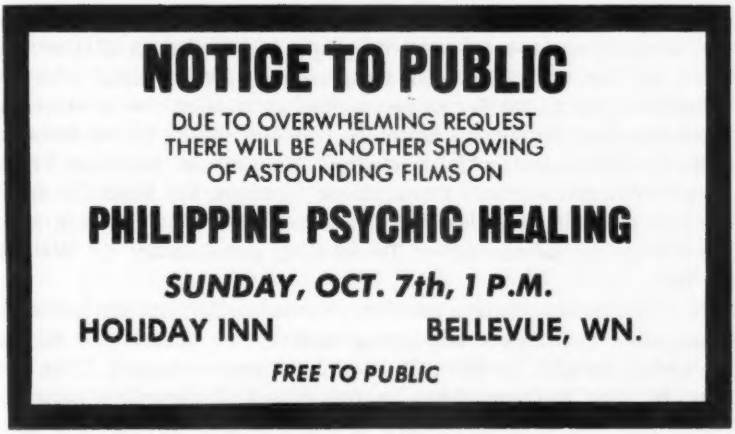
> HOW DOES OUR AMERICAN MEDICAL ASSOCIATION FEEL ABOUT THIS? Most doctors due to their training are sceptical, and yet we have many doctors going for treatment themselves, as well as others around the world who are now in the process of researching all available information.

12. CX 8A-H is a series of photocopied newspaper, news letter, and magazine articles conveying the impression that the human body is opened with the bare hands, that diseased tissue or disease-causing material is removed curing serious or terminal illnesses. Numerous references are made to actual surgery with the bare hands, the body being opened, and diseased tissue or disease-causing material being removed.

13. Hundreds of copies of the foregoing newspaper articles were printed by Mr. Galazan and distributed at various public film showings sponsored by Travel King held during the fall of 1973. Ms. Hasson, the Travel King office manager, recalled delivering multiple copies of CX 8A-H in bulk to one of the film showings held during September or October of 1973 (Galazan, Tr. 830-33, Hasson, Tr. 1901).

Public Film Showings and Advertising Thereof

14. Travel King sponsored a number of public meetings, announced by advertisements in major Seattle newspapers, at which films depicting Philippine "healers" were shown to the public. The advertisements were placed during the fall of 1973 in the Seattle Post-Intelligencer, the Seattle Times, and other papers such as the Aberdeen Daily World (CX 9, 10, 14-16, 192, 193 AND 197). The advertisement of Oct. 6, 1973, in the Seattle Post-Intelligencer was as follows (CX 10):



NOTICE TO PUBLIC

DUE TO OVERWHELMING REQUEST
THERE WILL BE ANOTHER SHOWING
OF ASTOUNDING FILMS ON

PHILIPPINE PSYCHIC HEALING

SUNDAY, OCT. 7th, 1 P.M.

HOLIDAY INN BELLEVUE, WN.

FREE TO PUBLIC

15. The public meetings were held in Seattle, Bellevue, Bellingham, and Everett, and several hundred people attended each of them. Ms. Ford and Mr. Galazan attended representing Travel King, with Mr. Galazan acting as master of ceremonies at at least one of them. At these meetings, individuals known as Tom Muchlinski, Elaine Shinn, or both, spoke concerning "faith healing." Mr. Galazan described Travel King's tours and services. During these meetings, Ms. Ford also spoke to those attending and described the tours offered by Travel King to the Philippines (admissions of Travel King and Galazan; Dr. Wallace, Tr. 753).

16. The record contains the film, provided by Mr. Galazan, shown at these public meetings or one similar to it (CX 80; Galazan, Tr. 825-26; see also C. Wright, Tr. 120-130). It depicts "psychic surgery." The film must be seen to comprehend its full impact. It records a series of "operations" on individuals, each of whom is shown lying on a table surrounded by onlookers. The "psychic surgeon" or "faith healer" appears to have his hands, surrounded by blood, in a depression in one part or another of the patient's body, and appears to have opened or to be opening it with his bare hands, without anesthesia or surgical instruments of any sort, and to be removing tissue or other material from inside. During the "operation," the "psychic surgeon" or "faith healer" from time to time holds up to the view of the onlookers what appears to be tissue or material removed from the body. Thereafter, the abdomen, or other part of the anatomy which appears on the film to have been opened, is wiped clean by the "psychic surgeon" or "faith healer," or his attendants. No marks of any incision are seen, and there is no scar. The patient arises and walks away. See CX 80; CX 79 and CX 81 are other reels of film depicting "psychic surgery" which, as described later herein, were shown at meetings connected with or sponsored, directly or indirectly, by respondents Gem and Phil-Am, or those promoting tours with those respondents.

17. Travel King tour brochures (CX 2), "QUESTIONS YOU MAY HAVE" (CX 7A-B), and the photocopied newspaper, newsletter and magazine material (CX 8A-H), were distributed at the Travel King film showings (admissions of Travel King and Galazan; Galazan, Tr. 823-834).

18. During the Sept. 30, 1973, meeting, sponsored by Mr. Galazan and typical of these Travel King film showings (see CX 192 and CX 193; Galazan, Tr. 821-24). Tom Muchlinski, mentioned in finding 15, told the assembled crowd that before he went to the Philippines he had a heart problem which made it difficult for him to walk and which necessitated his taking many nitroglycerin pills. He also told the group he no longer needed to take the pills and showed a film (similar to CX

80) of the kind of "psychic surgery" he experienced. Mr. Muchlinski also showed the group what he claimed was a piece of cholesterol removed from his heart by the psychic surgeons with their bare hands. A woman who claimed to be "legally blind" also spoke at the meeting, telling how she had been operated on in the Philippines by the "psychic surgeons," and that they had improved her vision. Mr. Galazan introduced the various people who spoke about their operations to the audience. The cost of the hotel room in which the meeting was held was shared equally by Travel King, Inc. and Mr. Galazan (Galazan, Tr. 823-833).

19. The film showing held on Oct. 7, 1973 (see CX 10), was similar to the September 30 showing. At this time, Mr. Muchlinski, and other people, again came forward and gave testimonials about the "psychic surgery" they had received in the Philippines. When people asked whether they could be cured of specific diseases, they were told there might be hope for them. Several people signed up at the meeting itself to go on the next Travel King tour. The same literature that was distributed at the Sept. 30, 1973, meeting was also made available at the Oct. 7, 1973, meeting (Galazan, Tr. 858-864). Nyla Ford estimated that about 500 people came to the September meeting and 700 to the October meeting (Ford, Tr. 1824-1832). Additional film showings for audiences also numbering several hundred were held on Nov. 4 and Nov. 17, 1973, at which Mr. Galazan was present (Galazan, Tr. 890A-B; see CX 14, 15 and 16). Mr. Muchlinski's expenses in promoting Travel King's "psychic surgery" tours were paid by Mr. Galazan (Tr. 864-65).

20. Dr. John Wallace is a psychiatrist and teacher of psychiatry at the University of Washington School of Medicine. He is also a consultant to other doctors on the counseling of patients and families of patients who are ill with life-threatening diseases, such as cancer or heart disease. In November 1973, Dr. Wallace saw an ad for a "psychic healing" film showing by Travel King. He subsequently attended the showing at the Olympic Hotel in Seattle (CX 14 and 15 are copies of the advertisements for the showing which appeared in Seattle papers). Dr. Wallace identified Mr. Galazan, Elaine Shin (Shinn), and Mr. Wallinski (Muchlinski) as the principal persons involved in the showing, and identified a Travel King Brochure (CX 2) and promotional document entitled, "QUESTIONS YOU MAY HAVE" (CX 7) as being distributed (Dr. Wallace, Tr. 698-701). Dr. Wallace testified that the films were identified verbally as "showing psychic surgical operations taking place in the Philippines" (Dr. Wallace, Tr. 701). At one point there was a comment by one of the film showers "There it is, the tumor is out" (Dr. Wallace, Tr. 720). Dr. Wallace testified with respect to the audience and the effect of the film at the Olympic Hotel (Tr. 722, 724-25, and 729):

> There were 100 to 150 people present in the Spanish Ballroom. Both sexes, all ages

> from children to very elderly people. Many of them obviously infirm in one fashion or another, lame, handicapped in a variety of ways. Some individuals obviously were definitely ill at that time as indicated by their powdered complexion and feebleness and so forth. Others had been clearly through some serious illness. They looked pretty pale. Others in the audience were obviously healthy.
>
> * * * * * * *
>
> Certain individuals in the audience were obviously made very anxious and distressed by the close-ups of human anatomy or alleged human anatomy. Some elderly ladies appeared to be about to faint. There were several comments to the effect, look at that, he is really taking it out, quote, unquote.
>
> In the contents of the film and in the dialogue that went on between the showers of the film and the audience there was a consistent reassurance that cure or some degree of help would be forthcoming. In the context of the film, it would appear that certain dramatic surgical procedures were taking place.

Dr. Wallace testified that questions from the audience in effect asked Travel King representatives whether any condition could be helped by the "psychic surgeons." The answer received was "yes, any condition can be helped by psychic surgery" (Tr. 725).

21. Dr. Wallace evaluated the Travel King brochure (CX 2) and promotional document "QUESTIONS YOU MAY HAVE" (CX 7). In his opinion, statements in CX 7 would contribute to the belief in "psychic surgery" by a seriously ill person. He referred both to claims of cures and a statement suggesting that the existence of films proved that "psychic surgeons" were not hypnotists (Tr. 732). Dr. Wallace testified that CX 7, distributed at the film showings (Tr. 732):

> * * * implies that what you see on the camera is all, or on the film, is all there is to be seen, and that the camera or that results of the filming are the complete and whole truth in the context of a variable description of what the audience was told is being done * * *. The audience was consistently told to suspend their faculties.

TV Advertising

22. Respondents Travel King, Yuda Galazan and Ronald Brown disseminated advertising over TV station KTVW, Channel 13, in the Seattle-Tacoma area promoting Travel King's tours to the Philippines to see "psychic healers." The audio portion of the advertisement is in the record (CX 210). The commercial was broadcast twice each day between Sept. 26 and Oct. 16, 1973 (CX 209). The audio portion of the script states (CX 210):

> * * * YOU CAN VISIT THE *MIRACULOUS* PHILIPPINE FAITH HEALERS, ALTHOUGH TRAVEL KING TRAVEL AGENCY AND PARTICIPATING SCHEDULED AIRLINES ACCEPT NO RESPONSIBILITY FOR ANY SERVICES, *SURGERY* OR TREATMENT DONE BY THE PSYCHIC HEALERS, IN CONNECTION WITH THIS TOUR OF THE PHILIPPINES. (Emphasis added.)

Representations to the Public by Phil-Am

23. Respondent Phil-Am Travel Agency, Inc., like Travel King, disseminated travel brochures, literature, and other promotional materials, showed, arranged for or was responsible for the showing of

films, and engaged in other activities for the purpose of marketing its tours to the Philippines, representing to members of the public that "faith healers," "psychic healers," "spiritual healers," etc., would open their bodies with their bare hands, remove diseased tissue or disease-causing material, and thereby cure many persons of serious illnesses.

Travel Literature

24. Individual respondents Emile H. Heredia and Adeline C. Heredia, co-owners of corporate respondent Phil-Am, became interested in the business prospects of selling tours to the public to visit Philippine "healers," and authorized Phil-Am's marketing and sales manager, one Victorino P. Mapa, to prepare travel brochures (see Mapa, Tr. 1420-26, 1428-1430, 1432-38; CX 111). The record contains examples of these brochures (CX 26, 27, 39, 106, and 175). One of Phil-Am's brochures "SPIRITUALIST PILGRIMAGE TO THE PHILIPPINES" states (CX 26):

> A European authority on parapsychology said that *the phenomenon of psychic surgery is happening in the Philippines* because of the intense religious devotion of its people. Witness and experience this at close range.
>
> See and consult with the world famous spiritual healers of the Philippines * * *. (Emphasis added.)

The Pan-American tour brochure disseminated by Phil-Am listed 14 Philippine "spiritual healers" (CX 27; see also CX 28 and CX 29). A number of these were identified by Ms. Carol Wright, a witness herein, as "psychic surgeons" who purported to "operate" on patients by opening their bodies with their bare hands, and removing diseased tissue or disease-causing material using fakery and deception in the process (C. Wright, Tr. 110, *et seq.*). In addition to travel brochures prepared by Phil-Am and Pan-American, brochures were prepared with Northwest Orient Airlines (CX 26), Philippine Airlines (CX 175), and Japan Airlines (CX 176). In the case of Northwest Orient and Pan-American the airlines paid one-half the cost and Phil-Am the other half. The brochures prepared with Northwest Orient, Pan-American Airways, and Philippine Airlines were disseminated to members of the public by mail and personally to those who visited Phil-Am's offices (admissions of Phil-Am).

25. In addition to brochures, Phil-Am disseminated a booklet entitled "A GUIDE TO SPIRITUAL AND MAGNETIC HEALING AND PSYCHIC SURGERY IN THE PHILIPPINES" (Mapa, Tr. 1485-86), and offered it for sale to prospective tour members (CX 170). Page 2 of the booklet discusses "What is PSYCHIC SURGERY?" and states (CX 41):

> By means totally unexplainable in terms of modern science, certain individuals (usually with little or no academic training) possess the ability to "operate" on the human body using only their bare hands, and remove diseased tissue, blood clots, and pus * * *.

On page 13, the booklet states (CX 41):

> * * * the healers themselves are concentrating their efforts on patients whose arrangements are handled by Christian and Diplomat.
>
> * * * * * * *
>
> Diplomat Travel & Tours * * * specializes in handling patients who desire to visit Tony Agpaoa at his clinic * * *.
>
> * * * * * * *
>
> Christian Travel Center * * * specializes in handling patients who desire to visit one or more of the healers associated with the Union Espiritista Cristiana de Filipinas.

Phil-Am was appointed by the Christian Travel Center, Inc. of the Philippines as their exclusive travel agents in the United States to organize tours to consult "spiritual healers", who in fact purported to open the human body with the bare hands, and the "President General" of the foregoing "Union Espiritista Cristiana de Filipinas, Inc." so informed Phil-Am by letter of July 19, 1973 (CX 111; see also Adeline Heredia, Tr. 1565). Phil-Am worked with Diplomat Tours of the Philippines until April 1973 bringing groups from the United States to see "psychic surgeons" (CX 177).

Tour Promoters

26. A number of individuals with the approval, assistance and financial support of Phil-Am promoted that firm's tours to the Philippines to visit "faith healers" or "psychic healers." These persons had previously acted as tour conductors for Phil-Am's group tours to the Philippines, or had otherwise been to the Philippines, and after returning to the states showed films, slides, and photographs depicting "psychic surgeons," and in some instances placed advertisements in newspapers for Phil-Am "psychic surgery" tours. They engaged in such promotional activities to go again to the Philippines by obtaining free passage as tour conductors on another of Phil-Am's tours (admissions of Phil-Am). In some cases Phil-Am reimbursed promoters for their expenses (Adeline Heredia, Tr. 1545-46; Mapa, Tr. 1476-77, 1481), and substantial numbers of recruits for Phil-Am's tours were obtained by them (Mapa, Tr. 1474-75).

27. One of these promoters, Ms. Blanchard, was reimbursed by Phil-Am for the reprinting of magazine articles, mileage incurred by traveling to various cities for film showings, telephone calls and film (Blanchard, Tr. 1590-92). This reimbursement was part of an $1,800 payment (Blanchard, Tr. 1599). About $400 or $500 in "pocket" money was also paid to Ms. Blanchard by Phil-Am in early 1974 (Tr. 1601-02). In addition to these payments, this promoter was a tour conductor three times for Phil-Am, going free twice and splitting a ticket with another the third time, thus receiving tickets worth approximately

$2,500 (CX 214; Blanchard, Tr. 1606-07). Total compensation paid by Phil-Am for promotional activities of Ms. Blanchard, including free passage, etc., thus amounted to some thousands of dollars. Emile H. Heredia and Adeline C. Heredia testified that the money paid Ms. Blanchard in reality came from the "Christian Travel Center" in the Philippines (Emile H. Heredia, Tr. 1509-1510; Adeline C. Heredia, Tr. 1545-46; see also Jesus Ma. Jose, Tr. 1706-07). Ms. Blanchard likewise testified that she regarded her payments to have come from "Christian Travel" (Blanchard, Tr. 1590-91). Payments, nevertheless, were made to Ms. Blanchard, and for similar activities to another tour promoter, Ms. Lillian Lux, on Phil-Am checks with no indication that the money came from any source other than Phil-Am (CX 212 and CX 213). The payments were sizeable, the check to Ms. Blanchard being for $1,800 and the check to Ms. Lux for $1,500. Adeline C. Heredia knew that both Ms. Blanchard and Ms. Lux were promoting Phil-Am tours to the Philippines (Tr. 1549-1550). The brochure of Phil-Am for the Nov. 3, 1973, tour via Pan-American had Ms. Blanchard's name on its cover, and a similar brochure for the Phil-Am tour via Philippine Airways contained the name of Ms. Lux (CX 106 and CX 107).

In connection with the foregoing claim that "Christian Travel Center" paid Ms. Blanchard and Ms. Lux rather than Phil-Am, it is relevant to note that Phil-Am had an exclusive working arrangement with the Philippine "Christian Travel Center" (CX 106). For a member of the public to be assured of treatment by certain "psychic surgeons" in the "Union Espiritista," arrangements could only be made through Phil-Am (Adeline C. Heredia, Tr. 1565). Christian Travel provided "land" arrangements, including "spiritual healers," in the Philippines, for Phil-Am's tours, and Phil-Am marketed the "package tour" in the United States. In fact, Phil-Am was the "Christian Travel Center's" exclusive United States agent to organize tours to the Philippines to see "spiritual healers" (CX 106). Phil-Am's "Reservation Application" form provided for a release by the tour member of any liability on the part of "Phil-Am Travel Agency, Inc., and Christian Travel Center, Inc.," for treatment by the Philippine "Spiritual Healers" (CX 29). In essence, Phil-Am and "Christian Travel Center" were engaged in a joint venture involving the marketing of tours to the Philippines to visit "psychic surgeons," "spiritual healers," "faith healers," etc. Whether the money paid Ms. Blanchard and Ms. Lux was that of Phil-Am, or whether Phil-Am was reimbursed or transmitted "Christian Travel Center" funds is not significant. Phil-Am knew about, benefited by, and either paid or transmitted funds to Ms. Blanchard and Ms. Lux in payment for or to defray the cost of their promotional activities, and is responsible for representations by them to prospective tour members that "psychic surgery" was an actual surgical operation, that the body was opened by the "psychic surgeons" and diseased tissue or disease-causing material removed.

28. The films shown to the public by Ms. Blanchard depicted "psychic surgery" operations. Films were shown with considerable frequency, and small advertisements were placed in local papers publicizing them (Blanchard, Tr. 1575-78, 1582). Literature was often distributed at such film showings, such as a reprint of an article entitled "The 'Spiritual Healers' " which appeared in Philippine Panorama on Aug. 26, 1973. (CX 31; Blanchard, Tr. 1584). The article features Alex Orbito, a "psychic surgeon" with whom Phil-Am scheduled appointments for tour members (CX 28, 29, and 107) and describes at length and in great detail the techniques, methodology, and successes of "psychic surgery," with liberal use of medical terms. The flavor of this promotional item is indicated by a picture of a young woman undergoing an "operation" under which the caption states (CX 31B):

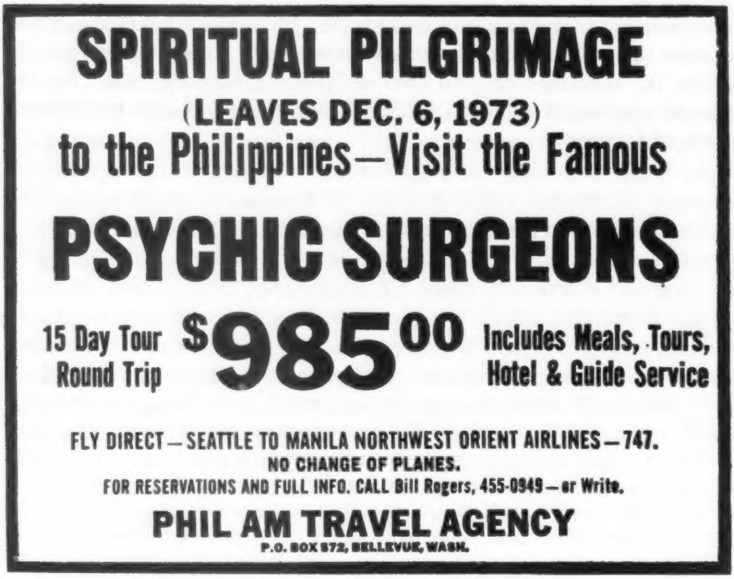
> OPERATION BY BARE HANDS. Alex Orbito removes the malignant growth from abdomen of Linda Fruechtenicht of Illinois. Center photo shows malignant growth removed from the patient. There is little blood on the skin, but there is not a sign of wound after cleaning with cotton.
>
> AFTER OPERATION. Linda (at right) smiles, obviously feeling very much relieved. She said she felt no pain during the operation.

29. Another article photocopied from Philippine Panorama magazine was distributed at some of Ms. Blanchard's film showings (Blanchard, Tr. 1585). The article is called "The Healers of Pangasinan" and is dated Sept. 30, 1973 (CX 32B and C). Various "psychic surgeons," some of whom are named in Phil-Am travel brochures (see CX 28, 29, 107, and 108), are discussed and pictured. The article includes descriptions of "miracle cures," and descriptions of various procedures in which bodies are entered with bare hands and diseased tissue or disease-causing material removed. Eyeballs are removed from their sockets, repaired and replaced, and the ability of "healers" to cure many diseases including cancer and diabetes are discussed. Other illnesses which are said in the article to be treated successfully by "psychic surgery" include defective kidneys, high blood pressure, heart problems, cataracts, and varicose veins. Ms. Blanchard distributed Phil-Am tour brochures at her film showings (Blanchard, Tr. 1578-79).

30. Another promoter, Mr. Bill Rogers, and his wife were given free passage as tour conductors on one of Phil-Am's tours to the Philippines. Between August 1973 and January 1974 Mr. Rogers was paid several thousand dollars by Phil-Am for expenses incurred in promoting Phil-Am's tours to the Philippines, including the cost of newspaper advertising, stamps and printing (admissions of Phil-Am).

31. Phil-Am authorized Mr. Rogers to use the name "Phil-Am" in

advertisements for Phil-Am's tours to the Philippines, reimbursed him for costs, and CX 37 and 38 are advertisements placed in newspapers by him for meetings held to discuss "psychic surgery" and Phil-Am tours (admissions of Phil-Am, 54, 57, 59 and 60-61). CX 38 is reproduced herein, as follows:



SPIRITUAL PILGRIMAGE

(LEAVES DEC. 6, 1973)

to the Philippines—Visit the Famous

PSYCHIC SURGEONS

15 Day Tour
Round Trip

$\$985^{00}$

Includes Meals, Tours,
Hotel & Guide Service

FLY DIRECT—SEATTLE TO MANILA NORTHWEST ORIENT AIRLINES—747.
NO CHANGE OF PLANES.
FOR RESERVATIONS AND FULL INFO. CALL Bill Rogers, 455-0949—or Write.

PHIL AM TRAVEL AGENCY
P.O. BOX 572, BELLEVUE, WASH.

This advertisement appeared in one of the two major Seattle newspapers, the Seattle Times or Post-Intelligencer (Allen, Tr. 675-680). Mr. Rogers also distributed travel brochures of Phil-Am, under Phil-Am's name, which stated to prospects that "psychic surgery is happening" in the Philippines "because of the intense religious devotion of its people" (CX 39D). The brochures distributed by Mr. Rogers advised prospects to mark all letters, applications, etc., "Attention Bill Rogers" (CX 39C). Mr. Rogers traveled free as a tour conductor to the Philippines with Phil-Am tours on three occasions, and his wife accompanied him, also free, on two of these trips, also as a tour conductor (Rogers, Tr. 1653-54, 1681-83). Total ticket value was nearly $5,000 (CX 214).

32. In connection with the promotion of Phil-Am tours, Mr. Rogers showed films of "psychic surgery" to the public extensively in the Pacific Northwest. The "psychic surgeons" shown included "healers" mentioned in the testimony of witnesses Donald and Carol Wright, discussed later herein, and which are identified, discussed or quoted in many of the magazine articles which Mr. Rogers and others disseminated publicly (CX 31-36). These "psychic surgeons" included Alex and Marcos Orbito, Romeo Bugarin, Marcello, Tony Agpaoa, Jose Mercado, Juan Blance and others (Rogers, Tr. 1659). Most of these names appear on the brochures and reservation applications used by Phil-Am (CX 27-29, 107, 108, 180). The films show operations for varied illnesses, such as eye ailments, abdominal ailments, paralysis, arthritis, in fact, "just about any type of ailment you can name" (Rogers, Tr. 1654-1660; CX 79).

33. As stated, Mr. Rogers showed his film extensively in the Pacific Northwest. He estimated approximately 75 showings, with about 25 to 40 people attending each showing, although some of his showings were attended by over 100 people. He showed his films to high school classes, at colleges and churches, and before business organizations (Rogers, Tr. 1651-54; Tr. 1682). A typical promotion for "psychic surgery" and Phil-Am tours included the showing of a film which Mr. Rogers or his son took. In the narration of the film, Mr. Rogers sometimes identified the people and usually identified the ailment or illness of that person. What the people observed in these films was some area of the body exposed, the opening thereof with the bare hands, a puddle of blood-like fluid appearing, tissue or material of some sort removed, the wiping up of the liquid revealing no wound, and no sign of a scar. Mr. Rogers answered questions and added his own account of his experiences in the Philippines (Rogers, Tr. 1653). Along with personal reports of what he had seen, Mr. Rogers on occasion referred people with specific questions about specific illnesses to others whom he knew had gone to

the Philippines and had been "cured" of a particular ailment. If he didn't know firsthand whether "psychic surgeons" could cure, for example, arthritis, he might recommend that the caller telephone a person who had visited "psychic surgeons" for that ailment (Rogers, Tr. 1671-72). At these showings CX 30-36 were distributed. CX 31-36 are reprints of articles about the truth and validity of "psychic surgery," and an informational sheet. Mr. Rogers additionally distributed CX 39, identical to CX 175, the original Phil-Am tour brochure, and CX 40, whenever he talked to groups or showed films to groups who were interested in "psychic surgery." CX 30 is an information sheet for prospective tour members explaining the advantages of journeying to the Philippines in a tour group and receiving group rates. Mr. Rogers signed this document as a representative of Phil-Am, as follows:

> When sending in reservation applications, either to the Seattle or Bellevue Office, *Please Mark* all mail and applications *ATTENTION* Bill Rogers. This will assure you of prompt service. Make all checks payable to Phil Am Travel Agency, Inc.
>
> Sincerely,
>
> Bill Rogers - Group Coordinator
> Representative of Phil Am Travel
> Agency, Inc. and Christian Travel
> Center, Inc. - Manila, P. I.
>
> Direct Mail Address:
> Bill Rogers
> P. O. Box 572
> Bellevue, WA 98009
> Phone: (206) 455-0949
> Seattle Office:
> Bill Rogers
> c/o Phil Am Travel Agency, Inc. 705 - 2nd Ave., Suite 1602
> Seattle, WA 98104
> Phone: (206) 623-0670

34. At film showings and meetings, Mr. Rogers distributed the travel brochure "PHIL-AM TRAVEL AGENCY'S SPIRITUALIST PILGRIMAGE TO THE PHILIPPINES" (CX 26), reservation applications for Phil-Am (CX 29), the information sheet mentioned in the preceding finding, and reprints of articles describing the opening of bodies by "spiritual healers," "faith healers," etc., in the Philippines, the removal of tissue or disease-causing material, and miraculous cures achieved (CX 31-36).

35. As previously set out, Mr. Rogers was compensated by Phil-Am for his efforts in recruiting members for Phil-Am's tours to the Philippines. Mr. Rogers had a number of discussions concerning reimbursements with Mr. Jose, manager of the Seattle Phil-Am office (Jose, Tr. 1702). Mr. Rogers told him the amount he needed for his

various expenses. His expenses included office incidentals, advertising, telephone calls, and gasoline used in travel to show films. Like Ms. Blanchard and Ms. Lux, Mr. Rogers was reimbursed by a Phil-Am check in the amount of approximately $2,800 (Rogers, Tr. 1646-49).

36. In sum, Mr. Rogers actively held himself out to be an agent and representative of Phil-Am, distributed Phil-Am literature, was accepted and ratified as such by Phil-Am, and was compensated by Phil-Am for his efforts. Phil-Am used him to promote Phil-Am tours to the Philippines, and in such promotion represented to the public through talks, meetings, film showings and the distribution of literature that "spiritual healers," "faith healers," "psychic surgeons," etc., in the Philippines performed actual surgical operations by opening and entering the body with their bare hands and removing diseased tissue or disease-causing material, and that serious and even terminal illnesses were often cured thereby.

Representations to the Public by Gem Travel Service

37. Respondent Gem Travel first set up its "psychic surgery" tours early in 1972 in response to a request from Diplomat Tours in Manila. The request came from the manager of Diplomat, one Doris Almeda, to Mr. Cortez, a salesman for Gem and the brother-in-law of Ms. Almeda. Ms. Almeda informed Mr. Cortez that people in the United States would be traveling to the Philippines "seeking the help of the healers," and Diplomat requested that Gem "facilitate the handling of these people" (Cortez, Tr. 1019-1028). Ms. Almeda wanted Gem to organize groups for visits to Rev. Agpaoa, as already noted, a well known "psychic surgeon". Mr. Ron Cacas, an officer of Gem, also discussed initial arrangements with Diplomat (Cortez, Tr. 1029; Cacas, Tr. 1164-65). Under the initial agreement between Gem and Diplomat, Diplomat would set up the land arrangements in the Philippines for the tours for which it would charge Gem a fee, while Gem would arrange air transportation (Cortez, Tr. 1030-32; Cacas, Tr. 1169).

38. Diplomat Tours is a Philippine travel agency formerly managed by Ms. Almeda and currently managed by "psychic surgeon" Rev. Agpaoa's wife. Diplomat Tours has an arrangement with Rev. Agpaoa under which appointments with him are handled exclusively by Diplomat, and Diplomat granted an exclusive agency to Gem for Gem tour members to see Rev. Agpaoa. In effect, this meant the only way for a sick person to have an appointment with Rev. Agpaoa was through Gem (Cortez, Tr. 1032; Cacas, Tr. 1169-1170; Mapa, Tr. 1434-35) and Gem promoted this exclusivity (CX 52, 144). CX 52, printed on a Gem letterhead, states:

SPECIAL ANNOUNCEMENT

For those wishing to visit with Rev. Tony Agpaoa in Baguio City.

Appointment and consultation with Rev. Tony can be confirmed by DIPLOMAT TRAVEL & TOURS of Baguio ONLY if travel arrangements are handled through GEM TRAVEL SERVICE of San Francisco, California.

Due to the number of people coming from Europe, Australia and New Zealand, anyone traveling from the United States, Mexico and South America must make advance reservation. For your reservation please fill out and return the form below.

39. On Feb. 22, 1972, Gem ran its first "psychic surgery" tour to the Philippines. The original tour was set up by Ms. Butterfield, Mr. Cortez, and other employees of Gem in conjunction with Diplomat Tours. Ms. Butterfield was the Gem officer with principal responsibility for origination of the tours, although all Gem officers discussed and agreed to setting up those tours (admission of Gem; Marquez, Tr. 1109-1110; Butterfield, Tr. 1180-81). Mr. Cortez was a Gem employee and part-time commission salesman of Gem for more than six years. Mr. Cortez worked in the office of Gem at a desk provided by Gem. He was the principal salesman and tour organizer for the "psychic surgery" tours. Inquiries regarding the tours were generally referred to Mr. Cortez. Gem authorized Mr. Cortez to speak to or correspond with persons inquiring about "psychic surgery" tours. This responsibility was delegated to him by Mr. Marquez (admission of Gem; Marquez, Tr. 1127). Mr. Cortez received half of Gem's commission on each "psychic surgery" tour package sold (Marquez, Tr. 1132-33).

40. Gem prepared and disseminated travel brochures describing its "SPIRITUALIST TOURS to the PHILIPPINES" (CX 50, 51). The brochures included a specific waiver by the tour member of any responsibility of Gem for treatment by Rev. Agpaoa. Mr. Marquez insisted on the inclusion of such a waiver of liability because he was aware of the risk Gem was running in taking customers to Rev. Agpaoa (Marquez, Tr. 1108, 1111-13). Brochures were sent to persons inquiring about Gem "psychic surgery" tours and about cures by Mr. Agpaoa (admission of Gem; Allen, Tr. 574).

41. Gem's "SPIRITUALIST TOURS to the PHILIPPINES" are set up for people who wish to undergo "psychic surgery." Gem arranges and guarantees meetings between its customers and Rev. Agpaoa during those tours, who is known to employees of Gem and members of the public as a "psychic surgeon" (answer of Gem; admission of Gem; see also CX 147(a)). Gem prepared travel literature which was sent or given to persons interested in Gem's "psychic surgery" tours to the Philippines. An example is CX 53 titled "THE PHILIPPINE CHURCH OF SCIENCE REVELATION, INC." "SPIRITUALISM AND PSYCHIC HEALING" which was used to promote a tour from San Francisco to Baguio City, Philippines, in June 1972. This pamphlet,

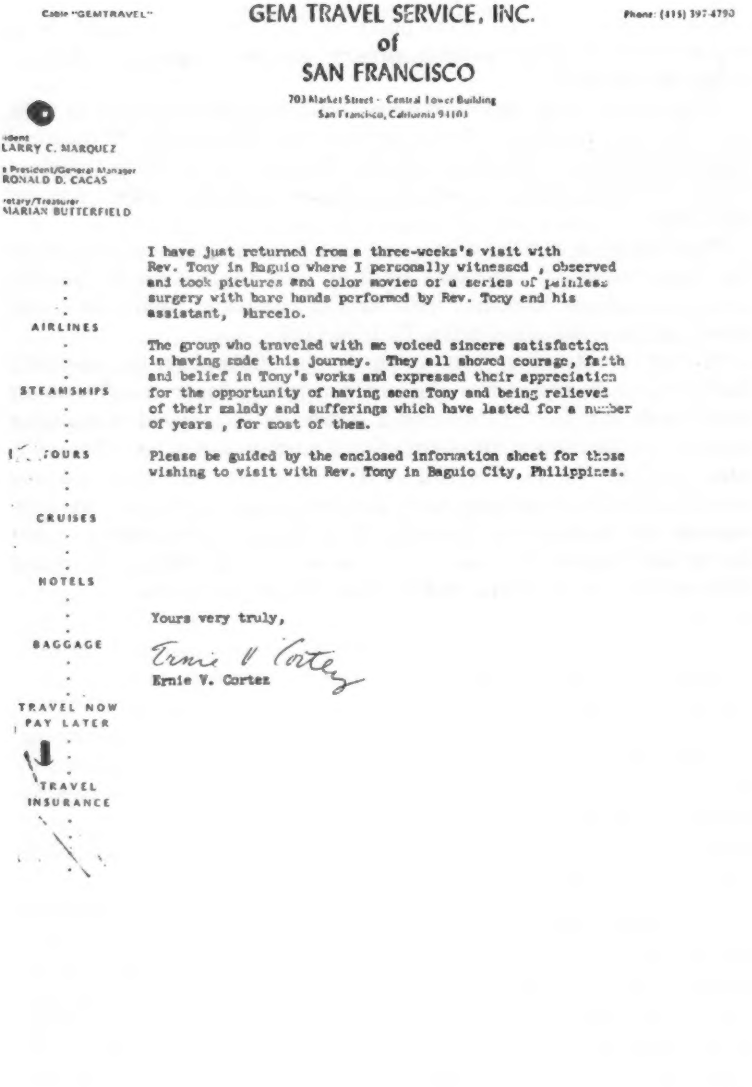
which was disseminated to the public by Gem, was most explicit in its representations about "psychic surgery" and Rev. Agpaoa, as follows:

Psychic Surgery

"Not with a knife, but with hands" said Maestro Salvatore D'Aura, and this the fabulou[s] Tony Agpaoa, the Philippines' "Miraculous Spiritual Healer," will demonstrate. Witness the amazing, painless, almost bloodless operation which continues to baffle medical science! [CX 53B.]

This document further announced that Rev. Agpaoa would touch on the finer points of "Spiritual Healing" and the nature of "psychic surgery," and was identified with Mr. Cortez's name, Gem's name, and Gem's address. See also Cortez, Tr. 1099-1100.

42. After returning from a trip to the Philippines in June 1972 during which he filmed Rev. Agpaoa performing "operations" with his bare hands, Mr. Cortez prepared a statement to respond to inquiries from the public coming into Gem's San Francisco and other offices (CX 54A, 153A-B; Cortez, Tr. 1042, 1047). It is reproduced herein and describes "painless surgery with the bare hands performed by Rev. Agpaoa and his assistant, Marcelo." This document was signed by Mr. Cortez and was mailed with a Gem price list (CX 54B) attached and often with a Gem brochure enclosed (Cortez, Tr. 1048-1055).



Cable "GEMTRAVEL"

GEM TRAVEL SERVICE, INC.
of
SAN FRANCISCO

703 Market Street - Central Tower Building
San Francisco, California 94103

Phone: (415) 397-4790

ident
LARRY C. MARQUEZ

e President/General Manager
RONALD D. CACAS

retary/Treasurer
MARIAN BUTTERFIELD

AIRLINES
STEAMSHIPS
TOURS
CRUISES
HOTELS
BAGGAGE
TRAVEL NOW PAY LATER
TRAVEL INSURANCE

I have just returned from a three-weeks's visit with Rev. Tony in Baguio where I personally witnessed , observed and took pictures and color movies of a series of painless surgery with bare hands performed by Rev. Tony and his assistant, Marcelo.

The group who traveled with me voiced sincere satisfaction in having made this journey. They all showed courage, faith and belief in Tony's works and expressed their appreciation for the opportunity of having seen Tony and being relieved of their malady and sufferings which have lasted for a number of years , for most of them.

Please be guided by the enclosed information sheet for those wishing to visit with Rev. Tony in Baguio City, Philippines.

Yours very truly,

Ernie V Cortez

Ernie V. Cortez

43. At the time Mr. Cortez was mailing out CX 54 in response to inquiries about Rev. Agpaoa, he was preparing to show his film of Rev. Agpaoa in operation (CX 81). He announced two showings on Sept. 1, 1973, at the Olympic Hotel in Seattle by postcard sent to people who were inquiring about tours to the Philippines (CX 144A; admission of Gem; Cortez, Tr. 1033-37). The postcard announced an "ACTION MOVIE 'THE WONDER HEALERS OF THE PHILIPPINES' Rev. ANTONIO AGPAOA and his assistant MARCELO," stated that travel information would be given "after each show," and that appointments with Mr. Agpaoa and Marcello would be "arranged exclusively" by Mr. Cortez of "Gem Travel Service, Inc." (CX 144A). Mr. Cortez narrated the film describing both the travel and the tour accommodations. He described one segment of his movie as being a "hemorrhoid operation" performed by Mr. Agpaoa and he described other "operations." Mr. Cortez also told the people, in response to questions as to how people felt after the operations portrayed in the film, "There was no pain * * * all they felt was pressure in their body" (admission of Gem; Cortez, Tr. 1035). Mr. Cortez also gave out Gem brochures at the film showing (Cortez, Tr. 1035).

44. Mr. Marquez and Ms. Butterfield, the owners and officers of Gem, viewed Mr. Cortez's film in mid-1972 and were aware that Mr. Cortez planned to show it to promote Gem's tours to the Philippines (Gem answers to interrogatories; see also Marian Butterfield, Tr. 1181). In fact, Gem had a showing of "psychic surgery" taken in the Philippines in its office (Butterfield, Tr. 1182). Mr. Cortez discussed the Seattle film showing with both Mr. Marquez and Ms. Butterfield and received their approval for showing it (Cortez, Tr. 1043-44; Butterfield, Tr. 1194-95). Ms. Butterfield stated that she thought the showing was a good idea at the time (Butterfield, Tr. 1195). Gem paid for part or all of the hotel expenses for that showing (admission of Gem; Cortez, Tr. 1043). The film is in the record as CX 81 and depicts "psychic surgery" in the Philippines showing the opening of the human body with the bare hands, removal of tissue or other material, and the closing of the incision without a scar.

45. In addition to the film shown by Mr. Cortez to the Seattle audience, another film similarly depicting "psychic surgery" was shown by a person known as Elaine Shinn (Cortez, Tr. 1037). Ms. Shinn narrated her film, and Mr. Cortez referred most questions as to Rev. Agpaoa's "successes" to Ms. Shinn who answered them as well as questions about her film (Cortez, Tr. 1037-39; admission of Gem). Prior to the Seattle film showing, Elaine Shinn had conveyed her desire to Mr. Cortez to become a tour conductor for Gem (admission of Gem), and had told Mr. Cortez that she had her own films of "psychic surgery"

(Cortez, Tr. 1039). Subsequent to the Seattle Olympic Hotel showing, she did receive a free ticket from Gem for a tour to the Philippines two weeks later, Sept. 15, 1973 (admission of Gem; Cortez, Tr. 1040-41).

46. In the San Francisco area Gem arranged for the non-promotional showing of a film depicting "psychic surgery" to a study group in the Berkeley area. This was done by a person known as Sarah Paukert on the request of individual respondent Marian E. Butterfield (Butterfield, Tr. 1181-83). Ms. Paukert's promotional activities on behalf of "psychic surgery" were described in her own testimony in this proceeding. She first took a Gem tour to see Rev. Agpaoa on Feb. 3, 1973. Shortly after returning from this tour, she told Mr. Cortez of her interest in becoming a tour conductor and at approximately the same time started showing her films (Paukert, Tr. 1275-77). Because she was spending as much as an hour discussing travel agency arrangements at the end of her showings, she requested that Mr. Cortez supply her with Gem brochures, which she told him were for distribution at such showings (Paukert, Tr. 1276, 1284). In December and November 1973, Ms. Paukert traveled to the Philippines free as a tour conductor for Gem (Butterfield, Tr. 1184, 1216; CX 143B). The value of the tickets she received from Gem appears to have been about $3,000 (Paukert, Tr. 1276; see CX 143B, which shows Ms. Sarah Paukert to have been a Gem tour conductor on two occasions and a "Dr. Norman Paukert" to have accompanied her as a tour conductor on one of these). Gem, that is, Ms. Butterfield and Mr. Cortez (Butterfield, Tr. 1184; Cortez, Tr. 1067), knew the nature of the "psychic surgery" films being shown to the public by Ms. Paukert, *i.e.*, that they purported to show "operations" in which human bodies were opened with the bare hands, diseased tissue removed, etc., provided her with Gem travel brochures to pass out at such showings (Paukert, Tr. 1284), had Ms. Paukert's name printed on such brochures (Butterfield, Tr. 1184), and provided her with free trips to the Philippines as a tour conductor (Butterfield, Tr. 1184; CX 143B). Under the circumstances, respondent Gem must accept responsibility for the representations to the public contained in Ms. Paukert's films.

47. Other persons showed films of "psychic surgery" tours, distributed Gem travel brochures, and received free passage as tour conductors for Gem (CX 143A-D; Butterfield, Tr. 1192-98; Cortez, Tr. 1069-1087; CX 115, 127).

Use of Varying Terms for "Psychic Surgery"

48. In promoting their tours to the public for consultation and treatment by Philippine "healers" respondents used varying terms including "psychic surgery" (CX 26, 37-38, 39D, 41, 53A-B, and 175; Galazan, Tr. 811) "faith healing," "spiritual" or "spirit healing" (CX 2, 7A, 17, 27-29, 31-35, 45, 53D, 107-108, 168, 170, 179B, and 210), "psychic

healing" (CX 9, 10, 14, 16, 41, 192, 193, 197, and 210), and "magnetic healing" (CX 41). All these terms were used by respondents in conjunction with the graphic depiction by films of what appeared to be actual "surgical operations" with the bare hands in the Philippines (CX 79, 80 and 81), by verbal statements at film showings, by travel and promotional literature, by distribution of newspaper and magazine articles, and booklets, and through letters and advertisements, to the same effect. In the context used by respondents all the foregoing terms, together with the films, statements, promotional literature and materials disseminated and employed with those terms, meant and conveyed to the public the impression of "psychic surgery" as that term is used in the complaint. All collectively represented to the public that those who purchased tours to the Philippines would be taken to "healers" who would perform actual "surgical operations" with the bare hands, would open the body, remove diseased tissue or disease-causing material, close the body without a scar, that all would be done in a few minutes without anesthesia, pain or suffering, and that many would be cured thereby of serious or even terminal illnesses.

"Psychic Surgery"

49. "Psychic surgery," that is, the opening of the body with the bare hands, removal of diseased tissue or disease-causing material, closing the opening without a scar, etc., is pure and unmitigated fakery. More bluntly, the "surgical operations" of "psychic surgeons," "psychic healers," "faith healers," "spiritual" or "spirit healers," "magnetic healers," etc., with the bare hands are simply phony.

50. The illusion of opening the human body with the bare hands, and the removal of diseased tissue or material therefrom, is created by a variety of crooked devices, mainly clever sleight-of-hand. The "psychic surgeons," "faith healers," "psychic healers," etc., are skilled sleight-of-hand artists, and additionally employ a variety of tricks, devices and methods of deception, including the use of small animal parts, to convey the deceptive impression that a "surgical operation" is taking place and that material is being removed from the body. As the record discloses, thousands of well-meaning people, the sick and infirm have been gulled, exploited and deceived, sometimes with tragic and heart-rending consequences.

51. Two witnesses who testified in this proceeding, Donald F. and Carol Wright, studied "psychic surgery" in the Philippines, actually became "psychic surgeons," and revealed in detail the complete fakery of that phenomenon. The Wrights had studied ESP in the United States, and were extremely interested in what they had heard about the "psychic surgery" phenomenon in the Philippines, tending initially to give it credence. They journeyed to the Philippines in January 1973,

and returned again in July 1973 with a group of ill people who were seeking help (C. Wright, Tr. 113-16). The "healers" contacted on this visit included Virgilio Gutierrez, Romeo Bugarin, Tony Rumbo, Alex Orbito, and Tony Alcantara. The techniques used by these persons were very similar. In most of the operations, cotton was used to wipe off the area to be operated on. A bowl of water was present. In nearly all the operations blood clots or material appearing to be blood clots were removed from the body, and sometimes a piece of tissue which looked like an organ was removed. The area being operated on was wiped clean and there was no scar. The Wrights saw this procedure performed many times on the people they had brought with them. However, no one was visibly improved by these "operations" (C. Wright, Tr. 119).

52. The Wright's party returned to the United States but the Wrights stayed on, moving out of their hotel and renting a house. Their purpose in staying was to work with the "healers" and to learn the phenomenon of "psychic surgery." They were disappointed that there were no miracle cures of the people they had brought with them, but they did not yet suspect that "psychic surgery" was fakery. They met a "healer" who offered to allow the Wrights to work with him. They assisted him as he treated Filipino patients. The Wrights also had the opportunity to work with one Virgilio Gutierrez at his center. The centers were located in the "healers' " homes or in small houses where they worked "treating" the sick.

53. While working as assistants to a number of different "healers," the Wrights discovered "psychic surgery" did not consist of "surgery" at all, but was being performed by sleight-of-hand. Donald Wright noted objects falling from the "healers' " hands onto the bodies of the patients before the "operations" (D. Wright, Tr. 270), and Carol Wright had the opportunity to examine a "tumor" which had been removed from a patient. As an assistant, one of her jobs was to dispose of the "extracted" material at the end of an operation. Before emptying the bowl, she unwrapped what looked like a tumor. She testified (Tr. 134):

> * * * so I took the membrane and pulled it back and found that this was a tumor, a membrane that had been stuffed with cotton and blood clots and it appeared very much like a tumor, but it was not, it was just a flat piece of membrane that had been stuffed with cotton and blood clots to look like a round tumor.

The Wrights separately and together had experiences which led them to the conclusion that "psychic surgery" was performed by sleight-of-hand and that the extracted material had not come from within a human's body.

54. After confronting one of their teacher "psychic surgeons" with what they had observed, the "psychic surgeon" admitted that the "operations" were done by sleight-of-hand. The Wrights were eventual-

ly taught the techniques involved. The Wrights were trusted because they had been working with this particular "psychic surgeon" for a number of months. Carol Wright explained (Tr. 215):

> I believe that we showed to them our sincerity in that we were come to stay until we did learn and that we did work with them in their centers * * *. We gave this or impressed them that we gave of our time every day in working with their healing centers from morning until night, and over a long period of time they recognized we were serious of being there to learn that.

55. The Wrights were taught how to shop for animal parts used to make up a "bullet." A bullet is actual animal tissue or a clot of animal blood and cotton which is made to appear like tissue coming from inside the body (C. Wright, Tr. 137-141). The Wrights were taught how to make the bullet, how to wrap it, how to prepare the tissue, how to hide the bullet and then how to transfer it onto the patient. They were taken to an open market where they bought animal tissue. The "healer" showed them which animal parts looked most like human parts and then taught them how to prepare the materials. After that, the Wrights were taught where to hide the prepared bullets, for example, on their persons, inside cigarette packs, in their stockings, in their belts, etc. They were taught the techniques of palming so that no one would see the bullet, planting the bullet on the patient's body, moving the bullet if it were necessary, using continuous kneading action in an indentation on the patient's body (which appears to be manipulation but allows the "psychic surgeon" to open his bullets), the importance of such an indentation on the patient's body, the addition of water obtained from saturated cotton balls often passed to the "healer" by attendants, which mixes with a small bullet of animal blood and is used to make the appearance to the uninitiated of human blood issuing from an "opening" in the body, the spreading of an animal membrane in the "blood" in the indentation in the human body to look like an opening therein, and the bringing "out" of the hidden animal membrane so that it seems that material from the body of the person being operated on is being removed. The Wrights were shown how to end an operation, how to clean up the area being "operated on" and to dispose of all the bullets (C. Wright, Tr. 137-154; D. Wright, 269-71). The Wrights, in sum, learned the techniques used for creating the illusion of an actual operation, and they used all these techniques on people who visited some of the centers where they were working. The Wrights continued to work with many other "healers," and they observed the same techniques that they had learned and could perform themselves. They joined the "Union Espiritista Christiana de Filipinas" (C. Wright, Tr. 192-93) which is an organization to which most Philippine "healers" performing "psychic surgery" belong.

56. The nature of Ms. Carol Wright's testimony can be appreciated from the following (Tr. 137-39):

Q. What did you observe as he demonstrated these techniques?

A. He showed me exactly where he had positioned the bullet, as it was known, on himself and then on the body of the patient before he did the operation.

To go back, if I may, he taught me also how to make a bullet, which is the actual tissue, blood clot and cotton that is used in the operation that is made to appear like material coming from inside the body. He took me to—he showed me how to buy the material, what to look for, what to buy, how to make it, how to wrap it, how to prepare the tissue, then on patients, and I worked on a number of patients, not models or not just to practice on, but they were patients who were ill, doing these types of operations.

Q. Where were the materials for these operations obtained?

A. In an open market.

Q. What kind of materials were obtained?

A. Blood clots, blood, from the blood of a cow, which was congealed, and also material from pigs and from cows. Liver was used. We were shown how to look in the intestines to pick out small glands and cysts that could be used, for example, in an adenoid operation or thyroid operation. We were shown what to look for and how to prepare the material so it would very closely resemble the human body as you would bring out a piece of tissue.

Q. And how were these materials then prepared before the operation?

A. Before the operation they would be prepared, for example, taking a small piece of blood clot, perhaps the size of a marble, and placing it into a square of cotton, a small piece of cotton—they always used Red Cross cotton, for some reason—rolling it up very tight and then placing it into a cigarette pack so it would not be noticeable when it was carried.

Q. How were these items carried to the scene of the operation?

A. Inside these cigarette packs, empty cigarette packs. They were also secreted on the person of the healer, the psychic surgeon, perhaps in his socks. We were shown that if you were to wear socks like a man would wear, to put them inside the elastic at the top. They could be put inside the belt, they could be under the collar, they could be—I observed one of the female psychic surgeons take one from her bra—any place on your body which would be or could be a hiding place.

Q. And, in the operation you were shown, how were the materials which were prepared then used to create the appearance of the operation?

A. Taking one of the bullets, which is the blood clot inside the cotton, it would be palmed and held in such a manner that it would not be seen by the patient or by relatives or whoever was around, have it in here like so, and would be planted on the patient's body somewhere and then, after a moment, it would be brought to the area wherever they were going to do the operation and they would begin kneading and they would also make a pressure indentation into the patient's body if it's on the abdomen. If the person was very, very thin, they would often bring the legs up in order to make it softer so that the hands could go down further. And then, through kneading, through pushing, then adding some water, this blood that is in the cotton would begin to mix with the water and appear red and begin to run all over the body and be kind of messy and dramatic and then, if there was also wrapped inside the bullet a piece of tissue, then, while the psychic surgeon's hands are down in, with the hands folded underneath, then it could be—they would break that open and bring these pieces out bit by bit, always keeping one hand in. This was one thing they would say, if they took both hands out, the opening would close, but there was always one hand down and the fingers would be bent under like so, and this is how I was taught to do this.

57. The Wrights testified that the "operations" which they per-

formed and the thousands of "operations" which they witnessed being performed by some of the most well-known "psychic surgeons" in the Philippines were in truth not real operations, the body of the patient was never opened, the flowing blood-like fluid was not that of the patient, the material removed had never been inside the patient, and there was no scar because there had been no "operation." These "operations" were all performed by sleight-of-hand. All the "healers" they witnessed and the "healers" who had taught them used sleight-of-hand techniques commonly employed by magicians (C. Wright, Tr. 145-46; D. Wright, Tr. 267).

58. The Wrights stayed in the Philippines until April 1974. Toward the end of their stay they tried to expose "psychic surgery" for what it was, fakery (C. Wright, Tr. 180). Their original hopes and expectations of learning a miracle healing method from "psychic" or "spiritual" sources by then had been dashed. When they returned to Iowa, they continued to try to expose "psychic surgery" through appearances on local television (D. Wright, Tr. 336-38).

59. Mr. Wright demonstrated in the hearing room the techniques of "psychic surgery" exactly as he and Carol Wright had been taught by Philippine "psychic surgeons" (see transcript beginning at Tr. 296 for demonstration by D. Wright). The techniques used in Mr. Wright's demonstration were similar to those on the films which have been received in evidence (CX 79, 80 and 81). Carol Wright viewed two of respondents' promotional films, CX 80, which was used by respondents Travel King and Mr. Galazan, and CX 81 used by Gem and Mr. Cortez. Based on her experience and training as a "psychic surgeon" Ms. Wright analyzed the events portrayed. The techniques were the same as she learned, and she detected the sleight-of-hand involved, including that used by Rev. Tony Agpaoa (C. Wright, Tr. 124-25, 169-170).

60. The "healers" or "psychic surgeons" who worked with the Wrights, or whom the Wrights testified they observed as performing sleight-of-hand, include the following: Terte, Virgilio Gutierrez, Jr., Tony Rumbo, Tony Alcantara, Romeo Bugarin, Juanito Flores, Alex Orbito, Tony Santiago, Jose Mercado, Felicia Irtal, Rosita Bascos, Marcello, Rudy and Placido Palitayan (C. Wright, Tr. 137, 148-153; D. Wright, Tr. 286-292). Their testimony discusses a number of variations of "psychic surgery" which "psychic surgeons" used to apply to different ailments and on different parts of the body. A number of these names are the same as those on respondents' Phil-Am and Travel King promotional literature (CX 17 and Galazan, Tr. 834-844; CX 27, 107, and 108). Many of these names also occur in articles written in magazines or newspapers which were reprinted or photocopied and distributed at promotional meetings by tour conductors of various

respondents herein. The Wrights considered these healers to be the "major psychic surgeons" in the Philippines. The number of "psychic surgeons" the Wrights observed at work while living in the Philippines was great. They concluded that the techniques used by the "psychic surgeons" were all essentially similar and all were fake. The techniques of "psychic surgery" originated in a particular locality among a core group of practitioners, and spread as the commercial demand developed, with Mr. Terte and Mr. Agpaoa teaching recruits (C. Wright, Tr. 233; D. Wright, Tr. 288, 477). Donald Wright testified that once he had learned the techniques used by the psychic surgeons, he could detect the use of sleight-of-hand every time (Tr. 403). An additional technique employed by one particular "psychic surgeon" involved the use of a hidden razor blade to make a minute and shallow cut on a patient's body, enhancing the dramatic effect and heightening the illusion of "surgery" (see Wright, Tr. 146-47; Gurtler, Tr. 351-52; Brown, Tr. 2112-13).

61. Another witness who observed "psychic surgery" at close range in the Philippines and who determined it to be pure fakery accomplished by sleight-of-hand combined with clever use of "props," dramatic effects to exploit the gullibility of onlookers and the desire of many to believe, was a professional magician and sleight-of-hand artist, Robert Gurtler (Andre Kole). Mr. Gurtler is a famous magician who has performed throughout the world on television and in films. He has also viewed and evaluated performances of many other magicians in this country and throughout the world. In September of 1973 while performing on stage and over television in Manila, Mr. Gurtler was contacted by Time magazine and was asked to investigate the phenomenon of "psychic surgery" which was beginning to receive wide publicity at that time (Gurtler, Tr. 350). Mr. Gurtler accepted this assignment and viewed at close range the activities of seven psychic surgeons, five of whom are mentioned in the literature of one or another of respondents.

62. One of the "psychic surgeons" used the technique mentioned earlier of a concealed razor blade employed as part of his "operation" (Gurtler, Tr. 351-52; see list of "psychic surgeons" on Phil-Am's travel brochure, CX 27, No. 2 on list). The technique, which creates the illusion that an incision is made when the "healer" points his or a spectator's finger at the skin of the patient, is in fact created by sleight-of-hand in the preliminarily cutting of the skin with the concealed blade. Mr. Gurtler's testimony describing the sleight-of-hand techniques used in "psychic surgery" corroborates the testimony of the Wrights. The "psychic surgeons" were observed by Mr. Gurtler to use what Mr. Gurtler called "loads" or capsules filled with blood and tissue to

simulate "surgical operations" with the bare hands. Mr. Gurtler's expert eyes detected these secreted by the "psychic surgeon" in a variety of places, on the person, in a cigarette pack or case, around the "operating" table, in the cotton swabs, on the person of an assistant, behind a fan, under the pillow, etc. They were used during the "operation" as convenient or required. The "psychic surgeon" would "make a depression" in the body of the patient, would knead it and during such process by sleight-of-hand would obtain a "load" or "bullet," would burst the "load" or "bullet," mixing the concealed blood and animal tissue with water in a piece of cotton offered by an attendant, producing a red blood-like fluid, and creating the illusion that the body had been penetrated (Gurtler, Tr. 353-366).

63. Mr. Gurtler's expert evaluation of the "psychic surgery" he witnessed make it clear why so many people have been fooled. The sleight-of-hand employed by the "psychic surgeons," in Mr. Gurtler's professional opinion, is better than the vast majority of the magicians he had witnessed throughout the world (Gurtler, Tr. 361). No training in science or medicine would ordinarily help a person initially to detect these sleight-of-hand techniques, although Mr. Gurtler believed that an observer could be taught to detect them. The techniques, however, were not new in the world of magic and could be duplicated by a sleight-of-hand expert or professional magician.

64. Another witness, Mr. Larry Allen, who personally observed and studied "psychic surgery," provided additional compelling evidence of its wholly fraudulent nature. This witness, an electronic technician, gave a detailed and credible account of his experience with Rev. Agpaoa, one of the most well-known of the "psychic surgeons," whom he observed closely and filmed while on a tour promoted by respondent Gem in September 1972. Mr. Allen was able to detect the manner in which Rev. Agpaoa's "loads" or "bullets" were brought into the room. He watched one of Rev. Agpaoa's assistants on several occasions enter the operating room quarters carrying two shopping bags, each of which was filled and covered with a towel. During the excitement surrounding an incident where a patient undergoing an "operation" began to hemorrhage, Mr. Allen looked into the shopping bags which he had seen brought in, and one was filled with the capsules or bullets used in the "operations."

65. Mr. Allen viewed numerous "surgical operations" in the hotel in Manila where the Gem tour group stayed. In one "operation" performed by Rev. Agpaoa on a woman's ear he "heard a pop," a squirt of red liquid shot out of Rev. Agpaoa's hand and almost hit the wall, and then Rev. Agpaoa pulled out what Mr. Allen recognized as "a chicken heart, the heart of a small chicken or bird" (Tr. 591). Rev. Agpaoa held

it up to the people and said, "This is causing her ear problem." Mr. Allen also viewed Marcello, Rev. Agpaoa's assistant, and Juan Blance performing "psychic surgery" (Tr. 682-83). He observed both of them using "loads" or "bullets" to perform their operations and, in addition, he saw Mr. Blance use a hidden razor blade in a performance similar to that described by the magician, Mr. Gurtler.

66. During a tour arranged by respondent Gem to see Rev. Agpaoa, a witness in this proceeding, Erna Hansen, saved garments which were stained with blood during "psychic surgery." She brought them back to the United States where they were examined by a criminologist, who was director of the King County (Seattle) Police Department Crime Laboratory. Analysis showed that (Sweeney, Tr. 2155):

> * * * the blood supported by the garments was of swine origin or hog blood.

67. A number of expert medical doctors provided evidence of the fakery involved in "psychic surgery." One of them was Dr. Thomas Gail whose practice as an active hospital staff member regularly includes surgery. While a doctor in the United States Navy assigned to the U.S. Embassy in the Philippines, he had occasion to view Rev. Agpaoa performing "psychic surgery" in Quezon City in 1966. Dr. Gail viewed, among others, abdominal "psychic surgery" and concluded that there had been no opening in the body and no actual surgery. He observed that the "blood," based on its color and its clotted appearance, was not fresh human blood. He also described the parts of the abdominal cavity which would be seen in an actual operation but which were not visible during the "psychic surgery." As to the tissues and membranes which appeared, he testified that "none of these structures even resembled those encountered in a surgical operation" (Tr. 533-38). Dr. Gail described a surgical procedure to correct sterility, one of the "operations" performed by Rev. Agpaoa which he witnessed, and testified that Rev. Agpaoa's procedure did not even simulate that operation with any fidelity (Tr. 538-39). The first "psychic surgery" witnessed by Dr. Gail was a nose "operation." In his opinion, based on viewing the tissues and structures, which were completely dissimilar from normal human tissues and structures, and dissimilar from anything he had "ever seen or encountered in surgery," no actual entry of the body occurred and no "surgery" had taken place (Tr. 547).

68. Dr. Gail viewed individual respondent Galazan's film of "psychic surgery" (CX 80) and gave his expert opinion as a surgeon that no surgery was taking place. This opinion was based on the dissimilarity between actual human blood and body tissue, and that which appeared in the film. Dr. Gail further testified that the events he saw portrayed in the film were generally similar to those he had observed in the Philippines (Tr. 545-47).

69. Dr. Gail believed the illusion of an opening in the body was created as follows (Tr. 557):

> * * * by sleight of hand, upon thrusting, after he [psychic surgeon] thrust his hand on the abdomen, he squeezed something in his palm and produced the bloody substance, and the bloody substance does not come from the person, and this illusion of the incision is created this way.

Dr. Gail furthermore believed that, if an operation had taken place during the "psychic surgery" he witnessed, based on the lack of sanitary conditions, there was virtually an absolute certainty that serious infection would have occurred (Tr. 540). In addition, in an abdominal operation the hands of the surgeon would normally go far into the abdomen to reach various organs, whereas Rev. Agpaoa penetrated only one or two inches (Tr. 534, 546). In Dr. Gail's expert opinion as a surgeon, the body cannot be entered without breaking the skin or without surgical instruments, nor can an operation be performed without leaving a scar (Tr. 539-540).

70. A medical doctor, Ronald Chard, Jr., an expert in the field of pediatric oncology (tumors in children) and hematology, who worked both as a practicing physician and assistant clinical professor at the University of Washington School of Medicine, testified in this proceeding. He viewed the Galazan film (CX 80), used to promote Travel King tours, immediately prior to testifying. In his opinion, there was "no evidence of any surgical operation in any of the procedures on the film" (Tr. 757). He testified that in nine of the ten procedures, puckering of the skin, such as would occur simply from pushing on the skin, occurred, unlike actual surgery in which the skin flaps open. Furthermore, the tissue supposedly removed was unlike any with which Dr. Chard was familiar (Tr. 758-59). Dr. Chard examined four patients who had been treated by "psychic surgeons." One boy with leukemia, who was under the regular care of Dr. Chard, was treated and supposedly cured of his disease. According to Dr. Chard (Tr. 767):

> Upon my examination about ten days after that there was no evidence in the child's skin or anywhere else that anything had been done at all, and X-ray was done of his pelvic area that included this and there were no abnormalities in this area.

Another patient of Dr. Chard, a teen-age girl with cancer in several areas of her body, had "psychic surgery" on her knees, stomach and lung. On her return, Dr. Chard testified (Tr. 770):

> The girl did have an examination, in which there was no evidence that any procedures on her skin had been accomplished. Repeated X-rays showed that all lesions were larger without interruption of any of their borders. There were also new lesions in the chest and the leg had progressed.

It was Dr. Chard's medical opinion that the statements appearing in the first paragraph of Travel King's information sheet (CX 7A) were "fraudulent" because in fact the body is not entered in "psychic surgery" (Dr. Chard, Tr. 780).

71. Another medical doctor, Elray G. Burgwald, is a surgeon in practice in the State of Washington. He testified that from October 1966 until January 1970, and from August of 1973 until the present, a person named Phyllis Douglass was a patient under his care. Ms. Douglass had originally been treated for breast cancer in 1966. In 1973, the disease was present in her shoulder and neck. Dr. Burgwald advised Ms. Douglass as to the worthlessness of "psychic surgery" but, despite his advice, she went to the Philippines that month for that purpose (Dr. Burgwald, Tr. 2052-54). On her return, Ms. Douglass was examined by Dr. Burgwald who testified (Tr. 2054):

> * * * if anything the mass in her left superclavicular area was slightly large[r], if anything, but overall there had been little change, if any, with an increase in the size of her mass, rather than any loss of size or removal of any tissue that was evident. There was no evidence of any new scars or other signs of surgery procedure..

Ms. Douglass' husband brought back to Seattle a piece of the tissue the "psychic surgeon," Rev. Agpaoa, "removed" from Ms. Douglass (Richard M. Douglass, Tr. 1352). Dr. Burgwald examined the tissue and, in his opinion, "there was no question from even gross examination that this was a specimen of small intestine or small bowel" (Tr. 2056). Dr. Burgwald turned the tissue over to a pathologist, Dr. Arnold D. Hoekzema, for further examination. Dr. Arnold D. Hoekzema analyzed the tissue "removed" from Ms. Douglass by Rev. Agpaoa, and received from Dr. Burgwald, and determined that it was or came from the bowel of a small animal (Dr. Hoekzema, Tr. 2067). CX 57 is a copy of the pathology report. The report states (CX 57):

> The specimen consists of two pieces of tissue, one a 15-cm. in length segment of what appears to be small bowel from a non-human source * * *.

Responsibility of Individual Respondents

72. Yuda Galazan, Nyla Ford and Ronald Brown were individually responsible for the promotion of tours to the Philippines so that tour members could undergo "psychic surgery," and each was individually responsible for false, misleading and deceptive written, oral and visual representations to the public, in connection with the sale of tours to the Philippines for "psychic surgery," that "psychic surgery" was an actual surgical operation, that the body was thereby opened with the bare hands, and diseased tissue or disease-causing material removed therefrom. As previously found, Nyla Ford and Ronald Brown were officers, owners, and managers of Travel King, Inc., Mr. Brown becoming sole owner, however, as of Feb. 1, 1974. They formulated, directed and controlled the policies, acts and practices of Travel King, Inc.

73. Yuda Galazan, as previously found, was president and sole owner of Ramble Travel & Tours, Inc., which continued the downtown Seattle business of Travel King, Inc., subsequent to Dec. 7, 1973, using

the trade names Travel King and Travel King & Ramble Tours. From Oct. 31, 1973, to Dec. 7, 1973, Mr. Galazan managed the downtown Seattle office of Travel King, Inc. Mr. Galazan formulated, directed and controlled the policies, acts and practices of Ramble Travel & Tours, Inc., from the date of its incorporation, and participated in the formulation, direction and control of the policies, acts and practices of the Travel King, Inc., office in downtown Seattle.

74. Mr. Galazan promoted tours to the Philippines for "psychic surgery" by a variety of methods, including newspaper advertising, public meetings with film showings, and tour literature. CX 9, 10, 14-16, 192 and 193 are newspaper advertisements from the major Seattle newspapers, the Seattle Times and Post-Intelligencer, placed by Mr. Galazan between August and December 1973.

CX 192 reads "PHILIPPINE PSYCHIC HEALING, Appointment and Tour Arranged, Films Available for Showing, For More Information Call 622-5424." This ad appeared in the Seattle Post-Intelligencer, Sept. 26, 1973. The telephone number was identified as Mr. Galazan's, and Mr. Galazan placed and paid for that advertisement (Galazan, Tr. 822-23).

CX 193 reads "NOTICE TO THE PUBLIC, Information for PSYCHIC HEALING in the Philippines, Film to be Shown Sunday, Sept. 30, 1 P.M., Holiday Inn—Bellevue," again listing Mr. Galazan's number. This ad appeared in the Seattle Post-Intelligencer on Sept. 29, 1973, and was placed and paid for by Mr. Galazan (Tr. 821-22).

CX 9 is a newspaper advertisement identical to CX 192, except that it shows the telephone number of the Travel King, Inc., downtown Seattle office rather than Mr. Galazan's number. This ad appeared in the Seattle Post-Intelligencer on Oct. 18, 1973 (Galazan, Tr. 854-56).

CX 10 is a newspaper advertisement which reads "NOTICE TO PUBLIC, Due to Overwhelming Requests There will be Another Showing of Astounding Films on PHILIPPINE PSYCHIC HEALING, Sunday, Oct. 7, 1 p.m., Holiday Inn, Bellevue, Wn., Free to Public." This ad appeared on Oct. 6, 1973, in the Seattle Post-Intelligencer. Mr. Galazan acknowledged that he placed this advertisement (Galazan, Tr. 854-57).

CX 15 is an advertisement which appeared in the Seattle Times on Nov. 15, 1973. It is entitled "VISIT PHILIPPINE FAMOUS PSYCHIC HEALERS" and announces a film showing in the Spanish Ballroom of the Olympic Hotel on Saturday, Nov. 17, 1973, at 1:00 P.M., and also announces a tour departure on Nov. 29, 1973. The advertiser is identified as "TRAVEL KING TRAVEL AGENCY—SEATTLE." CX 14 is an advertisement using practically the same language but a different format. Mr. Galazan placed and paid for these two advertisements (Galazan, Tr. 888-890A; Admission of Mr. Galazan; Galazan, Tr. 795).

CX 16 announces another film showing at the Holiday Inn in Bellevue, Wash., Sunday, Nov. 4, at 1:00 P.M. The downtown Seattle phone number of Travel King, Inc., is given in this advertisement. The exhibit is an advertising specimen for the Seattle Times dated Nov. 2, 1973. Mr. Galazan placed this advertisement before Oct. 31, 1973 (Galazan, Tr. 888-890A; downtown office phone number appears in respondent Ronald Brown's supplemental answers to interrogatories, Exhibit B).

75. As the foregoing findings disclose, Travel King and Mr. Galazan sponsored public meetings at which "psychic surgery" was discussed and films of "psychic surgery," like CX 80, were shown. These meetings have already been discussed in some detail. Mr. Galazan was present at all these showings and promoted tours to the Philippines for "psychic surgery" at them. The showings were before audiences of hundreds of people (Galazan, Tr. 890A-B), and "psychic surgery" was represented to the public as an actual surgical operation by which the body was opened with the bare hands, diseased tissue or disease-causing material removed, etc.

76. The TV advertising of Travel King has been the subject of prior findings. CX 210 is the script of this commercial which was prepared on the basis of instructions given to the manager of Channel 13 by Mr. Galazan (Galazan, Tr. 851-52).

77. Mr. Muchlinski and others were paid for their expenses in promoting Travel King "psychic surgery" tours. Mr. Galazan was a moving force in arranging to subsidize the expenses of Mr. Muchlinski in return for the promotion and recommendation by him of "psychic surgery" and Travel King tours (Galazan, Tr. 864-65). Mr. Galazan, in fact, continues to promote "psychic surgery" and tours to the Philippines (Galazan, Tr. 804, 815, 820, 862, 891-94, 925; Ford, Tr. 1821-22). Indeed, in a newspaper advertisement placed several months after a Federal court injunction was entered in this matter, the heading is used "TRAVEL KING AND RAMBLE TOURS AGENCY Continues Their Famous TOURS TO THE PHILIPPINES" (CX 19; Galazan, Tr. 896-97). Mr. Galazan placed this advertisement. Under the circumstances, this advertisement implies that a tour for "psychic surgery" is again being made available to the public, notwithstanding the injunction. This is especially so in view of Travel King's widely publicized film showings in the fall of 1973. Many of the people who went on the tour announced by this advertisement were sick and as a part of their tour, Mr. Galazan arranged visits with the "psychic surgeons" (Galazan, Tr. 895-900). During hearings in this very

proceeding, Mr. Galazan was involved in sending people to Portland, Oreg., for "psychic healing" (Galazan, Tr. 917-920, 958).

78. Ms. Ford, as earlier stated, fully participated in the formulation, direction and control of the policies, acts and practices of both Travel King, Inc., and Ramble Travel and Tours, Inc. She was instrumental in obtaining and operating the downtown Seattle office of Travel King, Inc., during 1973, and actively promoted tours to the Philippines for "psychic surgery." After Mr. Galazan and later Ramble Travel & Tours, Inc. took over operation of the downtown Seattle office, Ms. Ford continued working as a travel agent receiving a salary from Mr. Galazan. This employment was terminated in February 1974. One of the terms of the sale of the downtown office to Mr. Galazan was a provision for monthly payments or royalties to Ms. Ford based on the continuation of the "psychic surgery" tours (CX 1C; Ford, Tr. 1786-1790, 1796-97, 1838, 1848; Hasson, Tr. 1898; Galazan affidavit; Brown interrogatories; admissions of Ms. Ford).

79. Ms. Ford observed "psychic surgery" in the Philippines prior to promoting tours in the Seattle area. On her return from the Philippines, she obtained respondent Ronald Brown's concurrence in the promotion of tours for "psychic surgery" by Travel King, Inc., and prepared a tour program. A travel brochure was written and submitted to Northwest Airlines (Ford, Tr. 1814-1823; Hasson, Tr. 1900; Brown, Tr. 1861-63; Galazan, Tr. 807, 817, 960; Brown interrogatories; admissions of Ms. Ford). As noted earlier, CX 7A-B "QUESTIONS YOU MAY HAVE" was prepared by Ms. Ford for use in selling tours to the Philippines for "psychic surgery," and represents to the public that "there are men in the Philippines who have (or claim to have) powers to heal and/or operate on persons without instruments of any kind" (Ford, Tr. 1830-31). Ms. Ford was present with Mr. Galazan at film showings sponsored by Travel King showing "psychic surgery," and spoke at one of these meetings describing Travel King's travel brochure (Ford, Tr. 1824-1832).

80. Individual respondent Ronald Brown, although half-owner and later sole owner of Travel King and vice-president of that corporate respondent, was far less involved in the promotion of tours to the Philippines for "psychic surgery," and the misrepresentations connected therewith, than Mr. Galazan or Ms. Ford. Nevertheless, he did participate. He paid half the cost of television commercials for Travel King broadcast in September 1973 advertising "MIRACULOUS PHILIPPINE FAITH HEALERS," but disclaiming any responsibility for "surgery" by them (CX 210). Mr. Brown was well aware of the promotional activities for "psychic surgery" being conducted by Mr. Galazan and Ms. Ford, as already indicated, and the misrepresentations

being made (Galazan, Tr. 817, 960; Ford, Tr. 1819-1820; Brown, Tr. 1861-63).

81. Adeline C. Heredia and Emile H. Heredia were likewise individually responsible for the promotion of tours to the Philippines so that tour members could undergo "psychic surgery," and each was individually responsible for false, misleading and deceptive written, oral and visual representations to the public that "psychic surgery" was an actual surgical operation, that the body was thereby opened with the bare hands, and diseased tissue or disease-causing material removed therefrom. Mr. Mapa, the sales and marketing manager for Phil-Am, began the development of "psychic surgery" tours to the Philippines on behalf of that travel agency after encountering a tour group arranged by respondent Gem (Mapa, Tr. 1420-22). Thereafter he advised Mr. Heredia, co-owner of Phil-Am, of the potential of such tours and with his consent began planning a tour to visit Rev. Agpaoa, the best known "psychic surgeon" at that time (Mapa, Tr. 1420-26, 1428-29). Mr. Heredia had seen "psychic surgery" operations in the Philippines, was aware that Rev. Agpaoa, one of the most famous of the "psychic surgeons," had been indicted for fraud and had fled the United States, and yet, as owner and manager of Phil-Am, permitted Phil-Am to promote "psychic surgery" tours to the Philippines as described in earlier findings (Emile Heredia, Tr. 1498-99, 1500). Likewise, Adeline C. Heredia exercised the general executive responsibilities of president of Phil-Am. She had a general understanding of "psychic surgery" and approved the brochure publicizing Phil-Am's tour with Philippine Airlines which stated "psychic surgery is happening in the Philippines" (Adeline C. Heredia, Tr. 1534-1542; CX 175). She looked upon "psychic surgery" tours to the Philippines as "another market" for Phil-Am, and approved payments to former Phil-Am tour conductors for the promotion of "psychic surgery" by film showings and other means (Adeline C. Heredia, Tr. 1545-1550).

82. Individual respondents Laurence C. Marquez and Marian E. Butterfield jointly owned and controlled corporate respondent Gem. They knew of, participated in, and were responsible for, the activities of Gem in promoting "psychic surgery" tours to the Philippines so that tour members could undergo "psychic surgery," and each was individually responsible for false, misleading and deceptive, written, oral and visual representations to the public that "psychic surgery" was an actual surgical operation, that the body was thereby opened with the bare hands, and diseased tissue or disease-causing material removed therefrom. Both Mr. Marquez and Ms. Butterfield were fully cognizant of the promotional activities of Gem employees for "psychic surgery." Indeed, both had seen "psychic surgery" films and did not believe that

the body was actually opened with the bare hands, and diseased tissue or disease-causing material removed (Marquez, Tr. 1108-09, 1123; Cortez, Tr. 1148; Butterfield, Tr. 1205).

Respondents Had No Reasonable Basis for Representing "Psychic Surgery" to Be an Actual Surgical Operation, Etc.

83. It has been found that "psychic surgery" is pure fakery. The body is not opened, no "surgery" is performed with the bare hands or with anything else, and nothing is removed from the body. The entire "operation" is an egregious fraud perpetrated by sleight-of-hand and similar tricks and devices. The fact that an individual respondent in this matter may have been taken in by the tricks of the "psychic surgeons," if that is true, does not render the deception perpetrated on the public by the promotion and sale of tours to undergo "psychic surgery" any the less real. Knowledge or intent is not a requisite for finding that respondents engaged in false, misleading, deceptive and unfair acts and practices, and made material misrepresentations to the public in promoting tours to the Philippines for "psychic surgery."

84. In any event, in view of the absolutely incredible nature of "psychic surgery" respondents were under a duty to make a thorough inquiry before making representations to the public in promoting tours to the Philippines that actual surgery would be performed, that the body would be opened with the bare hands, etc. Respondents had no reasonable basis to represent, or to allow representations to be made on their behalf, that "psychic surgeons" opened the body with their bare hands, removed diseased tissue, etc. Indeed, apart from the incredible nature of "psychic surgery," there is evidence in the record of the wide dissemination of information, when respondents were promoting their tours, that fraud was involved in "psychic surgery." One of the more famous "psychic surgeons," Rev. Agpaoa, was indicted in 1968 for fraud in the United States involving "psychic surgery," forfeited bail and fled the country (CX 59A-C, CX 60). This received extensive publicity (see Adeline C. Heredia, Tr. 1500). Leading metropolitan newspapers in both Seattle and San Francisco carried prominent articles questioning "psychic surgery" (see articles in Seattle Times, CX 72 through CX 74, CX 76-78; Tr. 979-980; the Seattle Post-Intelligencer, CX 96, the San Francisco Chronicle, CX 147 and 148). In the Seattle area, one of the witnesses in this proceeding who saw "psychic surgery" in the Philippines and detected it as fakery, appeared on at least three occasions on Channel 7 disclosing the fraud involved (Allen, Tr. 627, 681-82). And in the Port Angeles, Wash., Chronicle as early as Oct. 25,

1972, articles appeared revealing the fakery in "psychic surgery" (CX 154).[3]

85. The publicity relating to "psychic surgery" described in the foregoing finding was very explicit. The Port Angeles Chronicle, for example, in October 1972 carried an article headed "Films of Phony Operations Will Be Shown." The Port Angeles Chronicle went on to state (CX 154):

> * * * The techniques used by Agpaoa can be clearly seen. They include use of animal parts and tissue as well as dehydrated blood capsules. At first the healer and his assistants welcomed the filmmakers, but when they realized how powerful the zoom lens on the camera was they stopped the cameras and wouldn't allow any more filming * * *."

The Seattle Times in December 1973 reported (CX 74):

> Agpaoa, a self-styled leader of the healers, jumped bail in Detroit five years ago after a federal grand jury charged he had defrauded ailing Detroit residents of thousands of dollars by enticing them to fly to Manila for "cures."
>
> The "psychic surgeries" he and other healers supposedly perform with their bare hands cause no pain and leave no scar. Skeptics say this is because the healers actually do not open the body.
>
> Several newspapers and persons who have witnessed the "surgeries" have reported the healers conceal animal organs and blood capsules in their hands, then palm the matter atop the body to give the appearance of an opening in the flesh.

The Philippine consulate was reported to have warned ailing persons "not to expect miracles" and that Rev. Agpaoa had been "denounced by the Philippine Medical Association for his questionable activities and faces possible criminal prosecution" (CX 76). Another article appearing in the Seattle Times in November 1973 contained the statement (CX 78):

> A nonbeliever is Alejandro Roces, a writer and secretary of education a decade ago in the cabinet of former President Diosdado Macapagal.
>
> On a recent occasion, he seized a pan of water containing flesh which a healer supposedly had just extracted from a patient.
>
> Roces said he took it to a laboratory for analysis. "It was chicken intestine," he said.

The article also contained a large picture of respondent Galazan. An article in the San Francisco Chronicle in June 1973 began with a statement that "Gem Travel Service, Inc." was marketing a "nifty" tour package "complete with two weeks' worth of visits to a psychic healer" (CX 147A; see also Cortez, Tr. 1025-26). The article featured " 'Dr. Tony' Agpaoa" and contained a picture with the caption "Films show 'Dr. Tony' operating with his bare hands." The article also noted that films were circulating in the "Bay Area," and reported that:

> Agpaoa made the mistake a month later of visiting this country and was arrested, tried, and fined for fraud and practicing medicine without a license. He's had his problems with the authorities back home, too, but continues in business.

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[3] These newspaper articles were not admitted for the truth of any factual information contained in them. They were received as relevant and material to the allegation in Paragraph Six of the complaint that respondents lacked a "reasonable basis for representations leading members of the general public to believe that the 'psychic surgery' performed in the Philippines is an actual surgical operation * * *." (Tr. 979-980).

A companion article on June 26, 1973, contained additional descriptive matter on "psychic surgery," endorsements of those who believed in it, and quotations from one "Dr. Francis Rigney, an assistant clinical professor of psychiatry at the University of California Medical Center" (CX 148A):

> Any decent magician could do it, and few people could spot the trickery * * *."

The American Cancer Society was quoted as follows (CX 148B):

> The cancer society's report also said tests have found the blood isn't always human blood—sometimes it is from animals, and sometimes ont [sic] blood at all—and the removed tissues are usually animal guts.

A witness in this proceeding, Larry Allen, mentioned earlier, after detecting the fraudulent character of "psychic surgery" on a Gem tour, returned to Seattle and in addition to appearing over television to expose the fraud, wrote a letter which the Seattle Post-Intelligencer published on Nov. 17, 1973, which stated (CX 96):

> * * * The healing turned out to be a common fraud, performed by sleight-of-hand with animal blood and innards * * *."

86. Publicity calling "psychic surgery" into question on the ground of fraud was proven by complaint counsel to have come to the attention of representatives of all corporate respondents. The article in the San Francisco Chronicle (CX 147A-B) published June 25, 1973, was seen by respondent Adeline C. Heredia (Tr. 1539), and both Ms. Heredia and Emile H. Heredia were long aware that Rev. Agpaoa had been indicted in the United States for fraud in connection with "psychic surgery" (Emile H. Heredia, Tr. 1500; Adeline C. Heredia, Tr. 1537). Laurence C. Marquez and Marian E. Butterfield of Phil-Am were also proven to have seen the San Francisco Chronicle article (CX 147A-B) see Tr. 1123 and Tr. 1205. Mr. Cortez, an employee of Gem, who particularly promoted that travel agency's "psychic surgery" tours, was also familiar with the San Francisco Chronicle articles and the indictment of Rev. Agpaoa (Cortez, Tr. 1024-27). Likewise, respondent Galazan had seen articles in the Seattle Times including the announcement, quoted earlier, from the Philippine consulate (CX 76). Mr. Galazan acknowledged seeing another article published Nov. 20, 1973, which contained his picture as well as the statement, also quoted earlier, of "Alejandro Roces" that he found the material allegedly removed from a patient by a "psychic surgeon" to have been "chicken intestine" (CX 78) see Galazan, Tr. 982-83.

Public Interest

Volume of Business

87. Substantial numbers of people have purchased package tours to the Philippines from and through respondents, paying substantial sums of money therefore. The cost of the tour offered by Travel King, Inc. & Ramble Tours from the West Coast was either $1,132 per person or

$1,186 per person, depending on the season (CX 2). Phil-Am's tour cost $985 under the group plan, and $1,200 under the independent plan (CX 26). The Gem tour was $932 under the group plan, $1,007 under the regular plan, and $1,116 under the independent plan (CX 50). Travel King, Inc. & Ramble Tours appear to have sold at least 200 tours (see Galazan, Tr. 804, 815, 820, 862, 891-92). Phil-Am has marketed over 814 tours (CX 214; Tr. 1570), and Gem about 1042 (CX 143; Tr. 1014). All in all, about $2,000,000 has been spent by the public on the "psychic surgery" tours of respondents to the Philippines. Further, insofar as travel to the Philippines to obtain "psychic surgery" is concerned the foregoing seems to be only the "tip of the iceburg." Many thousands of ill persons from all over the world seem to have made the trip, drawn by the desperate but futile hope that by some magic their bodies will be opened by Philippine "healers," and the causes of their diseases removed.

Injury to the Public

88. The representation that "psychic surgeons," "psychic healers," "faith healers," or "spiritual" or "spirit healers" have the ability to open the body with their bare hands, to remove diseased tissue or disease-causing material, to close the body and leave no scar, all without pain or anesthesia, has the capacity to cause the gravest and most serious, indeed, incalculable injury to individuals and to the public generally. Not only do such representations have the tendency and capacity to cause seriously ill persons to travel long distances at great expense, and to waste their time, money, and energy in the false belief that they will undergo an actual surgical operation, but such representations have the tendency and capacity to worsen the condition of the sick, and even to cause death, through interruption of normal medical care.

89. The foregoing are not purely theoretical possibilities. Complaint counsel produced evidence establishing the reality of such effects.

The case of Mr. Hansen

Mr. Hansen, suffering from congestive heart failure and a non-reparable hernia, was taken by his wife, through a Gem tour, to the Philippines to obtain "psychic surgery" from Rev. Agpaoa. Mr. Hansen was desperate to have his hernia repaired. Mr. and Mrs. Hansen had seen "psychic surgery" films, and decided to go to the Philippines to see Rev. Agpaoa (Mrs. Hansen, Tr. 2072-73). Mr. Hansen started the trip comfortably, although in a wheelchair. By the time he had traveled from Seattle to San Francisco, transferred aircraft and flown to Hawaii, he "had a spell." Mrs. Hansen, a registered nurse, had medications with her and there was a doctor on the plane. Mr. Hansen was given oxygen and was eventually able to sleep (Mrs. Hansen, Tr. 2073). After arriving in the Philippines, Rev. Agpaoa "operated" on Mr.

Hansen. According to Mrs. Hansen, Rev. Agpaoa removed "a piece of tissue that was about an inch wide and six inches long" from her husband. This amazed her "because you know when you are being operated on for a rupture, you don't have to pull out anything. You repair" (Mrs. Hansen, Tr. 2077). On the return trip, just as they arrived home, Mr. Hansen came down with pneumonia, and had to be hospitalized. Mr. Hansen spent eight days in the hospital with pneumonia and died at home of congestive heart failure on the day he was released (Mrs. Hansen, Tr. 2084-86). Persons with congestive heart trouble are susceptible to pneumonia, which is hard on their hearts (Mrs. Hansen, Tr. 2087-88).

The case of Mrs. Douglass

Mrs. Douglass suffered from inoperable cancer in her neck and had a short life expectancy. Her husband heard about, and became interested in, "psychic surgery" as offering a possible cure. Mr. Douglass saw an advertisement for a Travel King promotion at the Holiday Inn, Bellevue, Wash., which included a film showing. He and his wife attended. They watched the film and listened to testimonials (Douglass, Tr. 1344). As a result they purchased tickets, although from Gem, and both journeyed to the Philippines for "psychic surgery" from Rev. Agpaoa. Rev. Agpaoa "operated" on Mrs. Douglass, and pulled some tissue from the area of her neck. Mr. Douglass described Agpaoa's hands moving back and forth, moving cotton around on Mrs. Douglass' body, and seeing blood spurt after a few moments. He described blood clots on the skin's surface and the removal of what Rev. Agpaoa announced was "the tumor" (Douglass, Tr. 1351). As described in earlier findings, Mr. Douglass took a piece of the tissue Rev. Agpaoa had stated was the tumor he removed from Mrs. Douglass' neck. When they returned home the tissue was analyzed and was found to be of animal origin (Dr. Hoekzema, Tr. 2067). The report caused Mrs. Douglass to cry (Douglass, Tr. 1367). Mrs. Douglass did not improve. She received no benefit from her visit to the "psychic surgeon." She returned bitterly disappointed and physically weakened. The trip to the Philippines cost the Douglasses over $2,000 and they also left Tony Agpaoa a $100 donation (Douglass, Tr. 1367-68). The hot and humid climate and the disappointment of no improvement for his wife made Mr. Douglass describe his trip to the Philippines as "miserable" (Douglass, Tr. 1373).

The case of Mrs. Brown

Wallace Brown testified that his wife suffered a stroke in July 1972 which left her almost totally paralyzed. Over the next year, Mrs. Brown received various types of therapy, including physical, occupational, and speech therapy, but was able to improve her condition only slightly. She was confined to a wheelchair, had difficulty speaking, and had double vision. Mr. Brown went to an advertised Travel King film showing on Sept. 30, 1973 (see CX 193). At the showing, he saw films of "psychic surgery" operations. He felt that his wife was at a point where no more improvement would occur and that he would have to accept things as they were. The films of "psychic surgery," however, offered him a hope of improvement for her that was not available anywhere else (Brown, Tr. 2093-94). Mr. Brown was very impressed with what the film showed and, coupled with the testimonials offered at the film showing, was very anxious to find out more about "psychic surgery." As a result, Mr. Brown took his wife and a woman to assist her to the Philippines in October 1973. In a two-week stay, Mrs. Brown was "treated" by many "healers," including Alex and Marcos Orbito, Tony Agpaoa, and Juan Blance. Mrs. Brown had many "operations" by these "healers," respondent Yuda Galazan making all the arrangements (Brown, Tr. 2111), but each day Mr. Brown noticed that there was no improvement. He also noticed that there was no improvement in the other members who accompanied him on this Travel King tour. Upon returning to the United States, there was still no improvement in his wife's condition. She had in fact lost ground in her ability to feed herself, which she was able to do before the trip but, because she did not continue her therapy, she did not have the ability upon her return. Mrs. Brown found the loss of hope very hard to take. The trip cost between $3,000 and $4,000 (Brown, Tr. 2115-2117).

The case of William Chambers

Mr. William Chambers was afflicted with amyotrophic lateral sclerosis, also known as Lou Gehrig's disease. His physician, Dr. Otto Trott, estimated that he had about three years left to live (Dr. Trott, Tr. 1964). Mr. Chambers, his wife and mother-in-law attended a film showing of psychic surgery conducted by Ms. Blanchard, and later a showing at which Mr. Rogers was present (Mrs. Chambers, Tr. 2157-58; Mrs. Stolz, Tr. 1942). Both Ms. Blanchard and Mr. Rogers, as described in prior findings, received payment for expenses from Phil-Am for their promotional activities for "psychic surgery" tours to the Philippines. After the showing at which Mr. Rogers was present, Mr. Rogers sent Mr. and Mrs. Chambers Phil-Am travel literature, including "PHIL-AM, TRAVEL AGENCY'S SPIRITUALIST PILGRIMAGE TO THE PHILIPPINES" (CX 39). This brochure contained the statement "the phenomenon of psychic surgery is happening in the Philippines," as previously described. Mr. Chambers determined to journey to the Philippines to obtain "psychic surgery." Mrs. Stolz, his mother-in-law, accompanied him. In November 1973 they both traveled to the Philippines on one of Phil-Am's "psychic surgery" tours. Mr.

Chambers had much difficulty walking during the trip, especially on one occasion when he had to carry baggage a long distance over concrete at the airport (Mrs. Stolz, Tr. 1943). Once in the Philippines, Mr. Chambers' treatment consisted of "psychic surgery" with frequent, intensive massage of the legs. Mrs. Stolz testified that after these treatments, Mr. Chambers was in great discomfort with swollen and weakened legs (Mrs. Stolz, Tr. 1944-49). When Mr. Chambers returned, his wife observed that his condition was weaker, and several days later he entered the hospital with blood clots in the lungs for which he was placed on anticoagulant medication (Mrs. Chambers, Tr. 2159-2160). It was the opinion of his physician, Dr. Trott, that these emboli were caused by thrombosis of the legs resulting from the trip to the Philippines. The factors of a long flight, sitting upright in an airplane seat, and the frequent intensive massage connected with the "psychic surgery" combined to form blood clots in his legs which were carried to his lungs. In early April of 1974, Mr. Chambers had a fall at home, striking his head and suffering a subdural hematoma, a bleeding between the skull and the brain. Mr. Chambers recovered from this occurrence, but had to be taken off the anticoagulants upon which he had become dependent. Shortly thereafter, he suffered another pulmonary embolism, which resulted in his sudden death on the day he was scheduled to leave the hospital. Dr. Trott concluded that the Philippine "psychic surgery" tour resulted in Mr. Chambers' death when he was still expected to have approximately two years to live. Dr. Trott testified that pulmonary embolism is not a normal complication of amyotrophic lateral schlerosis and explained that blood clots could easily form in Mr. Chambers' weakened legs under the kind of massage he received in the Philippines. See Dr. Trott, Tr. 1968-2047. Mr. Chambers spent about $2,000 and Mrs. Stolz about $1,500 on the trip to the Philippines, including the tour price paid to Phil-Am, about $400 in donations to "psychic surgeons" and incidental expenses. Dr. Trott estimated that medical expenses incurred by Mr. Chambers as a result of his travel to the Philippines were about $3,300. In addition, because of his sudden death, Mr. Chambers was unable to obtain his normal pension from which his widow would have received benefits after he died (Mrs. Chambers, Tr. 2160-2186).

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the corporate and individual respondents, and over the acts and practices which are the subject of this proceeding.

2. Corporate and individual respondents promoted and were responsible for the promotion of tours to the Philippines so that tour

members could undergo "psychic surgery," "psychic healing," "faith healing," or "spiritual" or "spirit healing."

3. In the course of promoting tours to the Philippines, corporate and individual respondents made representations to the public which had the tendency and capacity to cause members of the public to believe that the "psychic surgery," "psychic healing," "faith healing," or "spiritual" or "spirit healing," which those who purchased tours from respondents would undergo in the Philippines, consisted of an actual surgical operation, that the body was opened with the bare hands, and that diseased tissue or disease-causing material was thereby removed.

4. Such representations were false and fraudulent, unfair, misleading and deceptive.

5. The "psychic surgery," "psychic healing," "faith healing," or "spiritual" or "spirit healing," performed in the Philippines on persons purchasing tours promoted by respondents did not consist of an actual surgical operation, the body was not opened with the bare hands, or with anything else, and diseased tissue or disease-causing material was not removed.

6. The "psychic surgery," "psychic healing," "faith healing," or "spiritual" or "spirit healing," to undergo which respondents marketed tours to members of the public, is pure fakery and a fraud accomplished by the deception and trickery of the "psychic surgeons," "psychic healers," "faith healers," or "spiritual" or "spirit healers" through the use of sleight-of-hand, tricks and devices, including the employment of animal parts, tissue and blood, all used to defraud and deceive trusting persons into the false and mistaken belief that human bodies have been opened with the bare hands, diseased material or disease-causing material removed, and the incision closed, all without pain or suffering.

7. The representations of corporate and individual respondents herein, and for which they were responsible, in the promotion of tours to the Philippines so that tour members could undergo "psychic surgery," "psychic healing," "faith healing," and "spiritual" or "spirit healing," had the tendency and capacity to inflict great injury and suffering on persons afflicted with serious, incurable or terminal illnesses and diseases, to prey upon and to exploit them, and to cause them, and in some cases their spouses, children or relatives, to undertake long journeys at great cost, hardship and inconvenience, and to forego medical treatment with the potential result of worsening their condition and hastening or causing their death.

8. There is great and abiding public interest in this proceeding.

9. The acts and practices of corporate and individual respondents disclosed by the record are to the prejudice and injury of the public, and constitute unfair methods of competition and unfair and deceptive

acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

REMEDY

All corporate respondents disseminated false, misleading and deceptive representations concerning the nature of the "psychic surgery," "psychic healing," "faith healing," or "spiritual" or "spirit healing," which those who purchased tours to the Philippines from them would experience. The individual respondents herein controlled the policies, acts and practices of the closely-held corporate respondents, and are responsible for the activities of the businesses they controlled and the employees thereof. *Standard Educators, Inc.*, 79 F.T.C. 858, 894-99, *aff'd Standard Educators, Inc.* v. *Federal Trade Commission*, 475 F.2d 401, 402-03 (D.C. Cir. 1973); *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112 (1937); *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F.2d 103 (4th Cir. 1963); *Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F.2d 7, 15 (2nd Cir. 1954); *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F.2d 351 (9th Cir. 1966). All individual respondents, in fact, knew of, and authorized, directly or by acquiescence, or personally participated in, the dissemination of false, misleading and deceptive representations to the public, through film showings, distribution of literature and printed materials, statements, and otherwise, that the "psychic surgery," "psychic healing," "faith healing," "spiritual" or "spirit healing," which members of the public would experience if they purchased tours to the Philippines from respondents, consisted of an actual operation, that the body was opened, and diseased tissue or disease-causing material removed. Responsibility of respondents for the representations of "tour conductors" or "tour promoters," under the circumstances set out in the findings made earlier in this initial decision, is clear. *Goodman* v. *Federal Trade Commission*, 244 F.2d 584 (9th Cir. 1957); *Holiday Magic, Inc.*, order of Oct. 15, 1974 [84 F.T.C. 748]. To end the false, misleading and deceptive representations, all corporate and individual respondents must be bound by an order. Such action does not constitute "regulation of religious action" or of travel which is "religious in nature." Respondents may continue to do business as travel agents, but respondents may not promote travel or tours by misrepresenting the nature of the "treatment" available.

The order issued not only prohibits misrepresentation that "psychic surgery," "psychic healing," etc., consists of an actual "surgical operation," but prohibits the continued use of the terms "psychic surgery," "psychic healing," "faith healing," "spiritual" or "spirit healing," and similar terms, employed in the past by respondents in the promotion of tours to the Philippines. The continued use of those terms would permit continued deception of the public. This would be true notwithstanding cessation of specific misrepresentations through films, dissemination of literature and printed materials, statements, etc., that "psychic surgeons" or "healers" in the Philippines had the miraculous power to open human bodies with their bare hands, and remove diseased tissue or disease-causing material. The legal authority to enter an order which will end all means of continuing past deceptive practices is well established. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-430 (1957); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946). The sale of "psychic surgery" or the arrangement for treatment by "psychic surgeons," in view of the record herein, is also obviously deceptive and requires prohibition, considering respondents' past conduct.

As an additional provision for ending continuing effects of past false, misleading and deceptive representations in the promotion of tours to the Philippines, respondents must also provide a copy of Attachment A to every member of the public who has taken a "psychic surgery" tour of a respondent or who inquires in the future about "psychic surgery," "psychic healing," etc., or who seeks to purchase travel, tours or accommodations for such purpose in the Philippines, or elsewhere. Past tour members must be notified because they may have discontinued vital medication or otherwise terminated valid medical treatment. As a result of the widespread publicity given to "psychic surgery" films, and other false, misleading and deceptive representations contained in the promotional materials and literature disseminated by, or on behalf of, respondents, it is probable that requests by the public for "psychic surgery" tours, and for travel to visit "psychic surgeons," or Philippine "healers," will be addressed to respondents in the future. Members of the public inquiring about "psychic surgery," "psychic healing," etc., must, for their protection, be given adequate disclosure of the fakery and danger involved. Such provision will also insure compliance with the order by preventing respondents from implicitly endorsing "psychic surgery," "psychic healing," etc., or continuing to sell such tours, by responding to requests for information by sending tour brochures or other literature. Such warning notice is clearly within the Commission's authority to order the relief essential to end unlawful practices and their continuing effects. *Federal Trade Commission* v. *National Lead, supra; Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Jacob Siegel Company* v. *Federal Trade Commission, supra;* see also, *Arthur Murray Studio of Washington, Inc.* v. *Federal Trade Commission*, 458 F.2d 622 (5th Cir. 1972), rehearing denied May 11, 1972; *S.S.S. Company, Inc.* v. *Federal Trade Commission*, 416 F.2d 226 (6th Cir.

1969); *All-State Industries of North Carolina, Inc.* v. *Federal Trade Commission*, 423 F.2d 423 (4th Cir. 1970).

Certain other provisions have also been included in the order. Respondents had no reasonable basis for believing that "psychic surgery," "psychic healing," etc., involved an actual opening of the human body with the bare hands, and the removal of diseased tissue or disease-causing material. In view of past misrepresentations with respect to treatment of disease by "psychic surgery," respondents must be prohibited from future misrepresentations with respect to any other form of treatment of disease unless there is a reasonable basis therefor. Those caught violating the Act "must expect some fencing in." *Federal Trade Commission* v. *National Lead, supra.* Similarly, the manner in which respondents approved, authorized, used, and benefited by the promotional activities of "tour promoters" or "tour conductors" for travel and tours to the Philippines for "psychic surgery," "psychic healing," etc., warrants that respondents be prohibited from providing compensation expenses, travel at free or reduced rates, or other benefits, to persons making representations or engaging in acts or practices prohibited by this order.

Complaint counsel originally sought a provision in the order requiring restitution to all persons who purchased "psychic surgery" tours to the Philippines from any corporate respondent in this proceeding. Subsequent to submission of proposed findings, complaint counsel withdrew their advocacy of restitution on the basis of the Commission's ruling of Jan. 21, 1975, striking the restitution provision from its order against *Holiday Magic, et al.*, Docket 8834 [85 F.T.C. 89]. The Commission's action was taken in view of the decision in *Heater* v. *Federal Trade Commission*, 503 F.2d 321 (9th Cir. 1974), and the decision of the Commission not to seek review of that decision by the Supreme Court. In striking the order of restitution from *Holiday Magic*, the Commission noted that while its determination not to seek review of the *Heater* decision should not be taken to signify a change in its view regarding the correctness of that decision:

> * * * it does eliminate any possibility that *Heater* will not continue to be governing law in the Ninth Circuit.

This case, of course, arose in the Ninth Circuit and all respondents are within that circuit. Hence, restitution is not a valid remedy in this matter, even if it were otherwise contemplated, and complaint counsel properly no longer urge a provision in the order to that effect.

Complaint counsel, however, although dropping the restitution provision from their proposed order, seek to amend retroactively the notice order issued herein to provide a basis for the Commission to seek, in its discretion, "consumer redress" in the form of restitution as authorized by the "Federal Trade Commission Improvement Act" of Jan. 4, 1975. Respondents oppose such action.

Section 206 of that Act creates a new Section 19 of the Federal Trade Commission Act, 15 U.S.C. §59, allowing the Commission, after it has issued a final cease and desist order, to sue a respondent or respondents in Federal district court to obtain "consumer redress" which may consist of "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification" respecting the unfair or deceptive acts or practices. The statute applies to cases in which a cease and desist order issued after the date of enactment if the respondent (Section 206(b)(2)):

> * * * had been notified in the complaint, or in the notice or order attached thereto, that consumer redress may be sought.

Neither the complaint, amended complaint, nor notice order in this proceeding contained any provision for restitution, or notified any corporate or individual respondent that "consumer redress" was or might be sought. Retroactive amendment of the Complaint would constitute a transparent evasion of the plain and unambiguous terms of the statute.

The fact that complaint counsel at the initial pretrial conference announced that they intended to seek restitution, and shortly thereafter filed a written notice to this effect (see notice of intent to seek restitution from corporate and individual respondents, filed Mar. 22, 1974) does not change matters. Such notice did not emanate from the Commission, but from complaint counsel. Respondents were never given notice by the Commission that "consumer redress" was or might be sought. And certainly, as stated, no such notice was in the complaint or notice order. To rule that, in lieu thereof, notice from complaint counsel met the requirements of the statute, would require construction and modification of the plain language thereof. Such action would be wholly unjustified. Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning. *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 315 (1953); *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 287 (1955). Giving effect to the plain language of the statute will not produce anomalous or absurd results, indeed, to the contrary. Cf. *Federal Trade Commission* v. *Tuttle*, 244 F.2d 605 (2nd Cir. 1957), *cert. denied*, 354 U.S. 925. The motion of complaint counsel to amend the notice order is denied. It may be noted, in connection with the advocacy of restitution or "consumer redress" by complaint counsel, that respondents did not retain the bulk of the money paid by members of the public for "psychic surgery" tours to the Philippines. Except for a commission, respondents remitted all such funds to airline companies and to hotels, etc., for "land" accommodations.

The following order is entered.

ORDER

It is ordered, That respondents Travel King, Inc., doing business as Travel King, Inc. & Ramble Tours; Phil-Am Travel Agency, Inc.; Gem Travel Service, Inc.; and Ramble Travel and Tours, Inc., corporations; Yuda Galazan and Nyla Ford, individually and as officers and directors of Ramble Travel and Tours, Inc.; Ronald Brown, individually and as an officer of Travel King, Inc.; Adeline C. Heredia and Emile H. Heredia, individually and as officers of Phil-Am Travel Agency, Inc.; Laurence C. Marquez and Marian E. Butterfield, individually and as officers of Gem Travel Service, Inc.; and their successors and assigns, and their agents, representatives and employees, acting directly or through any corporate or other device, or through any other person or firm, in connection with the advertising, offering for sale, sale, or provision of travel arrangements, or of any form of treatment for disease or disorder, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, in the promotion of travel or tours to the Philippines, or elsewhere, that "psychic surgery"[4] is an actual surgical operation, that the body is opened, and that diseased tissue or disease-causing material is removed from the human body.

2. Representing, directly or by implication, in the promotion of travel or tours to the Philippines, or elsewhere, that "psychic surgeons"[5] in the Philippines, or elsewhere, have the ability or power to open the body with the bare hands, and to remove diseased tissue or disease-causing material.

3. Advertising or promoting, directly or indirectly, "psychic surgery," or travel or tours to the Philippines, or elsewhere, for "psychic surgery," or for visits to "psychic surgeons," or to any person claiming to be, or known by the respondent involved to be, a "psychic surgeon."

4. Using the terms "psychic surgery" or "psychic surgeon" in the promotion of travel or tours to the Philippines, or elsewhere, or any other term, description or symbol which suggests, directly or by

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[4] Whenever used in this order the term "psychic surgery" includes the terms "psychic healing," "faith healing," and "spiritual" or "spirit healing," and equivalent terms, when those terms refer to or contemplate, a "treatment" or "healing" procedure or technique which purports to involve the opening of the body with the bare hands, and the removal of diseased tissue or disease-causing material.

[5] Whenever used in this order the term "psychic surgeon" includes the terms "psychic healer," "faith healer," and "spiritual" or "spirit healer," and equivalent terms, when those terms refer to a "healer" or person who purports to open the body with the bare hands, and to remove diseased tissue or disease-causing material.

implication, the opening of the body, the performing of any kind of surgery, or the removing of any tissue or material, with bare hands without instruments.

5. Offering for sale or selling "psychic surgery" or arranging or facilitating treatments by any "psychic surgeon."

6. Representing, directly or by implication, in connection with the promotion, sale, arrangement or scheduling of travel or tours, that during or at the end of such travel or tours, arrangements will be made for visits with any "psychic surgeon," or that any "psychic surgeon" will be available for visits.

7. Making any representation, directly or by implication, as to the validity, efficacy or safety of any form of treatment for disease or disorder without possessing, at the time the representation is made, a reasonable basis therefor.

8. Providing or arranging for the provision of any form of compensation, reimbursement, gratuity, or benefit, including free or reduced rate travel or accommodations to anyone known by the respondents involved, or who should have been known by the respondents involved with reasonable inquiry, to have engaged in the use of any of the representations or promotions prohibited by this order.

It is further ordered, That respondents shall:

(a) Deliver promptly to all persons who request information concerning "psychic surgery" or travel or tour arrangements to visit "psychic surgeons," or who have taken a "psychic surgery" tour of a respondent herein, a copy of the notice contained in Attachment A. [Where such inquiries are by telephone, the notice need only be sent if the inquiring person requests a written response or if a respondent sends written materials to the inquiring person.]

(b) Distribute a copy of this order to each of their employees and to all persons who are or have been tour conductors on respondents' "psychic surgery" tours.

It is further ordered, That each corporate respondent shall notify the Commission at least thirty days prior to any proposed change therein, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

ATTACHMENT A

The following notice shall be typed on a single page or printed in type at least as large as typewriter pica type on respondents' letterhead:

WARNING

The following factual information is of vital importance to anyone who has undergone or contemplates undergoing "psychic surgery" by any "psychic surgeon" in the Philippines, or elsewhere.

Please read this warning carefully.

"Psychic surgery" has been shown to be fraud and fakery. The "psychic surgeons" in the Philippines use sleight-of-hand and other tricks and deceptions, including the employment of animal parts, tissue and blood to create the appearance of surgery.

"Psychic surgeons" use small capsules filled with the blood and tissue of animals hidden in their hands, cotton, and other places, to simulate human blood and tissue. Chemical analysis of blood appearing during one "operation" showed it to have come from a pig and a tumor supposedly removed during another came from a small animal. Another "psychic surgeon" used a concealed razor blade to make surface incisions. Two former "psychic surgeons" have publicly testified that *all "psychic surgery" is a fake*, using sleight-of-hand techniques and animal parts to create its effects. There is no opening of the body and nothing is removed from inside the body during "psychic surgery," regardless of who claims to be able to perform it.

There are known instances of people who have died or have been seriously injured as a result of the careless manipulations of the "psychic surgeons." These manipulations are particularly dangerous for persons with cancer, tumors, varicose veins, and certain heart conditions.

If you have stopped taking medication or seeing your doctor because you believe you have been "cured" by "psychic surgery," *you may be in serious danger*. There is no way to diagnose many diseases yourself. The feeling of improvement, if any, may only be short-lived and if you wait too long to consult a doctor, it may be too late for him or her to help you.

You should check with a doctor to ensure your own safety.

This travel agency no longer provides any arrangements for visits to "psychic surgeons."

OPINION OF THE COMMISSION

BY HANFORD, *Commissioner:*

The amended complaint in this matter charges the eleven respondents (four West Coast travel agencies and seven of their officers and shareholders) with selling tours to the Philippines by falsely representing that the "psychic surgery" offered there is an actual surgical operation by which diseased tissue or disease-causing material is removed from the human body and with lack of reasonable basis for these same representations.[1]

The initial decision of Administrative Law Judge Hanscom, filed Feb. 28, 1975, found all eleven respondents in violation of Section 5 of the Federal Trade Commission Act on both theories. A comprehensive order was entered, prohibiting virtually any activity by respondents in connection with "psychic surgery," and requiring that respondents send warning notices to past purchasers of "psychic surgery" tours and to those who inquire about such tours in the future. One travel agency, Gem Travel Service, Inc., and its two officers and shareholders, Laurence C. Marquez and Marian E. Butterfield, appeal.

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[1] The following abbreviations are used for citations:

I.D. — Initial decision of administrative law judge;
Tr. — Transcript of testimony;
CX — Commission exhibit;
RB — Brief on appeal of respondent; and
FF — Findings of Fact.

We find no merit in any of respondents' contentions, nor do we see any other reason to disturb the initial decision and order; thus, they are both affirmed in full. The findings and conclusions of the law judge are adopted as those of the Commission.

Respondents raise four sets of arguments in challenging the initial decision.

1. Their first contention is that Judge Hanscom's findings of fact are not supported by the record as a whole.[2] Respondents' primary contention here is that their allegedly deceptive promotional efforts were few and far between and, in essence, *de minimis*. This argument is not supportable as either a legal or a factual matter. The dissemination of only one or a small percentage of deceptive representations has frequently been held to violate Section 5.[3] As we have stated previously, "we are not prepared to say that deception is all right if practiced in moderation."[4] This is particularly true where, as here, the deceptive representations have the capacity to cause extreme medical and financial injury to those members of the public who rely on them.[5]

Moreover, the deception practiced by respondents was by no means *de minimis*, either in time or in scope. In promoting its June 12, 1972 tour to the Phillipines, Gem's brochure featured the psychic surgery of Tony Agpaoa as one of its "highlights."[6] It was represented in these brochures that Mr. Agpaoa would perform "painless, almost bloodless operation[s]" with his hands, rather than a knife.[7] Soon thereafter, Mr. Ernie Cortez, a Gem employee, began sending out letters on Gem stationery, informing some of the "dozen a day or so" of potential Gem "psychic surgery" customers about the activities of Mr. Agpaoa.[8] This letter speaks of "painless surgery with bare hands."[9] Later, in mid-1973, Mr. Cortez, on behalf of Gem, attempted to promote "psychic surgery" tours through public showings of movies depicting actual "psychic surgery operations."[10] This film was shown five times in four cities in two states and was viewed by hundreds of prospective Gem customers.[11] It unquestionably has the tendency and capacity to convey the message that "psychic surgery" is an actual surgical operation involving the opening of the human body and the removal of diseased tissue and/or disease causing material.[12]

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[2] RB 5-12.

[3] *Gimbel Bros., Inc.* v. *F.T.C.*, 116 F.2d 578 (2nd Cir. 1941); Gimbel Bros., 60 F.T.C. 359 (1962), *appeal dismissed*, 7 S & D 549 (3d Cir. 1962); *Baldwin Bracelet Corp.*, 61 F.T.C. 1345 (1962), *aff'd*, 325 F.2d 1012 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *Fedders Corp.*, D. 8882 (Jan. 14, 1975 [85 F.T.C. 38]), *appeal docketed*, No. 75-4051, 2d Cir., Mar. 19, 1975.

[4] *Baldwin Bracelet Corp.*, 61 F.T.C. 1345, 1363 (1962), *aff'd*, 325 F.2d 1012 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 923 (1964).

[5] FF 88-89, Tr. 594-603.

[6] CX 53B. Mr. Agpaoa, who was indicted for fraud in connection with the practice of psychic surgery in 1967 and forefeited $25,000 bond, had an "exclusive dealing" arrangement with Gem, by which any American wishing to use his services had to book with Gem. CX 59-60, FF 38, CX 52.

[7] CX 53B, FF 41.

[8] Tr. 1041-55.

Moreover, films depicting "psychic surgery" were shown to the public on Gem's behalf by several Gem tour conductors.[13] The law judge found respondents liable for these films as well,[14] and respondents concede such responsibility.[15] We find no merit in respondents' contention that the representations made by the tour conductors were not deceptive.[16] This defense is bottomed on two propositions: 1) the films accurately portray that which took place and 2) the tour conductors accompanied the films with a "balanced" narrative, setting forth the possibility that "psychic surgery" may be a fake. However, the mere holding out of the possibility that the procedure is genuine when in fact it is not is deceptive. Secondly, the few disclaimers shown to have been made were not sufficient to dissipate the profound emotional message of the films. Third, when a person shows a film which ostensibly depicts a miracle cure involving an apparent opening of the body to seriously ill persons, then invites them to partake of the cure, it is virtually impossible for disclaimers to eliminate the tendency of the film to convey the message to at least some members of the audience that an opening of the body is taking place. We must also reject respondents' defense that the tour conductors did not intend to sell the "psychic surgery" tours.[17] Intent to deceive is simply not an element of a deception under Section 5.[18]

Respondents also argue that there has been no showing that sales resulted from any misrepresentations, rather than from word of mouth advertising.[19] This contention must be rejected for two reasons: first, much of the word of mouth must inevitably have stemmed from earlier misrepresentations;[20] second, it need not be shown that even one consumer actually relied on a particular false claim.[21]

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[9] CX 54A, CX 153A.

[10] CX 81, FF 43-44. Tr. 1033-44.

[11] Tr. 1033-34.

[12] CX 81, FF 43-44, 49-50.

[13] FF 45-47.

[14] FF 46.

[15] RB 8.

[16] RB 8-12.

[17] RB 9-10.

[18] *Koch v. F.T.C.*, 206 F.2d 311 (6th Cir. 1953); *Ford Motor Co. v. F.T.C.*, 120 F.2d 175 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941); *Gimbel Bros., Inc.* v. *F.T.C.*, 116 F.2d 578 (2d Cir. 1941); *F.T.C.* v. *Sterling Drug, Inc.*, 317 F.2d 669 (2d Cir. 1963); *Montgomery Ward & Co., Inc.* v. *F.T.C.*, 379 F.2d 666 (7th Cir. 1967).

[19] RB 12.

2. Contending that the law judge's order is overbroad, respondents ask us to alter Paragraphs 3 and 5 and delete Paragraph 6 and the first "*It is further ordered*" paragraph. The purpose of modifying Paragraphs 3, 5, and 6 is to allow respondents to continue to sell "psychic surgery" tours. We believe, however, that based on respondents' past conduct in promoting these tours and the law judge's conclusion that "psychic surgery" is "pure fakery and a fraud,"[22] an outright ban on promotion of "psychic surgery" tours or arrangement for visits to "psychic surgeons" is well within the permissible limits of the Commission's power to "fence in" law violators.[23] Where the very sale of a product or service is offensive to public policy, it is within the authority of the Commission to ban its sale entirely.[24]

Because we are dealing here with desperate consumers with terminal illnesses who want to believe that "psychic surgery" will cure them, no amount of disclosure will suffice to drive home to all the point that "psychic surgery" is nothing but a total hoax. Respondents' argument that we may not prohibit the arrangement or advertisement of "psychic surgery" has little force in light of their concession that we may prohibit them from selling "psychic surgery."[25] Surely the power to prohibit the sale of a service encompasses the power to prohibit its advertisement.

The second aspect of respondents' appeal of the order relates to the sending of the warning notice to past purchasers and those who inquire about "psychic surgery" in the future. As respondents themselves contend, much of their "psychic surgery" business stems from word of mouth of former customers. As respondent Butterfield put it, word of mouth had a "snowballing" effect.[26] Even if Gem no longer sells "psychic surgery" tours, some wayfaring souls, hearing the word of mouth, may book passage through Gem to the Philippines to see Mr.

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[20] As respondent Butterfield put it (Tr. 1186), word-of-mouth from the earlier tours created a "snowballing effect" on Gem's "psychic surgery" business. *See also* Tr. 747.

[21] *Bockenstette* v. *F.T.C.*, 134 F.2d 369 (10th Cir. 1943), *modified*, 4 S & D 423 (10th Cir. 1945); *Charles of the Ritz Dist. Corp.* v. *F.T.C.*, 143 F.2d 676 (2d Cir. 1944); *Northern Feather Works, Inc.* v. *F.T.C.*, 234 F.2d 335 (3d Cir. 1956); *American Life and Accident Insurance Co.* v. *F.T.C.*, 255 F.2d 289 (8th Cir.), *cert. denied*, 358 U.S. 875 (1958).

[22] I.D. 64[p. 764, herein].

[23] *F.T.C.* v. *National Lead Co.*, 352 U.S. 419 (1957); *S. Dean Slough* v. *F.T.C.*, 396 F.2d 870 (5th Cir.), *cert. denied*, 393 U.S. 980 (1968); *cf. Albert Lane* v. *F.T.C.*, 130 F.2d 48 (9th Cir. 1942).

[24] *Peerless Products, Inc.*, 56 F.T.C. 1070, *aff'd*, 284 F.2d 825 (7th Cir. 1960), *cert. denied*, 365 U.S. 844 (1961).

[25] In their proposed order, respondents would retain the prohibition against selling "psychic surgery" or offering it for sale. RB 21.

[26] Tr. 1186.

Agpaoa. This is a continuing effect of past deception and may properly be remedied via a warning letter.[27]

Additionally, for their own medical benefit, it is important to warn past "psychic surgery" tour participants that "psychic surgery" was a hoax. As Judge Hanscom said: "Past tour members must be notified because they may have discontinued vital medication or otherwise terminated valid medical treatment."[28]

As for future inquirers about "psychic surgery," it is obvious that they have at least some interest in partaking of "psychic surgery" services. The fact that they have come to Gem is evidence that the interest was likely engendered by Gem's past acts. To reduce the probability that, as a result of Gem's past deception, these individuals partake of "psychic surgery," it is not unduly burdensome to require respondents to inform them that "psychic surgery" is a hoax.

Respondents also ask us to delete the requirement that they distribute a copy of the order to employees and past or present "psychic surgery" tour conductors. Provisions of this type have frequently been entered by the Commission and upheld by the courts.[29] We find this provision entirely appropriate here.

3. Respondents also ask us to delete the reasonable basis provision (Paragraph 7) from the order.[30] This request is based on three arguments. First, they contend that the representations for which the reasonable basis was allegedly lacking were *de minimis*. We reject this contention as being unfounded in law or fact for the same reason we reject the *de minimis* argument as to the falsity issue.[31] Second, respondents argue that the tour conductors did not lack a reasonable basis for their claims, since they were "satisfied users." The experience of a lay tour guide is clearly not an adequate basis for this type of medical claim.[32] Respondents' third argument is that the order paragraph relating to reasonable basis is too broad in any case. They contend that it would stop their sale of tours to Lourdes or Fatima. This would be so only if the mere sale of a tour there constitutes a representation as to the efficacy of the "treatment for disease or disorder" which may be obtained there. We do not believe that a mere

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[27] *Campbell Soup Co.*, 77 F.T.C. 664 (1970); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *I.T.T. Continental Baking Co., D. 8860* (Oct. 19, 1973 [83 F.T.C. 865]), *appeal docketed*, No. 75-4141, 2d Cir., July 11, 1975; *Sugar Information, Inc.*, 81 F.T.C. 711 (1972); *I.T.T. Continental Baking Co., Inc.*, 79 F.T.C. 248 (1971); *Ocean Spray Cranberries, Inc.*, 80 F.T.C. 975 (1972); *Pay Less Drug Stores Northwest, Inc.*, 82 F.T.C. 1473 (1973); *Boise Tire Co.*, C-2425 (July 16, 1973 [83 F.T.C. 21]); *Lens Craft Research and Development Co., et al.*, D. 8950 (Sept. 4, 1974 [84 F.T.C. 355]); *Wasem's Inc.*, C-2524 (July 23, 1974 [84 F.T.C. 209]).

[28] I.D. 66[P. 766, herein].

[29] *E.g., Consumers Products of America, Inc., v. F.T.C.*, 400 F.2d 930 (3d Cir. 1968), *cert. denied*, 393 U.S. 1088 (1969); *National Dynamics v. F.T.C.*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974).

[30] RB 15-17.

[31] Pp. 2-4, *supra*[pp. 772-773 herein].

[32] Cf. 21 C.F.R. Sec. 330.10 (a)(4) (ii).

visit to a religious or spiritual shrine constitutes a "treatment." Thus, this provision is not overbroad.

4. Respondents' last major argument is that individual respondents Marquez and Butterfield should not be included in the order because they did not personally represent anything about "psychic surgery" to anyone and did not encourage violations by the tour conductors.[33] Respondents miss the point. Under the law, the presence of knowledge, control, and authorization is more than an ample basis for individual liability.[34] All these elements were found by the administrative law judge and respondents do not contest these findings.[35] We hold that individual liability is amply justified under the law and is necessary on these facts to prevent circumvention of the order.[36]

For the reasons set forth herein, the appeal of respondents is denied. The initial decision will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents Gem Travel Service, Inc., Laurence C. Marquez and Marian E. Butterfield from the administrative law judge's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

It is ordered, That respondents, Travel King, Inc., Phil-Am Travel Agency, Inc., Gem Travel Service, Inc., Ramble Travel and Tours, Inc., Yuda Galazan, Nyla Ford, Ronald Brown, Adeline C. Heredia, Emile H. Heredia, Laurence C. Marquez, and Marian E. Butterfield shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

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[33] RB 17-19.

[34] *Surf Sales Co.* v. *F.T.C.*, 259 F.2d 744 (7th Cir. 1958); *Steelco Stainless Steel Inc.* v. *F.T.C.*, 187 F.2d 693 (7th Cir. 1951); *Consumers Home Equipment Co.* v. *F.T.C.*, 164 F.2d 972 (6th Cir.), *cert. denied*, 331 U.S. 860 (1947); *Walter Dlutz* v. *F.T.C.*, 406 F.2d 227 (3d Cir.), *cert. denied*, 395 U.S. 936 (1969); *Lloyd A. Fry Roofing Co.* v. *F.T.C.*, 371 F.2d 277 (7th Cir. 1966); *John A. Guziak* v. *F.T.C.*, 361 F.2d 700 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967); *Fred Meyer, Inc.* v. *F.T.C.*, 359 F.2d 351 (9th Cir. 1966) *rev'd on other grounds*, 390 U.S. 341 (1968); *Standard Educators, Inc.* v. *F.T.C.*, 475 F.2d 401 (D.C. Cir.), *cert. denied*, 414 U.S. 828 (1973); *contrast Coro, Inc.* v. *F.T.C.*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965), where individual liability was denied by the Court based on the individual's lack of knowledge of the facts constituting the deceptive practice.

[35] FF 82, I.D. 63-66. *See also* FF 7, 39, 40, 44, 46, 86, Tr. 1106-20, 1195-96.

[36] *F.T.C.* v. *Standard Education Society*, 302 U.S. 112 (1937).

Respondents also contend that the law judge exceeded his authority when he found their conduct to be "a fraud" (I.D. 64). Commission findings of "fraud" have been found supported in the past by the courts on numerous occasions, *e.g. International Art Co.* v. *F.T.C.*, 109 F.2d 393 (7th Cir.), *cert. denied*, 310 U.S. 632 (1940); *Consumers Home Equipment Co.* v. *F.T.C.*, 164 F.2d 972 (6th Cir.), *cert. denied*, 331 U.S. 860 (1947); *Dorfman* v. *F.T.C.*, 144 F.2d 737 (8th Cir. 1944). We find the law judge's characterization of respondents' conduct amply supported by the record and well within his authority.

In the Matter of

ROSENTHAL CHEVROLET CO., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8975. Complaint, July 1, 1974-Decision, Sept. 30, 1975

Consent order requiring an Arlington, Va., new and used car dealership, among other things to cease misrepresenting that any vehicle is new when it has been used in any manner other than the limited use necessary in moving or road testing it prior to delivery to the customer. Further, the complaint is dismissed as to individual respondent Robert M. Rosenthal.

Appearances

For the Commission: *Jerry W. Boykin.*

For the respondents: *Basil J. Mezines, Stein, Mitchell [Mezines,* Wash., D.C.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Rosenthal Chevrolet Co., a corporation, and Robert M. Rosenthal and Harry Rosenthal, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent Rosenthal Chevrolet Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3400 Columbia Pike, in the County of Arlington, Commonwealth of Virginia.

Respondents Robert M. Rosenthal and Harry Rosenthal are individuals and officers of the corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including those hereinafter set forth. Their business address is the same as that of the corporate respondent.

The respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

Par. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, and sale to the public of new and used motor vehicles and in the servicing and repair thereof.

PAR. 3. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused, their said motor vehicles to be sold to purchasers thereof located in various States of the United States and the District of Columbia, including the Commonwealth of Virginia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said motor vehicles in commerce, as "commerce" is defined in the Federal Trade Commission Act. Also in the course and conduct of their business, respondents have caused, and now cause, customers' notes, contracts, payments, checks, credit reports, title registrations, correspondence and other documents relating to payment of the purchase price for respondents' motor vehicles to be transmitted by various means, including but not limited to, the United States mails, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In the course and conduct of their business, as aforesaid, and for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their motor vehicles and services, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation and by means of radio and television broadcasts transmitted by radio and television stations located in the District of Columbia, having sufficient power to carry such broadcasts across State lines, and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Typical and illustrative of the statements and representations in said advertisements, published in October and November of 1970, disseminated as aforesaid, but not all inclusive thereof, are the following:

* * * * * * *

THERE ARE STILL 80 - 1970's LEFT!

These are the last of the
5 YR. WARRANTY CARS

SAVE $500 to $1200

* * * * * * *

Bob Rosenthal largest
Chevrolet dealer in Washington
Maryland and Virginia

21 HOUR

Price-cutting Selling Spree
All day Friday Oct. 23rd and
all day Sat. Oct 24th
CLOSE-OUT 1970's
Only 165 LEFT

save up to
$1000
and even
more

8 cars
per hour
will be
our
goal!

Huge
Discounts
on any
remaining
1970's

No acceptable
offer refused

PLEASE NO DEALERS

1970's

are the last of the
FIVE YEAR WARRANTY CARS

* * * * * * *

PAR. 5. By and through the use of the above-quoted statements, and others of similar import and meaning but not expressly set out herein, the respondents have represented, and are now representing, directly or by implication:

1. That the motor vehicles described or referred to in respondents' advertisements are new;

2. That the motor vehicles described or referred to in respondents' advertisements carry a full five year warranty.

PAR. 6. In truth and in fact:

1. The motor vehicles described or referred to in said advertisements, in many instances, are not new. To the contrary, they have been

driven substantially in excess of the limited use necessary in moving or road testing a new vehicle prior to its delivery to the ultimate purchaser.

2. Some of the motor vehicles described or referred to in respondents' advertisements do not carry a full five year warranty, but merely the remaining balance of the factory warranty. The warranty starts to run from the date the motor vehicle is sold or from the original date the vehicle is placed in service. Many of the advertised motor vehicles have been driven a number of miles and/or have been placed in service for a number of months.

Therefore, the statements and representations as set forth in Paragraphs Four and Five, hereof, were, and are, unfair, false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their motor vehicles, respondents, through oral statements by their salesmen, have misrepresented the nature and extent of the prior use of said motor vehicles. Said salesmen have represented motor vehicles as demonstrators when, in truth and in fact, such vehicles were driver education vehicles used in high schools in the Washington, D.C. Metropolitan Area.

Therefore, such representations and statements are unfair, false, misleading and deceptive acts and practices.

PAR. 8. In the further course and conduct of their aforesaid business, respondents have engaged in the following acts and practices in connection with the sale of their said motor vehicles:

1. A $40 dealer handling and service charge is added to the price of respondents' used motor vehicles, the first indication that such a charge is being made, in many instances, occurs at the time the buyer receives a copy of the sales invoice and the conditional sales contract. The purchaser, in many said instances, believes that the motor vehicle will be delivered in satisfactory condition and appearance without the imposition of additional charges. The dealer handling and service charge becomes an undisclosed cost that should have been made known prior to the consummation of the sale.

2. Respondents have repaired or repainted, or have caused to be repaired or repainted, damaged cars, said repairs or repainting hide damage that may adversely affect a vehicle's performance and life expectancy. Respondents have failed to disclose to prospective purchasers and purchasers of respondents' motor vehicles that said damage has been hidden by repairs or repainting.

Therefore, respondents' failure to disclose such material facts, prior to the time of sale was, and is, unfair, false, misleading and deceptive.

PAR. 9. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals in the sale, service and repair of new and used motor vehicles of the same general kind and nature as that sold, serviced and repaired by respondents.

PAR. 10. The use by the respondents of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices and the failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete and into the purchase of substantial quantities of respondents' motor vehicles and services by reason of said erroneous and mistaken belief. Respondents' aforesaid acts and practices unfairly cause the purchasing public to assume debts and obligations and to make payments of money which they might otherwise not have incurred.

PAR. 11. The acts and practices of the respondents, as set forth above, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint charging that the respondents named in the caption hereof have violated the provisions of the Federal Trade Commission Act; and

The Commission having duly determined upon motion submitted by complaint counsel and respondents that, in the circumstances presented, the public interest would be served by a withdrawal of the matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order; and

The respondents and counsel for the Commission having executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedures described in Section 2.34 of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Rosenthal Chevrolet Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3400 Columbia Pike, in the County of Arlington, Commonwealth of Virginia.

Respondent Harry Rosenthal is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Rosenthal Chevrolet Co., a corporation, its successors and assigns and its officers, and Harry Rosenthal, individually and as an officer of said corporation, and respondents' agents, representatives and employees directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution, service and repair of new and used motor vehicles, or any other products or services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, orally or in writing, directly or by implication, that any vehicle is new when it has been used in any manner other than the limited use necessary in moving or road testing a new vehicle prior to delivery of such vehicle to the customer.

2. Offering for sale or selling any vehicle of the current or previous model year, which has been used in any manner, other than the limited use referred to in paragraph 1. above, without orally disclosing, prior to any sales presentation the nature and extent of such previous use of said vehicle.

3. Advertising any vehicle of the current or the previous model year which has been used in any manner, other than the limited use referred to in paragraph 1. above, without clearly and conspicuously disclosing in any and all advertising thereof the nature of such previous use of said vehicle.

4. Displaying, offering for sale or selling any vehicle of the current or the previous model year which has been used in any manner, other than the limited use referred to in paragraph 1. above, without clearly and conspicuously disclosing by decal or sticker affixed to the inside of

the side window containing the manufacturer's suggested retail price or "Monroney sticker," or if space is not available thereon, in close proximity thereto, so as to be clearly visible, the nature of such previous use of said vehicle. Said decal or sticker shall also contain the following statement: "FOR EXACT mileage, see odometer."

5. Misrepresenting, orally or in writing, directly or by implication, the nature or extent of previous use or condition of any vehicle displayed, offered for sale or sold.

6. Representing, orally or in writing, directly or by implication, that any of their motor vehicles are warranted, unless the nature and extent of the warranty, the identity of the warrantor and the manner in which the warrantor will perform are clearly and conspicuously disclosed; misrepresenting, in any manner, the terms, conditions and extent of any warranty.

7. Failing to disclose both orally and in writing, prior to the signing of the completed retail order for a used motor vehicle, and in any and all advertising of such vehicles, the precise amount of handling and service charges which will be added to the cost of respondents' used motor vehicles.

It is further ordered, That respondent Robert M. Rosenthal be dismissed from the complaint as an individual and named officer of the corporate respondent.

It is further ordered:

(a) That respondents shall forthwith distribute a copy of this order to each of their operating divisions;

(b) That respondents deliver a copy of this order to cease and desist to all present and future personnel engaged in the offering for sale, or sale, of any motor vehicle, and in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person;

(c) That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order;

(d) That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

(e) That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

HOLLYWOOD CARPETS, INC., ET AL.

OPINION, ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket 8983. Complaint, July 8, 1974-Decision, Sept. 30, 1975

Order requiring a Beltsville, Md., seller and distributor of carpeting and floor coverings, among other things to cease misrepresenting the word "sale," and the savings afforded purchasers of respondent's products; failing to maintain adequate records; and misusing the term "warehouse." Further, the order proscribes respondent's from violating the Textile Fiber Products Identification Act by misbranding and falsely advertising its textile fiber products.

Appearances

For the Commission: *Everette E. Thomas, Richard C. Donohue* and *Thomas J. Keary.*

For the respondents: *Ben Paul Noble, Noble & Lorsen,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hollywood Carpets, Inc., a corporation, and Charles Snyder, Florence H. Snyder and Dale E. Snyder, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hollywood Carpets, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 10212 Southard Dr., Beltsville, Md.

Respondents Charles Snyder, Florence H. Snyder and Dale E. Snyder are individuals and are the principal officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent. All of the aforementioned respondents cooperate and act together in the carrying out of the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have caused, and now cause, the dissemination of certain advertisements concerning the aforesaid carpeting and floor coverings, by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of interstate circulation for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of respondents' said merchandise.

In the further course and conduct of their business, as aforesaid, respondents have caused, and now cause, their said merchandise, when sold, to be shipped from their places of business located in the State of Maryland, to purchasers thereof located in the Commonwealth of Virginia and the District of Columbia. Thus, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of their salesmen to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

WAREHOUSE SALE

at

HOLLYWOOD CARPETS, INC.
SATURDAY, Dec. 13
8 a.m. to 6 p.m.
Free Coffee and Donuts for the Early Birds!
WAREHOUSE ONLY
SAVE 50 to 75%

* * * * * * *

WAREHOUSE SALE 1st Quality BROADLOOM REMNANTS and RUGS
From PHILADELPHIA CARPETS, INC.

Yes, we bought more than 15 Tons of beautiful carpeting way, way under book prices, from this great mill. All large sizes — it took two large trailers to deliver them. Choose from Wools, Acrylics, Polyesters, Nylon Deep Plush Piles, Hi-ho's, Twists. Quality you dream about and now at these lower than ever prices everyone can afford the best.

* * * * * * *

HOTTEST
CARPET
WAREHOUSE
SALE
IN TOWN
NOBODY BEATS OUR LOW PRICES

* * * * * * *

15x15' SALE $98
Compare $238 to $264 Value
12x18' SALE $96
Compare $184 to $235 Value

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication, that:

1. By and through the use of the word "SALE," and other words of similar import and meaning not set out specifically herein, that said carpeting and floor coverings may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

2. Purchasers of respondents' carpet remnants are afforded savings of 50 to 75 percent off the prices at which such carpet remnants are usually and customarily sold at retail.

3. By and through the use of the words "Compare $238 to $264 Value" and other words of similar import and meaning not set out

specifically herein, that said comparative value is the price at which the same carpet remnants are being offered for sale by a substantial number of the principal outlets in respondents' trade area.

4. By and through the use of the words "WAREHOUSE SALE," separately or in conjunction with the words "LOW PRICES," and other words of similar import or meaning, not set out specifically herein, that the facility at which respondents' merchandise is being offered for sale or sold is used primarily for the storage of merchandise used by respondents' retail business, and that respondents' merchandise is being offered for sale or sold out of such facility at prices substantially below those charged for the same or similar merchandise by a substantial number of the principal outlets in respondents' trade area.

PAR. 6. In truth and in fact:

1. Respondents' merchandise is not being offered for sale at special or reduced prices. To the contrary, the price respondents regularly advertise and their so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price.

2. Purchasers of respondents' carpet remnants are not afforded savings of 50 to 75 percent off the prices at which such carpet remnants are usually and customarily sold at retail. To the contrary, the percentage price comparison is based on prices for quantities of carpeting required for wall-to-wall installation rather than the advertised carpet remnants or rugs which are usually sold for less than wall-to-wall prices.

3. The same carpet remnants are not offered for sale at the comparative price by a principal number of the principal outlets in respondents' trade area.

4. The facility at which said merchandise is being offered for sale or sold is not used primarily for the storage of merchandise used by respondents' retail business. Instead, such facility is regularly used for the display and retail sales of merchandise at prices not substantially below those charged for the same or similar merchandise by a substantial number of the principal outlets in respondents' trade area.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof, were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting, floor coverings services of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Textile Fiber Products Identification Act and the implementing rules and regulations promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 10. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including carpeting and floor covering and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 11. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and of the rules and regulations promulgated thereunder, in that they were falsely and deceptively advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

PAR. 12. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and to assist, directly or indirectly, in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the rules and regulations promulgated under said Act.

PAR. 13. Among such textile fiber products, but not limited thereto, was carpeting which was falsely and deceptively advertised in the Washington Post newspaper published in the District of Columbia, and having a wide circulation in the District of Columbia and various States of the United States, in that said carpeting was described by such fiber connoting terms among which, but not limited thereto, was "Acrilan," and the true generic name of the fiber contained in such carpeting was not set forth.

PAR. 14. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

1. In disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

2. A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by said Act, and the regulations promulgated thereunder, in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid rules and regulations.

3. A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid rules and regulations.

PAR. 15. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, and unfair methods of competition, in commerce, under the Federal Trade Commission Act.

INITIAL DECISION BY MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

MARCH 18, 1975

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this matter on July 8, 1974 (mailed July 17, 1974), charging respondents with unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), as well as with violation of the Textile Fiber Products Identification Act (15 U.S.C. §70) and the rules and regulations promulgated thereunder. By answer duly filed respondents denied summarily many of the substantive allegations of the complaint, although they did admit making certain representations alleged in the complaint. Respondents also denied that their practices were "in commerce," and denied that they had violated the Federal Trade Commission Act or the Textile Fiber Products Identification Act. Respondents also asserted numerous defenses including the Commission's lack of jurisdiction, "laches," no showing of public interest, and "de minimis."

Adjudicative hearings were held in Wash., D.C. on Nov. 6, 7, 11, 12 and 26, 1974. The record in this proceeding was closed on Dec. 19, 1974, although the record was thereafter reopened by order of Jan. 3, 1975, for the sole purpose of receiving CX 62 into evidence (see Tr. 416-417, 522). In addition certain corrections in the official transcript were ordered on Jan. 3, 1975.

In support of the allegations of the complaint, Commission counsel adduced the testimony of respondents Charles Snyder, Florence Snyder and Dale Snyder; two consumer witnesses Verna Dickerson and Howard Beard; Harold Reznick, executive vice-president and general manager of Diener's, Inc., a carpet retailer; Lindsay Stott, Jr., an ex-employee of Hollywood; and Martin Adem, owner of Marty's Floor Covering, Alexandria, Va. Counsel's exhibits included copies of respondents' newspaper advertising (CXs 1-48), several so-called installment sales agreements (CXs 61, 123) and numerous invoices covering Hollywood's purchases of carpeting from certain suppliers (CXs 154-772).

In support of the defense, respondents adduced the testimony of Charles and Dale Snyder; John Bowen, assistant classified advertising manager, Washington Post; Mark Teaney, Wash., D.C. area sales representative of Philadelphia Carpet Co., a carpet manufacturer; Curt Brandland, representative of Barwick Mills, a carpet manufacturer; and

Steven Wexler, salesman for Coronet Carpets, a carpet manufacturer. Respondents' exhibits include pictures of its facility in Beltsville, Md. (RX 1-17); pricelists of various carpet manufacturers (RX 18, 20, 27); an advertisement respondents placed in the Washington Post on Dec. 15, 1973 (RX 41); documents relating to respondents' complaint to the Washington Post about the use of the word "Acrilan" in RX 41 (RX 42, 43, 45; CX 62); copies of advertising of other retailers (RX 44, 51); pictures of other retail establishments (RX 46-50); numerous sales invoices (RX 36, 39, 40, 52-72); and an analysis of respondents' retail sales by type of carpeting in each of its store locations (RX 73b, d).

On Feb. 5, 1975, counsel supporting the complaint filed their proposed findings of fact, conclusions of law, and proposed order. On Feb. 14, 1975, respondents filed their counter-proposed findings of fact, conclusions of law, and proposed order along with their memorandum brief in support thereof. Respondents' counsel advised the administrative law judge that failure to file proposed findings on the scheduled day of Feb. 5, 1975, was due to certain internal office problems. Complaint counsel have not objected to this late filing and have advised the administrative law judge that they did not intend to file a reply.

Any motions appearing on the record not heretofore or herein specifically ruled upon either directly or by the necessary effect of the conclusions in this initial decision are hereby denied.

The proposed findings and conclusions submitted by counsel have been given careful consideration and to the extent not adopted by this decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

Some of the abbreviations used in this decision are as follows: CX - Commission's exhibits; RX - respondents' exhibits; Tr. - transcript of testimony; CPF - Commission counsel's proposed findings; RPF - respondents' proposed findings; Comp. - complaint; Ans. - respondents' answer to the complaint.

At this posture of the case there appears to be little dispute over the evidentiary facts. Respondents' main contentions appear to be that the allegations of the complaint and complaint counsel's proposed findings relating to the meaning of the terms "SALE" and "WAREHOUSE," either considered separately or in conjunction with each other, do not constitute a violation of the Federal Trade Commission Act. In addition, respondents assert that their representations as to certain savings relating to remnants are in fact true. It is significant to point out that the evidence concerning respondents' alleged unfair trade practices presented by counsel supporting the complaint relate mainly to a period of time from Nov. 15, 1970, through June 1972, at which time respondents operated certain retail stores in addition to their so-called "warehouse."

Having reviewed the record in this proceeding, and having considered the demeanor of the witnesses as they testified, together with the proposed findings, counter-proposed findings, conclusions and arguments submitted by the parties, I make the following findings of fact based on the record considered as a whole:

FINDINGS OF FACT

1. Respondent Hollywood Carpets, Inc. ("Hollywood"),[1] is a District of Columbia corporation with its principal office and place of business located at 10212 Southard Dr., Beltsville, Md. (Comp.; Ans. Par. One). Incorporated in 1962, Hollywood has operated retail stores at Prince Georges Plaza, Md., Bladensburg, Md., and Bailey's Crossroads, Va. (Tr. 7, 16, 217, 419; see CX 39). In addition, since 1969 Hollywood has had a retail store and storage and cutting facility at its Beltsville location (Tr. 17, 420). The Virginia store was closed in late 1969 (Tr. 24) and the Prince Georges Plaza and Bladensburg stores were closed by the end of 1972 (Tr. 16, 218; see CX 45). Since 1972 Hollywood has done business only from its Beltsville facility (Tr. 17). In the period from November 1970 through November 1971 Hollywood's dollar volume of sales was approximately $610,000 (Tr. 519). In 1974 Hollywood's annual retail sales were approximately $400,000 (Tr. 23).

2. Respondent Charles Snyder was president and the chief executive officer of Hollywood from 1962 until 1971 (Tr. 7-8). Since 1971, he has served the corporation in the capacity of a director and consultant. His main duties have been "advising for advertising and purchases and different duties because of his past experience" (Tr. 13, 15). Mr. Snyder owns 51 percent of the outstanding shares of stock in Hollywood (Tr. 14). He has been connected with the carpet business in some capacity since 1949 (Tr. 92).

3. Respondent Florence H. Snyder, wife of Charles Snyder, has been a director and officer of Hollywood throughout its corporate existence (Tr. 8, 109). In 1972 she assumed the office of president and is also treasurer (Tr. 12-13, 109). She is an owner of shares of stock in Hollywood (Tr. 14-15).

4. Respondent Dale E. Snyder, son of Charles and Florence Snyder, has been actively employed by Hollywood since 1962 (Tr. 119, 120, 452). Before Nov. 15, 1971, he cooperated and acted with Charles Snyder in carrying out the acts and practices of the corporate respondent, and since that time has been instrumental in carrying out the acts and

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[1] Most of the time hereinafter "Hollywood" refers to all of the respondents.

practices of the corporation (Tr. 114, 120). He is presently vice-president and secretary of Hollywood and is an owner of shares of stock in that corporation (Tr. 15, 109).

5. The individual respondents Charles, Florence and Dale Snyder, formulate, direct and control the acts and practices of the corporation, and all of these respondents cooperate and act together in carrying out the acts and practices of the corporation as such acts and practices are pertinent and relevant to this proceeding (findings 2, 3, 4, *supra;* see Ans. Par. One; see also Tr. 15, 111-112, 113, 115).

6. At all times relevant herein, respondents have been engaged in the advertising, offering for sale and distribution and installation of carpeting and floor covering to the public at retail (see Ans. Par. Two).[2] During the period from Nov. 15, 1970, through Nov. 15, 1971, and subsequently, respondents advertised regularly in the classified section of the Washington Post Newspaper, a few times in the Evening Star, and occasionally on a radio station, all of which have circulation or transmission across State boundaries (Tr. 22, 28-31; see CXs 1-48). In the course and conduct of their business respondents have caused their said carpet merchandise, much of which had been purchased from suppliers located outside the State of Maryland (CXs 275-772) to be shipped from their place of business located in Maryland to purchasers located in the Commonwealth of Virginia and the District of Columbia (Tr. 24, 25). Hollywood is in competition with other retail carpet stores in the metropolitan Wash., D. C. area (Tr. 25). The acts and practices and the methods of competition challenged in this proceeding are acts and practices "in commerce" and methods of competition "in commerce" as "commerce" is defined in the Federal Trade Commission Act (15 U.S.C. §41).

7. Certain of respondents' newspaper advertisements contained the following statements and representations:

WAREHOUSE SALE
at
HOLLYWOOD CARPETS, INC.
SATURDAY, DEC 13
8 a.m. to 6 p.m.
Free Coffee and Do-nuts for the Early Birds!
WAREHOUSE ONLY
Save 50 to 75%
3000 sq. Yds. Cabin Craft — Thick Plush Nylon Pile
Broadloom — Full Rolls 9 Colors
Will Cut to Any Size $3.33 sq. yd.

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[2] During the period November 1970 to November 1971, Hollywood also sold drapery and dinette sets (Tr. 17).

1000 Broadloom Remnants $9.99 to 99.99 each
Room Sizes Included

100 sq. yds. Jute Padding Remnants
Short Ends-of-Rolls 25 sq. yd.

Thousands of Square Yards of Shags — Plush — HiLo Loops
at Low, Low Prices Full Rolls

ALL PRICES F.O.B. WAREHOUSE
ALL 1ST QUALITY - WE NEVER SELL 2NDS

HOLLYWOOD CARPETS, INC.
10212 Southard Drive
Beltsville, Maryland
Rear of New Hess Gas Station
1 mile north of Beltway on Rte. 1

(CX 34; Exhibit received by Commission, Nov. 15, 1971)

* * * * * * *

HOTTEST
CARPET
WAREHOUSE
SALE
IN TOWN

Nobody Beats Our Low Prices
Sale Days
Friday - Saturday - Monday
Daily 9 to 9; Saturday 9 to 6.

Always First Quality. We never sell seconds.
We boast the cleanest warehouse anywhere

Alexander Smith Shag Scatter Rugs
$1 each
9x12 Rug Cushions
$9.99 each
Wall to wall Bath Sets
$11.99 set
8'6" x 11'6" Room Size Shag Rugs
$22.99 each
Indoor/Outdoor Carpeting
$1.55 sq. yd.
Cabin Craft Shag, Plush, or Hilo Pile Broadloom
$2.99 sq. yd.

More than 800 Nylon, Wool, Acrilan, all brand name beautiful quality remnants. From hall sizes to big room wall to wall sizes. And if we don't have your size, we'll cut it.

You Save 50 to 70%
3-Day Special Drapery Sale
Any Pair in Stock
1/3 OFF from our reg. Stock
Call 345-5595 for directions
on sale at all 3 locations

HOLLYWOOD
Carpets, Inc.
Warehouse Locations
10212 Southard Dr. Beltsville, Md.
1 Mi. N. off Beltway on RT. 1
Rear of Hess Gas Station
Call for directions, 345-5595

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PRINCE GEORGES PLAZA
Opposite Big Boy Restaurant
West Hyattsville, Md. 779-5151

5426 ANNAPOLIS ROAD
Opposite Cheverly Theater
Bladensburg, Md. 864-5945

All prices F.O.B. Store or Warehouse
Credit Terms Available

(CX 6 Apr. 23, 1971).

* * * * * * *

HOLLYWOOD
Carpets, Inc.
BELTSVILLE WAREHOUSE
SALE
TODAY, FRIDAY-SATURDAY-MONDAY
Daily 9 to 9; Saturday 9 to 6

BROADLOOM REMNANTS SALE

More than 1000 in stock to choose from. All first quality, never sell seconds. From America's finest mills.
MOHAWK - LEES - CABIN CRAFT - BARWICK - CORONET-
PHILADELPHIA CARPET

More Mills Means Better Selection
Choose from 501 Nylon, Acrylic, Wools
Shags, Plushes and Hilo Designs

15x15', SALE $98
Compare $238 to $264 Value
12x18', SALE $96
Compare $184 to $235 Value

12x15', SALE $78
Compare $138 to $192 Value
12x12' SALE $68
Compare $104 to $156 Value
9x15', SALE $58
Compare $97 to $138 Value
9x12', SALE $48
Compare $69 to $124 Value

ALSO 20,000 SQ. YDS. OF BROADLOOM
FROM $3.99 to $6.88 sq. yd.
Call 345-5595 For Directions

HOLLYWOOD
Carpets, Inc.
10212 Southard Dr., Beltsville, Md.
1 MI. N. OFF Beltway on RTE 1, Rear of Hess
Gas Station Right Side Heading North
All Sales F.O.B. Warehouse; All items subject to
prior sales Credit Terms Available
345-5595

(CX 15 (July 9, 1971; July 16, 1971; July 23, 1971)).

* * * * * * *

HOLLYWOOD CARPETS
WAREHOUSE SALE

1ST QUALITY BROADLOOM REMNANTS AND RUGS FROM
PHILADELPHIA CARPETS, INC.

Yes, we bought more than 15 TONS of beautiful carpeting, way, way under book prices, from this great mill. All large sizes - it took two large trailers to deliver them. Choose from Wools, Acrylics, Polyesters, Nylon Deep Plush Piles, Shags, Hi-Lo's, Twists. Quality you dream about and now at these lower than ever prices everyone can afford the best.

STARTS TODAY SAT. 9 to 6

All prices FOB Warehouse. Check the listed Qualities and sizes and hurry to our beautiful warehouse and see hundreds more not listed.

100% Wool Pile

12x13' RESPLENDANT FROSTED GOLD SHAG $139

100% Acrylic Pile

Size	Quality Name	Color	Style	Price
10x15	Jarmain	Royal Blue	Plush	$118

* * * * * * *

100% Nylon Pile

12x16'11" LaPrado Gold Shag $119

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100% Polyester Pile

12x14'9" Happy Talk White Wine Shag $149

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HOLLYWOOD CARPETS
On SALE ONLY AT OUR BELTSVILLE WAREHOUSE
CALL 937-5595 for DIRECTIONS
1 mile North of
Beltway Exit 27 on RT. 1
Rear Gas Station,
Next to Furniture City"

(CX 43, Saturday, Apr. 15, 1972)

8. In addition to the four advertisements detailed in finding 7, *supra*, (the advertisements apparently relied on by counsel supporting the complaint in drafting the specifications of the complaint), the record contains 45 other advertisements. Commission Exhibit 1 through CX 40 were published in the Washington Post during the period Nov. 15, 1970, through Nov. 15, 1971, the latter date being the day on which respondent Charles Snyder made return on a subpoena at the investigational hearing in this matter. Dates of publication are noted on CX 1 through CX 28. CX 29 through 40 appear to be substantially similar in content, but because the date of publication is not known, these advertisements are of little relative additional value.[3] CX 41 through 48 are Hollywood advertisements published from Feb. 2, 1972, through Dec. 2, 1972, and RX 41 was disseminated on Dec. 15, 1973 (Tr. 369). A review of CXs 1-28 and CXs 41-48 demonstrates that from about May 1971 until March 1972, respondents have often represented that they are conducting a "WAREHOUSE SALE," and that in many instances the sale is being conducted at their stores as well as at the

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[3] It appears that some of the undated advertisements are duplications of other exhibits.

warehouse (see CXs 1-6, 10-12, 24, 27, 42). Indeed until August 1971, respondents listed their stores as well as the Beltsville facility under the general heading "WAREHOUSE LOCATIONS" (see CXs 1-8, 12-14). Also respondents used such other sale descriptions as "LABOR DAY WAREHOUSE SALE" (CX 21), "ANNIVERSARY SPECIALS" (CX 22), and "WAREHOUSE AND STORE-WIDE END-OF-THE-MONTH SALE" (CX 27).

Most of Hollywood's advertising was placed in the classified section of the Washington Post. Several display advertisements that would appear in other sections of the paper, are CXs 28 and 43. (see Tr. 28-31)

In a few instances respondents used comparative pricing representations relating to remnants (see CXs 15, 16, 18, 19), and on at least two occasions used comparative pricing for carpet products other than remnants (see CXs 18, 19).

On several occasions respondents represented savings as percentages (50 to 70 percent - CX 34; 40 percent to 70 percent - CX 35; 20 percent - CXs 41, 48). However, usually respondents merely stated a price for a particular rug or groups of rugs, remnant or group of remnants (*e.g.* from $11 each up - see CXs 5, 9, 11) or for carpeting, quoted per square yard.

Also a review of the dated exhibits demonstrates that in 14 instances the term "acrylic" was used (CXs 7, 12, 15, 17, 18, 19, 20, 27, 28, 42, 43, 44, 46, 47) whereas in only 5 instances was the term "acrilan" used (CXs 1, 6, 21, 23, 24). In some instances respondents noted that certain carpeting had "foam backing" (CX 29) or "double jute back" (see CX 25).

9. There are three general price levels at which respondents (and for that matter any retailer) purchase carpeting from a manufacturer: the price for a full roll of carpeting, the price for a particular size of carpeting, and the price for remnants (Tr. 112). The principal price is called the "roll price," that is the base price at which carpeting may be bought in a complete roll (Tr. 294). This price is quoted in terms of yards, meaning square yards. A roll usually consists of carpeting in a standard width of 12 or 15 feet (4 or 5 yards) and in lengths varying from 50 feet to 400 feet (Tr. 59). The differences in length are controlled by the variances in the manufacturing process usually relating to the amount of material available from the same dye lot or lots (Tr. 42, 61, 88). Manufacturers afforded quantity discounts on large purchases of rolls (Tr. 96, 280, 293-294).

When respondents purchased a roll of carpeting they either sold to the customer from a display sample located in the retail stores or from the customer's observation of the roll itself which was stored at the Beltsville facility (Tr. 104-105).[4] The retail price for such carpeting is usually based on a 40 to 42 percent markup above respondents' cost for said carpeting (Tr. 53, 55, 118; but see Tr. 313-316).

10. In those circumstances where respondents do not have a roll of the particular color or style of carpeting desired by the consumer they may, selling from samples, order a designated quantity (less than a roll) from the manufacturer (Tr. 41-42). This order is called a "cut order" (Tr. 42, 294). Usually the manufacturer's "cut order" price to respondent (or any other retailer) is 18 to 20 percent higher than the roll price for the same carpeting (Tr. 57, 91A, 256, 305). Manufacturers generally state their "cut order" and roll price in their published price lists (see RXs 18-22; Tr. 95). Respondents' retail price for carpeting ordered on a cut order basis is usually based on the 40 to 42 percent markup above its cost ("cut order" price) for said carpeting (Tr. 21, 53, 55, 118; but see Tr. 313).

11. When a manufacturer uses a roll for "cut orders" or when a retailer uses a roll to fill customers' orders, the end of the roll which is too small for general use in filling wall-to-wall carpet orders becomes a "remnant" (Tr. 41-42, 56, 294). This so-called remnant, which is unbound, and which may vary in length from a few feet to 30 feet (usually under 20 feet)[5] is sold at a substantially lower price than the same carpeting sold at a roll price or the higher cut order price (see Tr. 483). The manufacturer usually sells remnants at from 40 to 50 percent lower than the roll price (Tr. 42, 254-255, 295, 306). Retailers usually purchase remnants in groups or packages consisting of a large number of assorted styles, patterns and colors (Tr. 118-119, 294). When respondents purchase remnants from manufacturers they add the usual 40 to 42 percent markup to their cost to arrive at their retail price (see Tr. 18, 53, 55, 118; but see Tr. 313-316). When respondents create a remnant in the course of their business they reduce the price from their usual roll price (Tr. 57-61).

12. Remnants are usually purchased for use as area rugs (Tr. 117). To create an area rug in the size desired by the customer the carpeting (whether a remnant or a cut from a roll) is cut to size and bound, the binding being done at respondents' Beltsville facility for a charge (Tr. 56). In addition, area rugs of certain standard sizes may be created by the manufacturer or by respondents before being ordered by a particular customer and are offered for sale as "rugs" (Tr. 18, 19-20).

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[4] When the prospective purchaser went to the Beltsville facility she would buy looking at the roll itself not a sample (see Tr. 88).

[5] Remnants are light enough to be moved without the aid of machinery and are usually displayed by standing the roll along a wall (Tr. 483, 502-503).

Moreover, remnants may also be created by cutting rolls into sizes of 20 feet or under (Tr. 514).

13. Remnants are of the same quality as carpeting of the same style and patterns that are obtainable in rolls or by cut order. Hollywood purchases carpeting as remnants in many cases substantially similar or identical in quality and pattern to carpeting it already carried in inventory as rolls (Tr. 58, 454). If the style, patterns and grade of carpeting desired by a customer are not available in a remnant, that customer would have to pay a roll price (if a retailer carried a roll of that carpeting) or the "cut order" price if no roll was stocked. Respondents do not handle "seconds" (Tr. 62, 295, 325, 356, 506).

14. During the period from November 1970 through November 1971 and at other times when respondents operated more than one retail location, their regular "roll price" at the stores were higher than the "roll price" for the same product at the Beltsville location, the difference being reflected in the cost to them of "free" delivery from the Beltsville location, *i.e.*, 11 cents per square yard. No deliveries were made at that time on products purchased at the Beltsville location (Tr. 105, 212, 219, 226, 233, 242, 448-449).

15. Generally, when respondents advertised a "SALE" the items specifically referred to therein were priced lower than the prices at which those items had been offered for sale by respondents in the past or the "cut order" list price therefor (Tr. 106, 122). With respect to remnants, respondents' lower price was usually compared to the price at which the same or substantially comparable carpeting could be purchased from respondents or a competing retailer at a "cut order" price (Tr. 72, 107, 123, 304). When remnants were purchased from a manufacturer they were added to the remnant lines of respondents and included in the remnant sale (Tr. 50, 118, 122). If a special purchase is made from the manufacturer "* * * you go in and buy it naturally you are going to have a sale * * * based on [those] reduced prices * * * and you can reduce some of your own inventory and put it all together and have a sale and profitably do so" (Tr. 52). Hollywood had sales "Whenever it seemed necessary." "There are certain times bills must be paid and we have to reduce items, or when we buy something that is not moving we have to sell it out. Or if we buy special purchase of remnants on things like we used to stock. These sort of things" (Tr. 131-132).

16. When respondents specifically advertised remnants at "50 - 70 percent off" the higher price reference is to the regular cut order list price for the same carpeting (Tr. 56, 63, 122). The higher discount was for smaller pieces that sell for halls or runners (Tr. 63-64). "This is the value of the remnant. This is the end of the roll. This is the end of the

roll that we sold for $10 a yard and there are four yards left on the end of it. We sell it for 50 percent of our prices which is $5 a yard. That is a 50 percent sale. That is how we determine that comparison, the percentage" (Tr. 57).

17. Respondents admitted in their answer that by and through the use of the word "SALE" and through other words of similar import and meaning, they have represented that the carpeting and floor covering which they offer for sale may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices (see CXs 1-48; Ans. Par. Five (1)).

18. Respondents' representation is true (see findings 14, 15, *supra*).

19. Respondents admitted in their answer that they have represented in their advertising that purchasers of respondents' carpet remnants are afforded savings of 50 to 75 percent off the prices at which such carpet remnants are usually and customarily sold at retail (see CXs 1-48; Ans. Par. Five (2)).

20. In truth and fact the higher price on which respondents base their comparisons is the price at which the same grade and quality of carpeting as the advertised remnant usually and customarily sold at retail (see findings 13, 15, 16, *supra*).

21. Respondents also admitted in their answer that by and through the use of the words "Compare $238 to $264 Value" they have represented that said comparative value is the price at which the said carpet remnants are being offered for sale by a substantial number of the principal outlets in respondents' trade area (Ans. Par. Five (3)).

22. In fact, respondents represented by use of the words "Compare $238 to $264 Value" that said comparative value is the price at which carpeting of the same grade and quality as the advertised remnant is being offered for sale by a substantial number of the principal outlets in respondents' trade area (see findings 9, 10, 11, 12, *supra;* see CXs 15, 16, 18, 19).

23. Respondents representation as to the comparative value of advertised remnants (see finding 22, *supra*) was in fact true (see findings 9, 10, 11, 12; see also conclusion, *infra* pp. 23-25) [pp. 808-810 herein].

24. Respondents' Beltsville facility which was opened in late 1969 (Tr. 17), is "located in a district that is adjacent to commercial warehouses" (Tr. 406). It is a portion of a larger building with three roll-type-overhead-door entrances at the front, which could be described generally as a loading bay (see Tr. 90, 178; RX 1 - frames 34A-36). A walk-in door entrance is located to the left of the overhead door entrances (see RX 1-frames 34A-36, RX 5).

This walk-in door leads into a small enclosed area described as "a sample show room perhaps 12 by 36 feet" (Tr. 75, 420; see RXs 2, 4, 5). In this area respondents display samples used in its "cut order" business, *i.e.*, the ordering directly from the manufacturer of specific quantities of carpeting (Tr. 88). The remaining portion of this facility, consisting of a floor area of approximately 11,000 square feet, contains the rolls of carpeting and remnants and other merchandise which Hollywood maintains as stock (see RXs 2, 3, 6, 7, 8, 9). The remnants (rolled up) are usually stacked standing up along the right and left walls of this large room (Tr. 84), whereas the rolls of carpeting are placed horizontally in pyramid fashion on the floor in piles with walk space between the remnant display and roll display (Tr. 84; RXs 2, 3, 6, 7, 8, 9, 10, 11, 12, 13). The middle of the floor area in the large room is used as a cutting area (Tr. 86; see RX 6). A three ton fork-lift truck ("hyster" Tr. 84-85) is used to move the rolls from the various piles to the cutting area (see RX 1, frame 33A-34). Certain office space is located over the sample room with access by stairs from the large storage-work area (see RXs 2, 8; Tr. 82).

Until late in 1972, Hollywood stored most of its rolls of carpeting in this facility, customers being able to either order this merchandise from its other store locations from samples taken from the rolls on stock at Beltsville or by ordering directly by observation of the actual roll at Beltsville (Tr. 75-76). The facility at Beltsville is open to the public (except the office area) and Hollywood has a "retail license and occupancy permit for retail sales" at this location (Tr. 77). Before opening its Beltsville facility Hollywood stored its on-hand merchandise (rolls and remnants) in the back room of its Bailey Crossroads store or the basement of its Bladensburg store (Tr. 217-218, 223).

25. During the times relevant to this proceeding Hollywood referred to its Beltsville facility as its "WAREHOUSE" or "WAREHOUSE LOCATION" (Tr. 111-116; see CXs 1-48). "We don't call it a store, we call it a warehouse. That is what it is" (Tr. 111).

26. By and through the use of the words "WAREHOUSE SALE" separately and in conjunction with the word "LOW PRICES" and other words of similar import or meaning, the respondents have represented that said facility was used primarily for the storage of merchandise sold by respondents at retail and that the merchandise offered for sale or sold was available for sale or sold out of such facility at substantial savings to consumers from the prices charged for the same or similar merchandise by a substantial number of the principal outlets in respondents' trade area (Tr. 44-70, 301-302, 306, 340, 350; see CX 1-40; RPF 13).

27. The Beltsville facility is in fact a WAREHOUSE and respondents' representation that said facility was used primarily for the

storage of merchandise used by respondents' retail business was true (see findings 14, 25, *supra*). The additional fact that this facility was also a retail store or a "showroom and warehouse combined" and that the public had everyday access thereto does not, on this record, alter the fact that the facility was a "WAREHOUSE" (*ibid.*).

28. A "WAREHOUSE SALE" implies that a retailer, who has a warehouse used primarily for storage, is having a rare sale, one usually held to move merchandise quickly and in a short period of time said merchandise being that which it was not able to sell at retail during the regular course of its business. Such a sale implies substantial savings because it has been priced for quick sale and/or the goods have been stored at the facility without incurring the overhead costs of the traditional retail store (see Tr. 140, 163, 178, 182, 195-196).

Mrs. Verna Dickerson, a consumer witness and customer of Hollywood, testified that when she saw the term "WAREHOUSE SALE" she thought she would be getting a "saving at a warehouse price" (Tr. 140, see also Tr. 153). Mr. Howard Beard, also a consumer witness and customer of Hollywood, testified that when he saw a Hollywood "WAREHOUSE SALE" advertisement, he thought the sale would be "out of the ordinary" (Tr. 178). Significantly, neither Mrs. Dickerson nor Mr. Beard purchased carpeting at any particular price stated in the advertisements (see Tr. 153, 188-189). These witnesses were attracted to respondents' premises by the representation of the "WAREHOUSE SALE" (Tr. 161-162, 177, 193).

29. Actually, respondents conducted their retail business at the Beltsville warehouse and the "sales" they advertised as "Warehouse Sales" were not out of the ordinary, but were conducted almost on a weekly basis during the period November 1970 through December 1972. In addition, respondents' products were not priced to afford substantial savings over and above usual price reductions for its retail "sales." Respondents' use of the term "WAREHOUSE SALE" had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief all to the prejudice and injury of the purchasing public and respondents' competitors.

30. The information to be contained in advertisements appearing in the classified section is usually supplied by telephone (Tr. 372, 373-375, 390). No practical opportunity exists for the advertiser (*e.g.* respondents) to actually proofread the copy before it is published and disseminated (see Tr. 396-398). The importance of the distinction

between the words "acrilan" and "acrylic" is generally misunderstood (Tr. 370, 375, 385, 387, 397-398). It is possible that the receiver of the information at the Washington Post mistakenly wrote the word "Acrilan" whereas respondents had specified "Acrylic" (see Tr. 371-375, 384-385, 389; see RX 43).

31. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting, floor coverings, and services of the same general kind and nature as those sold by respondents.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Hollywood, Charles Snyder, Florence Snyder and Dale Snyder.

Said respondents have at all times relevant hereto engaged in interstate commerce within the intent and meaning of Section 4 and 5 of the Federal Trade Commission Act. The Washington Post newspaper, in which most of their advertisements were placed, has interstate circulation. In addition, Hollywood has purchased carpeting from suppliers located outside the State of Maryland and has delivered carpeting to customers located in Virginia and/or the District of Columbia. The acts and practices which are challenged in this proceeding relate to respondents' interstate advertising and are "in commerce" within the coverage of the Federal Trade Commission Act. See *Guziak* v. *Federal Trade Commission*, 361 F.2d 700 (8th Cir. 1966); *Ford Motor Co.* v. *Federal Trade Commission*, 120 F.2d 175 (6th Cir. 1941); *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944); *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951).

Respondents contend that the activities complained about were so small compared to its overall business and, at the time of the complaint and adjudicative hearing the investigation was so old, that the public interest would hardly be served by sustaining the complaint. I do not agree.

In its complaint the Commission made the determination that this proceeding is in the public interest. There is nothing in this record which demonstrates that that determination was in error. This proceeding is in the public interest insofar as that determination is essential to the Commission's assertion of jurisdiction. See *Koch* v. *Federal Trade Commission*, 206 F.2d 311, 319 (6th Cir. 1953);

American Airlines, Inc. v. *North American Airlines, Inc.* 351 U.S. 79, 83 (1956).

So-called "laches," *viz.*, the failure to act expeditiously to enforce a claim or right, does not apply to proceedings brought in the public interest pursuant to Section 5 of the Federal Trade Commission Act, where deception of public is asserted. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 80 (1934). Moreover, the record shows that respondents' advertising contained the type of representations which were the subject of this proceeding at least until late in 1973 (see RX 41). This is not a situation for application of the *de minimis* rule.

2. Respondent Charles Snyder was president of Hollywood until 1971 and since then has been engaged as an advisor and consultant of Hollywood. He is the majority stockholder in the corporation. Florence Snyder has been president of Hollywood since 1971, and at all times during the corporation's existence has been actively engaged in its affairs. Dale Snyder is presently an officer and the operating manager of Hollywood. All of these individual respondents have cooperated and acted together in formulating, directing and controlling the acts and practices of the corporation, including the placing of the challenged advertising, and they are individually responsible for the content of said advertisement and the acts and practices of Hollywood. See *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 120 (1937); *Sunshine Art Studios, Inc.* v. *Federal Trade Commission*, 481 F.2d 1171 (1st Cir. 1973).

3A. It was alleged in the complaint and respondents admitted in their answer that they represented in their advertisements by and through the use of the word "SALE" that carpeting and floor coverings may be purchased at special or reduced prices, and that purchasers are thereby afforded savings from respondents' regular prices.

It is the contention of complaint counsel that such a representation is not true, and accordingly false and misleading, because the advertised prices were not special or reduced prices from respondents' regular prices or, if certain items were reduced in price, such reductions were not significant reductions from respondents' regular prices. In support of their contention that respondents' use of the word "SALE" constitutes an unfair trade practice violative of Section 5 of the Federal Trade Commission Act, complaint counsel cite only the Commission's "Guides Against Deceptive Pricing," quoting a portion of Guide I(e) thereof. That section reads as follows:

> If the former price is set forth in the advertisement, whether accompanied or not by descriptive terminology such as "Regularly," "Usually," "Formerly," etc., the advertiser should make certain that the former price is not a fictitious one. If the former price, or the amount or percentage of reduction, is not stated in the advertisement, as when the ad merely states, "SALE," the advertiser must take care that the amount of reduction is not

> so insignificant as to be meaningless. It should be sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered. An advertiser who claims that an item has been "Reduced to $9.99," when the former price was $10, is misleading the consumer, who will understand the claim to mean that a much greater, and not merely nominal, reduction was being offered. [16 C.F.R. §233.1(e) (1974).]

Almost all of respondents' advertisements of record in this proceeding use the word "SALE" and contain price quotations without reference to a former price or the amount or percentage of reduction involved (see CXs 1-15, 17, 19, 21-28, 42-44, 46, 47).[6]

The record shows that although respondents did reduce certain items for its various "SALES", in most instances they were relying generally on the fact that carpeting that was sold off rolls that they had in stock were offered at a significantly lower price than the same grade and quality carpeting that they offered for sale in the regular course of business at the "cut order" price, *i.e.*, the price at which a purchaser would pay if said carpeting was purchased directly from the manufacturer.

For example, respondents' regular price in its retail stores (other than the Warehouse location) for Philadelphia Carpets' Casa Real was $4.99 per square yard (Tr. 429-430; RXs 53-55). It was usually sold at the warehouse location for $4.88 per square yard (this 11 reduction reflecting a saving to respondents in delivery charges). The same carpeting if ordered on a "cut order" basis would retail at $5.99 per square yard (Tr. 429-442). This carpeting was advertised as a "SALE" item at $4.88 a square yard in CXs 1, 5, 7, 9, 13, 15, 21, 25, 27, 28 and 35, and probably was the carpeting referred to in CXs 10, 11, 12 and 14 (Tr. 212-214). During the relevant period Casa Real was advertised at prices other than $4.88 in only four advertisements: CX 14 and CX 23 - $4.99; CX 22 and CX 32 - $4.44.

The question presented is whether the $4.99 or $4.88 price is in fact a "SALE" price, *i.e.*, does it represent a significant reduction from respondents' regular price. The only authoritative help that I can find appears also in the Commission's "Guides Against Deceptive Pricing" where at Guide I(b), it states:

> A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, *that the price is one at which the product was openly and actively offered for sale*, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith — and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based. * * * [16 C.F.R. 233.1(b)(1974); Emphasis added.]

Although this section is speaking to the situation where the higher price is stated in the advertisements, but no sales were actually made at the higher price, it would appear only reasonable that the same principles would apply in establishing the regular price where it is not set forth in the advertisement of the "SALE" but where actual sales are made at the higher price, *i.e.*, the higher price "is one at which the product was openly and actively offered for sale." Because of the methods in which carpeting is retailed (purchases on "cut order," rolls and remnants), it is my opinion that the $5.99 "cut order" price is a legitimate regular price and that offering it for "SALE" at $4.99, $4.88 or $4.44 accords with the permissible guidelines promulgated by the Commission.

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[6] See also undated advertisements: CXs 29, 31-36, 39, 40.

The same rationale that was applied to the "SALE" of Casa Real applies to all other advertised prices relating to carpeting sold per square yard. Although the specific details as to the particular regular prices have not been developed on this record as to other carpeting the general approach taken by respondents appears to have been applied to all such representations.

The present guides, promulgated in 1964, superseded the 1958 guides which had clearly and specifically spelled out conduct which was deemed to be violative of the Federal Trade Commission Act. In comparison the 1964 guides appear to be general statements of policy and a foundation for developing on a case-by-case basis the do's and don't's of pricing (see Kintner: A Primer on the Law of Deceptive Practices, pp. 155-57 (Macmillan 1971)): Accordingly, the result reached here is based on the record in this case (1970-1972 advertising), and might not necessarily control a similar issue directed to the advertising by any other retailer or even to Hollywood today. Significantly during the 1970-1972 period Hollywood had retail stores as well as the warehouse location and had not an insubstantial amount of "cut order" business. There was testimony to the effect that the carpet retailing business was fast changing over to the "warehouse" type of operation with retailers concentrating on sales of carpeting cut from "rolls" in stock and in remnants. Dale Snyder testified that Hollywood's records showed the following change in its "cut order" business from 1968 to 1974 (RX 73(b)).

1968	553	
1969	444	
1970	237	
1971	134	
1972	128	
1973	63	
1974	78	(through Nov. 22, 1974)

The ultimate question, however, is whether the consumer would in fact realize a saving as represented in the advertisement as to the products mentioned in the "SALE." I find that the purchaser would in fact realize a saving by purchasing the "SALE" items and that the representation attributed to respondents' use of the word "SALE" as set forth in the complaint was not false or misleading.

B. It was alleged in the complaint and respondents admitted in their answer that they represented in their advertisements that purchasers of their carpet remnants are afforded savings of 50 to 75 percent off the prices at which such carpet remnants are usually and customarily sold at retail.

This meaning is found in several of respondents' advertisements as contained in the record. CX 6 states in part: "More than 800 Nylon, Wool, Acrilan, all brand name beautiful quality remnants. From hall sizes to big room wall-to-wall sizes. And if we don't have your size, we'll cut it. YOU SAVE 50 to 70%."

CX 34 states in pertinent part: "Save 50 to 75% * * * 1000 Broadloom Remnants $9.99 to 99.99, each Room Sizes Included."

CX 33 states in pertinent part: "Greatest name brand carpeting. First Quality Remnants * * * Save 40 to 70% * * *."

The record shows that respondents' basis for their representations on "percent-off" relating to remnants was the price at which that particular carpeting would retail for at the "roll" or "cut order" price. It is not disputed that remnants purchased as such from manufacturers cost respondents 50 to 70 percent less than the same carpeting would cost on a "cut order." Respondents, operating on a constant markup, would pass the same difference on to the purchaser at retail. The record is clear that respondents did not actually reduce their retail price of any particular remnant by 50 to 70 percent, although the retail price of remnants created by their own sales from "rolls" would generally be 50 percent less than the so-called roll price.

There is no doubt on this record that if a purchaser can find a remnant that suits her carpet needs including adequate size, color and quality that she would probably save 50 percent or more off the retail price for the same grade and quality of carpeting that she would pay if she had to order from a "roll" in stock or on a "cut order" basis.

However, it appears that the unsophisticated prospective purchasers of carpet do not know the manner in which carpeting is retailed and that the bare "50-70% off" representation might have the tendency and capacity to mislead the consuming public as to the nature of the savings represented. Accordingly, respondents should have specified exactly what higher price base they are using, *e.g.* 50-70 percent off "roll" or "cut order" price.

It is concluded that failure to state the higher price base, was a failure to state a material fact constituting a violation of the Federal Trade Commission Act. See *J.B. Williams Co.* v. *Federal Trade*

Commission, 381 F.2d 884 (6th Cir. 1967); *Haskelite Mfg. Corp.* v. *Federal Trade Commission*, 127 F.2d 765 (7th Cir. 1942).

C. It was also alleged in the complaint and respondents admitted that by and through the use of such words as "Compare $238 to $264 Value" they represented that said comparative value was the price at which the same carpet remnants are being offered for sale by a substantial number of the principal outlets in respondents' trade area.

As with respect to the "percentage off" representations, respondents' basis for the higher price on the advertised remnants, and accordingly the savings to be afforded the purchaser thereof, was the "cut order" price for the identical carpeting. Such comparison representations relating to remnants were contained in only a few of the respondents' advertisements contained in the record of this proceeding (CXs 15, 16, 18, 19, 20).

The only evidence concerning the actual prices relating to these comparison representations were for the six items listed on CX 15. Charles Snyder testified and it was stipulated that the carpeting referred to in the last five items was Westernaire by Mohawk or Barwick Mills and that he had derived the higher price from Diener's price for the same carpeting (Tr. 68-74). Harold Resnick, executive vice president and general manager of Dieners' testified that Diener's "regular price" for carpeting in the Westernaire line was $5.95 per square yard (Tr. 164-165). Respondents' point out, and correctly so, that Mr. Resnick did not specify whether the $5.95 price was Diener's roll price or the "cut order" price, and that Mr. Snyder used the "cut order" price for his comparison. Using the sizes and prices given and considering that the "cut order" price would be 20 percent higher than the $5.95 price the following mathematical comparisons are possible:

Item[7]	*Size*	*Sq. Yards*	*Diener's Reg. Price*	*Plus 20 %*	*Hollywood's Compare..Value*
2.	12X18'	24	$142.80	$171.36	$184 to $235
3.	12X15'	20	119.00	142.80	138 to 192
4.	12X12'	16	95.20	114.24	104 to 156
5.	9X15'	15	89.25	107.10	97 to 138
6.	9X12'	12	71.40	71.40	69 to 124

On the basis of the record and the resulting computations it appears that respondents' comparisons are in the ball park, and that respondents' advertised higher prices were not fictitious or misleading.

It is not disputed however, that the same grade and quality of carpeting if sold by Diener's as remnants would be 40 to 50 percent lower than their regular price for the same carpeting. Respondents have admitted that their remnant advertising represented a comparison with their competitor's remnant price. In view of the testimony, respondents' admission as to the meaning attributable to their advertising must be disregarded, in that such meaning is too limiting and it would be a gross miscarriage of justice to lock respondents to this admission. It is concluded that respondents' representation as to the comparative values related to the "cut order" price and that such representations were not false or misleading.

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[7] Charles Snyder testified that the first item on CX 15 was a Philadelphia Carpet wool carpet that retailed for $10.95 per square yard on a "cut order" (Tr. 72). The computed price for 15 square yards would be $273.75. Hollywood's representation was "Compare $238 to $264." (CX 15)

D. It was alleged in the complaint that by and through the use of the words "WAREHOUSE SALE" as set forth in their advertisements, respondents represented (1) that the facility at which their merchandise is being offered for sale is used primarily for the storage of merchandise used by their retail business, and (2) that respondents' merchandise is being offered for sale or sold out of such facility at prices substantially below those charged for the same or similar merchandise by a substantial number of the principal outlets in respondents' trade area. Although respondents denied in their answer that they have "advertised WAREHOUSE SALE in the manner complained of at any time material here," or that the meaning of said advertisements was as alleged (see Ans. Par. 4, 5(4)), they made the following counter-proposed finding of fact:

13. By and through the use of the words "WAREHOUSE SALE" separately and in conjunction with the words "Low Prices" and other words of similar import or meaning, the respondents did in fact convey that the merchandise offered for sale or sold was available for sale or sold out of such facility at a substantial savings to consumers from the prices charged for the same or similar merchandise by a substantial number of the principal outlets in respondents' trade area. (Tr. 44-70, 301-302, 306, 340, 350) [RPF #13.]

It is concluded that respondents did make the representations charged in the complaint. Although respondents' Beltsville facility has been found to be a "WAREHOUSE" in the general meaning of that term, and that respondents did in fact afford certain savings from the "cut order" price or "roll" price generally prevailing in the trade area to justify its using the term "SALE," it is the further conclusion of the administrative law judge that on the basis of the testimony and the exhibits of record that in most instances respondents did not afford substantial savings to consumers from the prices charged for the same or similar merchandise by its competitors.

The term "WAREHOUSE SALE" has a distinct meaning. It relates to a special or unusual event at which time the advertiser has generally reduced all or most of its merchandise in its storage facility for fast sale. In fact most of the time pertinent to these proceedings respondents were not conducting such a "warehouse sale" and the representations that they were had the tendency and capacity to mislead members of the purchasing public.

It is well established that it is an unfair trade practice to make statements in advertising which have the tendency and capacity to deceive the prospective customer. *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F.2d 523 (5th Cir. 1963). Where the advertisements themselves sufficiently demonstrate their capacity to deceive, the Commission can find the requisite deception or capacity to deceive on a visual examination of the exhibits without evidence the public was actually deceived. *Double Eagle Lubricants, Inc.* v. *Federal Trade Commission*, 360 F.2d 268, 270 (10th Cir. 1965). Moreover, the initial contact, if deceptive, may be prohibited under the Federal Trade Commission Act. *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F.2d 869, 873 (2d Cir. 1961) *cert. denied*, 370 U.S. 917 (1962); *Carter Products, Inc.* v. *Federal Trade Commission*, 186 F.2d 821, 824 (7th Cir. 1951).

In determining the impression created by an advertisement, the Commission need not look to the technical interpretation of each phrase but must look to the overall impression likely to be made on the consuming public. *Murray Space Shoe Corp.* v. *Federal Trade Commission*, 304 F.2d 270 (2d Cir. 1962); *National Bakers Services, Inc.* v. *Federal Trade Commission*, 329 F.2d 365 (7th Cir. 1964).

4. The Commission's charge that respondents have violated the Textile Fiber Product Identification Act is based in part on the fact that the trade name "Acrilan" appeared in certain of respondents' advertisements. The proper generic name for this man made fiber is "Acrylic" and it is required that this name be used in such advertising.

Respondents contend that the use of the term "Acrilan" was due to a misunderstanding or miscommunication in setting up the advertisements with the classified advertising section of the Washington Post. The record shows that this type of classified advertising is usually telephoned to the newspaper early in the week and that no opportunity exists for a review of the advertisement before publication. Respondents testified that they have complained from time to time about such errors and the record shows that in 1973 the Washington Post admitted that the use of the term "Acrilan" was probably the paper's mistake.

It is significant that in a large number of respondents' advertisements spanning the time period relevant here the proper term "Acrylic" was used. It appears that the use of "Acrilan" was completely inadvertent and not intentional. Under the circumstances responsibility for the violations of the requirements of the Act may not have been respondents.

Finally, the Commission has also alleged that respondents have not made proper disclosures relating to the exempted backings, filling or paddings as required by rule 11 of the rules and regulations (16 C.F.R. §303.11). Commission counsel have merely referred to certain exhibits of record as supporting their claim without further discussion or explanation. No further evidence or testimony of record relates to this alleged violation. Upon reading rule 11 and the cited advertisements I can not determine what information required by rule 11 was not included. In this respect I can discern no difference between the advertisements cited and those which were not cited. Compare CX 7 with CX 8.

Accordingly, not being able to describe the violation alleged I can make no finding that it in fact occurred (see Tr. 272).

THE REMEDY

The two violations of the Federal Trade Commission Act found in this proceeding were respondents' use in their advertising of the term "WAREHOUSE SALE"[8] and their failure to state the nature of the higher price on which their "percentage-off" claims were based. Significantly, the initial contact a prospective purchaser might have with respondents is at the point of reading such advertising. Although the true nature of respondents' promotion, including the fact that respondents might offer the best bargains in town, would appear obvious to any customer upon inspection of respondents' retail premises, the initial contact, if possessing the requisite tendency and capacity to deceive, may be prohibited outright.

Accordingly, in my opinion, requiring respondents to cease and desist from using the words "Warehouse Sale" or any combination of those words or other words that state or imply that respondents are conducting business anywhere else than at their retail establishment is appropriate under the circumstances and is reasonably related to the violation of law found.

Such a prohibition is clearly within the Commission's power, for it is vested with broad discretion in determining the type of order necessary to ensure discontinuance of the unlawful practices found. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613

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[8] It should be noted that the record shows that respondents did use a large sign mounted on top of a station wagon or truck that read "WAREHOUSE SALE TODAY." This sign was displayed at the side of the road in front of respondents' Beltsville facility. Although this would constitute an unfair trade practice, that act and practice is not "in commerce" and is not within the coverage of the Federal Trade Commission Act (see RX 1, frames 34A-36; Tr. 140).

(1946); *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883. The Commission is not limited to prohibiting the illegal practices in the exact form in which they were found to have been employed in the past. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Respondents should be required, when they use "percentage off" claims, to state the nature of the higher price upon which the claim is based. The Commission's power to require affirmative disclosure is well established. See *Federal Trade Commission* v. *Colgate-Palmolive Co., supra.*

ORDER

It is ordered, That respondents Hollywood Carpets, Inc., a corporation, its successors and assigns, and its officers, and Charles Snyder, Florence H. Snyder and Dale E. Snyder, individually, and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "WAREHOUSE SALE" or any combination of those words or other words of similar import and meaning that represent that respondents are conducting any business other than their regular retail business.
2. Representing that a sale price is a "percentage off" without disclosing in a clear and conspicuous manner the nature of the higher price upon which the claim is made.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of carpeting or floor coverings and other merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents deliver a copy of this order to all present and future personnel of respondents engaged in the sale, or the offering for sale, of any product, or in any aspect of preparation, creation, or placing of advertising, and secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That each of the individual respondents named herein promptly notify the Commission of the discontinuance of his or her present business or employment and of his or her affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which he or she is engaged as well as a description of his or her duties and responsibilities.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

The complaint in this matter was issued on July 8, 1974, charging respondents with a variety of unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) as well as with violation of the Textile Fiber Products Identification Act (15 U.S.C. 70) and rules and regulations thereof, all in connection with the retail sale of carpeting. Hearings were held before Administrative Law Judge Miles J. Brown, who rendered his initial decision on Mar. 18, 1975. The administrative law judge found that respondents, a carpet retailer and its controlling officers, had made misleading use of the term "Warehouse Sale," and had falsely advertised large percentage reductions on their merchandise (I.D. pp. 23, 26 [pp. 808, 810-811 herein]).[1] In all other respects the judge rejected the allegations of the complaint, and provisions of the notice order. Complaint counsel have appealed from the initial decision, urging that the provisions of the notice order be adopted in their entirety.

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[1] The following abbreviations are used herein:

I.D. p. - Initial Decision (Page No.)
I.D. - Initial Decision (Finding No.)
Tr. - Transcript of testimony (Page No.)
CX - Complaint Counsel's Exhibit
RX - Respondents' Exhibit

In reviewing the record of this case, the administrative law judge was no doubt impressed, as are we, that the named parties here are not among the more heinous male-factors to be haled before this tribunal. In a Rogues' Gallery of Commission Respondents they would find their place beneath the cobwebs of a back room. Nonetheless, proof of evil intent is not necessary in a Section 5 case, and good character does not excuse false advertising, nor lessen its capacity to harm consumers. For whatever reason, we believe that the administrative law judge dealt too gently with the practices set before him, finding truth where deception lay. Our job being not to punish, but only to prevent the recurrence of past violations, we believe that modification of the law judge's conclusions, and expansion of his order is necessary in several respects, all as set forth below:

I. FICTITIOUS "SALE" ADVERTISEMENTS

The initial controversy involves respondents' use of the word "sale" to characterize their offering of the same carpeting over a one-year period, November 1970 to November 1971. The administrative law judge found that there are three basic prices at which carpets and floor coverings are sold: (1) The retailer may purchase a full roll of carpeting from the manufacturer and sell various lengths from the roll. The price charged under this method is the "full roll" price (I.D. 9). (2) If the retailer cannot satisfy demand from stock he or she may place a special order with the manufacturer, which cuts off the required amount from its roll and ships it. As might be expected, a higher price is charged in such circumstances, referred to as the "cut order" price (I.D. 10). (3) A "remnant" is the portion at the end of a roll which is too small for general use in filling wall-to-wall orders. Remnants are sold by the manufacturer at 40-50 percent or more below roll price to the retailer and generally resold by retailers at similarly hefty discounts from full roll and cut order prices (I.D. 11).

The record indicates that during a year-long period under investigation respondents advertised as being on "sale" a brand of carpeting called "Casa Real" by Philadelphia Carpets at a price of $4.99 (or $4.88)[2] per square yard. Under questioning, respondent Dale Snyder conceded that $4.99 (or $4.88) was the "regular store price" established for Casa Real (Tr. 429-30). The administrative law judge concluded that respondents had not misused the term "sale" because during the period in question respondents did make some sales of Casa Real at $5.99, the cut order price. These, however, were instances in which respondents did not have in stock the particular color or pattern of Casa Real desired by the consumer (Tr. 430). The record indicates, moreover, that cut order sales of Casa Real at a price higher than $4.99 constituted only a tiny and declining fraction of all sales of the product (RX 73b; Tr. 496).

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[2] The lower price was apparently charged at respondents' large Beltsville facility, the higher price at its smaller retail showrooms, the difference in price reflecting the cost of shipping from Beltsville.

Under these circumstances we believe that the continuous representation by respondents that $4.99 (or $4.88) was a "sale price" for Casa Real was deceptive. Conceivably respondents intended by their advertising to reflect the fact that at the time the "sale" began they had begun to stock Casa Real in large quantities, thereby enabling them to provide roll prices for most colors and patterns, as opposed to the higher cut prices previously in force. If so, it was incumbent upon them to make this clear, as, for example, by announcing that they had changed their regular method of operation and could now offer lower prices on a wider range of merchandise. Unqualified, the term "sale," combined with citation of particular prices, clearly implies that a merchant has departed in significant measure from pricing patterns previously observed (and likely to be observed in the future) in the regular course of the merchant's business. It suggests to the consumer the advisability of taking *immediate* advantage of the unusual prices being offered, and, to the extent that the claim is believed, it may significantly influence buying behavior.[3] It is clearly an abuse of "sale" to apply it over a prolonged period of time to characterize what have become the everyday prices at which a merchant sells.

We will enter order language prohibiting deceptive use of the term "sale" (order Par. I(1)), and prohibiting representations of savings based on use of a fictitious regular price (Par. I(2)).

II. MISLEADING COMPARISON PRICES

The second assignment of error relates to the law judge's finding that respondents had not advertised falsely by using the cut order price of carpeting as a comparison price in the advertising of remnants, to wit:

15x15', SALE $98
Compare $238 to $264 Value
12x18', SALE $96
Compare $184 to $235 Value (CX 15)

The carpets described were remnants, and the prices at which they were offered were respondents' regular per-unit prices for *remnants*. The comparison prices were those at which the same size carpeting might be sold had it been cut ordered from the manufacturer. Respondents themselves conceded in their answer that advertising such as the above would be construed as a comparison of their remnant prices with their competitors' *remnant* prices.[4] Despite respondents' admission, the administrative law judge concluded that it would be "a gross miscarriage of justice to lock respondents to this admission." (I.D., p. 25 [p. 809, herein]). To the contrary, we believe the admission mirrored the truth. A consumer not familiar with the carpeting industry might well assume that the comparison prices did indeed represent those at which others would sell identical merchandise, *i.e.*, *remnants*. In fact, it appears that the prices respondents advertised were not only those at which they regularly sold remnants, but in the same general range as prices at which competitors sold remnants. The use of comparison prices 100-150 percent higher with no indication that such comparison prices were based on the prices of cut order merchandise could only deceive and mislead.

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[3] If consumers possessed perfect knowledge of all competitive alternatives no harm might flow from misrepresentations of the sort involved here. A consumer could readily determine how the advertised price compared to market alternatives (taking into account quality and service as well) and would simply ignore the merchant's own characterization of his price. Lacking such perfect knowledge, however, a consumer is likely to infer that if a merchant has succeeded in selling a substantial quantity of product at some "regular" price, that price must be a competitively viable charge. When the vendor offers a "sale," therefore, the consumer will infer that the new price is, in fact, cheap relative to competitive alternatives, which will, of course, be false if the "sale" includes only regular-priced items.

The administrative law judge himself recognized that respondents were remiss in failing to qualify representations that remnants were being sold at savings of "50-70%." He concluded that absent qualification consumers would be likely to assume that they would realize savings of 50-70 percent from what they would pay for comparable *remnants* elsewhere (I.D. p. 23 [p. 808, herein]). The same reasoning is equally applicable to respondents' use of unqualified comparison prices. The potential injury resulting from such misrepresentations is obvious. Respondents' unqualified comparison clearly suggests that the advertiser is providing a product at only a fraction of what the same product would cost elsewhere. The consumer who relies on the representation may, therefore, be induced to purchase the advertised product, assuming the quoted per-unit price cannot be matched, when in fact a more desirable remnant might be obtainable from a competitor at a comparable per-unit price.

There is, of course, nothing wrong (and much right) in pointing out to consumers that by purchasing remnants they can realize huge savings over costs incurred by buying the identical product cut from a roll. The additional order provision we shall enter respecting this violation will require simply that the nature of comparison prices be made clear in respondents' advertising (Par. I(3)).

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[4] Use of the word "Sale" might also tend to suggest that the advertised prices were below per-unit remnant prices charged by respondents themselves, and, therefore, that the "compare" prices were respondents' own former prices.

III. BAN ON UNQUALIFIED REPRESENTATION OF DOLLAR AMOUNT SAVINGS

Complaint counsel contend thirdly that the administrative law judge erred in modifying section I, paragraph 4 of the notice order to forbid only unqualified representations of percentage savings and not unqualified representations of dollar amount savings. While the complaint alleged, and the administrative law judge found that respondents had made only deceptively unqualified representations of percentage savings, we believe that the order in this matter should forbid unqualified representations of dollar amount savings in order to prevent respondents from repeating in a different guise the same violations which gave rise to the order. It would be absurd, if, being estopped from claiming without qualification "Save 50-75%," respondents were able to say, no less deceptively, "Save $70-$100." It is well established that the Commission in fashioning an order need not limit it to the most narrow formulation of the violation found. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). The prohibition on unqualified dollar savings claims is clearly related reasonably to the unlawful practices found, which were in essence misrepresentations of available *savings*.

IV. USE OF "WAREHOUSE"

Complaint counsel further contest the administrative law judge's limitation of the language of Section I, paragraph 6 of the Notice Order to forbid only use of the words "Warehouse Sale" or any combination of other words of similar meaning. Complaint counsel urge a prohibition on any use of the word "warehouse."

The administrative law judge found that respondents' Beltsville facility could indeed be termed a "warehouse." As he concluded (citations omitted):

> It is a portion of a larger building with three roll-type-overhead-door entrances at the front, which could be described generally as a loading bay * * *. A walk-in door entrance is located to the left of the overhead door entrances * * *.
>
> This walk-in door leads into a small enclosed area described as a "sample show room perhaps 12 by 36 feet" * * *. In this area respondents display samples used in its "cut order" business * * *. The remaining portion of this facility, consisting of a floor area of approximately 11,000 square feet, contains the rolls of carpeting and remnants and other merchandise which Hollywood maintains as stock * * *. The remnants (rolled up) are usually stacked standing up along the right and left walls of this large room * * *, whereas the rolls of carpeting are placed horizontally in pyramid fashion on the floor in piles with walk space between the remnant display and roll display * * *. The middle of the floor area in the large room is used as a cutting area * * *. A three ton fork-lift truck * * * is used to move the rolls from the various piles to the cutting area * * *. Certain office space is located over the sample room with access by stairs from the large storage-work area * * *. (I.D. 24.)

The administrative law judge, finding that a warehouse sale "relates to a special or unusual event at which time the advertiser has generally reduced all or most of its merchandise in its storage facility for fast sale" concluded that respondents had used the term deceptively (I.D. p. 26 [p. 810, herein].) We have no quarrel with this finding (nor do respondents, who did not appeal) since it appears that respondents employed the term on a regular basis to characterize their normal course of business. Indeed, given that respondents now operate from only one location, it is doubtful that they could under any circumstances conduct what consumers would generally construe to be a "warehouse sale." Therefore, a prohibition on any use of that term (and functional equivalents) seems clearly warranted.

Complaint counsel raise the further question of whether the order should forbid any use of the term "warehouse," as for example, "visit our warehouse location," another common advertising theme of respondents. The underlying question we believe is whether use of the term "warehouse" in an advertisement is likely to convey a misleading impression to consumers regarding the available range of products and prices they will encounter if they patronize the facility. While the physical attributes of a building might satisfy Noah Webster that it is a warehouse, the issue for Section 5 purposes is whether the building functions in the commercial setting in the way consumers will be led to expect by virtue of reference to it in an advertisement designed to sell carpeting. This is no more than a restatement of the well established proposition that the literal truth employed in a particular context may be used to deceive *Bockenstette* v. *F.T.C.*, 134 F. 2d 369 (10th Cir. 1943). On that point the evidence in the record is inconclusive. While it does not appear that respondents ever provided the significant savings generally associated with a legitimate warehouse sale, it does appear that by virtue of doing business from a large storage facility they were able to stock a wide range of carpeting at prices that at least sometimes compared favorably with those of competitors. Thus we conclude that complaint counsel have not sustained the burden of proof necessary to warrant an absolute prohibition on respondents' use of the term "warehouse" to characterize a part of their sales facility.

By the same token, respondents must not be allowed to misrepresent the situation. A statement such as "Visit our Warehouse Location" is likely to convey a misleading impression when in fact respondents have only one location consisting of a warehouse attached to a showroom. We think that on balance respondents should be permitted to employ the term "warehouse" provided that they make clear that it refers to a location at which they conduct their retail business in its regular course. We have fashioned an appropriate order. Paragraph I(6) is the administrative law judge's prohibition on use of "Warehouse Sale." Paragraph I(7) forbids the use of warehouse unless it is disclosed that the term refers to a facility at which retail selling is regularly conducted, *e.g.*, "Visit our warehouse-showroom." Paragraph I(8) prohibits other misrepresentations of the nature of respondents' physical facilities, a provision contained in Paragraph I(6) of the notice order and warranted as a reasonably related generic description of the violation occurring here.

V. TEXTILE FIBER PRODUCTS IDENTIFICATION ACT VIOLATIONS

Exhibits introduced by complaint counsel indicated that advertisements for respondents' products run in the Washington Post employed the term "Acrilan" when in fact the proper generic term for the fiber in question is "acrylic" and use of that term is required by the Textile Fiber Products Identification Act, 15 U.S.C. §§70, 70b. The exhibits upon which complaint counsel rely consist of advertising from 1971 (CX 1, 6, 21, 23, 33). Respondents introduced evidence to suggest that a single false advertisement which occurred in 1973, after the Commission's investigation, may have been the fault of an employee of the Washington Post who accepted instructions for the advertisement over the telephone (RX 41, 42, 45). No similar testimony was adduced for the 1971 advertisements, but the administrative law judge apparently reasoned, though he did not explicitly so find, that inasmuch as some advertisements during the 1971 period did employ the term "acrylic," the uses of "acrilan" may similarly have been due to repeated errors in transcription by Post employees. The administrative law judge thus omitted an order, finding that responsibility for the improper advertisements "may not have been respondents." (I.D. p. 27 [p. 811 herein].)

We would certainly agree that where, through no fault of an advertiser, a newspaper makes an error which results in deception, the advertiser is not liable, provided he or she takes prompt action to rectify the mistake which has occurred, and does not acquiesce in it or permit it to continue. In the instant case it appears that during the initial 1971 period respondents took no action to remedy repeated misuses of the term "acrilan." Thus, assuming, *arguendo*, that the improper advertisements were in fact due to errors in transcription by the Washington Post[5], it was nevertheless incumbent upon respondents, after the initial mistake had occurred, to take action to prevent its recurrence, which they did not do. The Commission is obliged to prevent negligent violations of the law as well as those that flow from more blameworthy motives, for in either case the result is the same. We, therefore, conclude that the administrative law judge erred in omitting an order provision with respect to the Textile Fiber Products Identification Act.[6]

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[5] The presumption, of course, should be to the contrary. Whether it was adequately rebutted here is a matter we need not consider.

Similarly, we believe complaint counsel are correct in pointing out that respondents ran afoul of the Act by characterizing carpets for sale as being composed of various fibers (wool, nylon, polyester) without disclosing that the fiber descriptions referred only to the face or pile of the carpet and not to other portions, as required by rule 11, 16 C.F.R. §303.11, promulgated by the Commission pursuant to the Textile Fiber Products Identification Act. (CX 1, 6, 7, 24, 30, 42, 46, 47) For the foregoing reasons we shall enter the notice order language requiring compliance with the provisions violated.

An appropriate order is appended.

FINAL ORDER

This matter having been considered by the Commission upon the appeal of complaint counsel from the initial decision, and the Commission for the reasons stated in the accompanying opinion, having granted the appeal in part:

It is ordered, That the following portions of the initial decision of the administrative law judge be, and they hereby are, adopted as the findings of fact and conclusions of law of the Commission: Pages 1-13 [pp. 790-800, herein] (except for finding 15, sentence 1, page 13 [p. 800, herein]); page 14 [p. 800-801 herein] (except for findings 18 and 20); page 15 [p. 801-802, herein] (except for findings 22-23); pages 16-18 [p. 802-804, herein] (except for finding 27, page 16 [p. 802, herein]); pages 19-20 [p. 805-806, herein]; page 21 [p. 806, herein], first sentence; [beginning with "The question presented * * *"]; page 22 [p. 807, herein], Sec. "B"; pages 23-24 (except for last textual sentence, p. 24) [pp. 808-809 herein, and textual sentence beginning "On the basis of the record * * *]; page 25, first two sentences, [p. 809 herein, beginning with "It is not disputed however, * * *], and Sec. "D" [p. 810, herein]; page 26 (except for last two sentences) [pp. 810-811 herein, sentences beginning with "4". The Commission's charge that respondents have violated * * *]; page 28, second full paragraph [p. 812 herein, beginning with "Such a prohibition is clearly within * * *].

Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

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[6] Use of the fiber trademark "acrilan" without use of the generic term acrylic is also contrary to the requirements of rules 41(a) and 41(c) [16 C.F.R. §303.41(a), (c)] of the TFPIA.

ORDER

I

It is ordered, That respondents Hollywood Carpets, Inc., a corporation, its successors and assigns, and its officers and Charles Snyder, Florence H. Snyder and Dale E. Snyder, individually, and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of carpeting and floor coverings, or any other article of merchandise, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Sale," or any other word or words of similar import or meaning not set forth specifically herein unless the price of such merchandise, being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

2. Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise or services have been sold or offered for sale in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of their business.

3. Advertising or otherwise representing a compared value price for carpet remnants or rugs (a) unless the carpet remnants or rugs being advertised are of the same grade and quality as the carpets with which such advertised prices are compared; and (b) without disclosing in immediate conjunction therewith that the carpet remnants or rugs are usually sold for less than wall-to-wall prices, and that the compared value is based on the wall-to-wall price of carpeting of the same grade and quality (unless the compared value is in fact based on the price of remnants of the same grade and quality).

4. Representing, directly or by implication, orally or in writing, that purchasers of respondents' merchandise will save any stated dollar or percentage amount without fully and conspicuously disclosing, in immediate conjunction therewith, the basis for such savings representations.

5. Failing to maintain and produce for inspection or copying for a period of three (3) years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar represen-

tations as set forth in Paragraphs One, Two, and Four of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

6. Using the words "Warehouse Sale" or any combination of those words or other words of similar import and meaning that represent that respondents are conducting any business other than their regular retail business.

7. Using the word "warehouse" or any other word or words of similar import to describe respondents' physical facilities, without also disclosing clearly and conspicuously that the word "warehouse" or other word or words of similar import describe a facility at which respondents regularly engage in the retail sale of carpeting, *e.g.*, "Visit our warehouse-showroom facility."

8. Misrepresenting in any manner the size, description or classification of any of respondents' physical facilities.

II

It is further ordered, That respondents Hollywood Carpets, Inc., a corporation, its successors and assigns, and its officers, and Charles Snyder, Florence H. Snyder and Dale E. Snyder, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

1. Misbranding textile fiber products by falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

2. Falsely and deceptively advertising textile fiber products by:

(a) Making any representations by disclosure or by implication, as to fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale, or offering for sale, of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Section 4(b)(1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

(b) Failing to set forth in advertising the fiber content of floor covering containing exempted backings, fillings or paddings, that such disclosure relates only to the face, pile or outer surface of such textile fiber products and not to the exempted backings, fillings or paddings.

(c) Using a fiber trademark in advertising textile fiber products without a full disclosure of the required fiber content information in at least one instance in said advertisement.

(d) Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of carpeting or floor coverings and other merchandise, with a copy of this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall forthwith distribute a copy of this Order to each of their operating divisions.

It is further ordered, That respondents deliver a copy of this order to all present and future personnel of respondents engaged in the sale, or the offering for sale, of any product, in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That each of the individual respondents named herein promptly notify the Commission of the discontinuance of his or her present business or employment and of his or her affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he or she is engaged as well as a description of his or her duties and responsibilities.

It is further ordered, That respondents shall, within sixty (60) days after the effective date of the order served upon it, file with the Commission a report, in writing, signed by respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

BRIDGESTONE TIRE COMPANY OF AMERICA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2734. Complaint, Sept. 30, 1975-Decision, Sept. 30, 1975

Consent order requiring a Torrance, Calif., distributor and seller of tires, among other things to cease misrepresenting the safety or performance characteristics of any automobile tires, and misrepresenting any generalized safety claims. Further, the respondent is required to have a "reasonable basis" in substantiation of claims regarding the safety performance characteristics of "any product."

Appearances

For the Commission: *Bruce J. Parker.*

For the respondents: *Anthony Liebig, Lillick, McHose & Charles*, Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Bridgestone Tire Company of America, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bridgestone Tire Company of America, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of California with its principal offices and place of business located at 2160 W. 190th St., Torrance, Calif.

PAR. 2. Respondent Bridgestone Tire Company of America, Inc., is now, and for some time last past has been, engaged in the distribution, sale, and advertising of various rubber products including automobile tires.

PAR. 3. Respondent Bridgestone Tire Company of America, Inc., causes the said products, when sold, to be transported from its place of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said products in or affecting commerce. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business respondent has disseminated and caused the dissemination of advertisements concerning the aforementioned products including automobile tires in or affecting commerce by means of advertisements printed in magazines and newspapers distributed by the mail and across State lines and transmitted by television and radio stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products including automobile tires.

PAR. 5. Among the advertisements so disseminated or caused to be disseminated by respondent is a print advertisement attached as Exhibit A.

PAR. 6. Through the use of the aforesaid statements and representations made in Exhibit A, respondent represented and is now representing, directly or by implication, that the RD-170V steel-belted radial tire is the best radial tire in America.

PAR. 7. At the time respondent made the representation as alleged in Paragraph Six, respondent did not possess and rely on a reasonable basis consisting of competent scientific tests which demonstrate that the RD-170V steel-belted radial tire is superior in terms of overall performance to all other radial tires in America. Therefore, the making of said representation as alleged in Paragraph Six constituted, and now constitutes, an unfair and deceptive act or practice in and affecting commerce.

PAR. 8. Further, through the use of the aforesaid statements and representations made in Exhibit A, respondent represented and is now representing, directly or by implication, that the RD-170V steel-belted radial tire is superior to all other radial tires in America with respect to the following characteristics:

1. Puncture protection;
2. Cornering and stopping; and
3. Gas mileage.

PAR. 9. Further, through the use of the aforesaid statements and representations made in Exhibit A respondent represented and is now representing, directly or by implication, that the RD-170V steel-belted radial tire provides a degree of long-run security and comfort that is rare in all other radial tires in America.

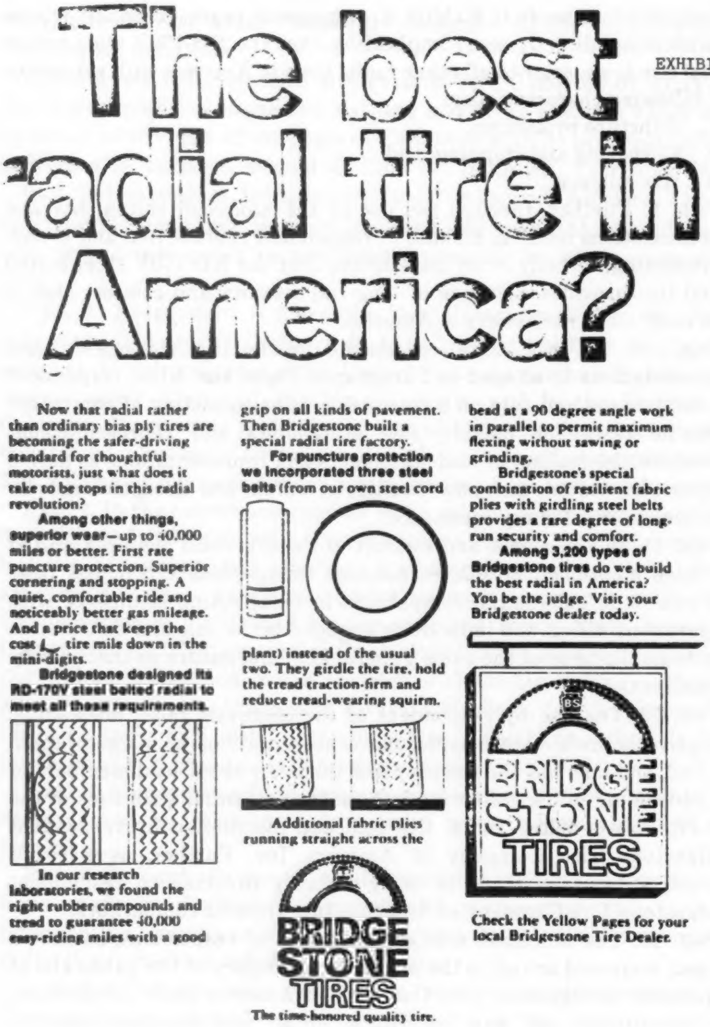
PAR. 10. At the time respondent made the statements and representations as alleged in Paragraphs Eight and Nine, respondent did not possess and rely on a reasonable basis consisting of competent scientific tests for making said statements and representations. Therefore, the making of said statements and representations as herein alleged constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce.

PAR. 11. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent Bridgestone U.S.A. has been and now is in substantial competition in or affecting commerce with corporations, firms, and individuals engaged in the sale and distribution of automobile tires of the same general kind and nature as that sold by respondent.

PAR. 12. The use by respondent of the aforesaid false, misleading, deceptive or unfair statements and representations as alleged herein has had, and now has the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of the RD-170V steel-belted radial tire sold and distributed by respondent Bridgestone Tire Company of America, Inc. Further, as a result thereof, substantial trade is being unfairly diverted to respondent Bridgestone Tire Company of America, Inc., from its competitors.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent Bridgestone Tire Company of America Inc.'s competitors, and constituted and now constitute, unfair and deceptive acts or practices and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

EXHIBIT A



The best radial tire in America?

Now that radial rather than ordinary bias ply tires are becoming the safer-driving standard for thoughtful motorists, just what does it take to be tops in this radial revolution?

Among other things, superior wear—up to 40,000 miles or better. First rate puncture protection. Superior cornering and stopping. A quiet, comfortable ride and noticeably better gas mileage. And a price that keeps the cost [illegible] tire mile down in the mini-digits.

Bridgestone designed its RD-170V steel belted radial to meet all these requirements.

In our research laboratories, we found the right rubber compounds and tread to guarantee 40,000 easy-riding miles with a good grip on all kinds of pavement. Then Bridgestone built a special radial tire factory.

For puncture protection we incorporated three steel belts (from our own steel cord plant) instead of the usual two. They girdle the tire, hold the tread traction-firm and reduce tread-wearing squirm.

Additional fabric plies running straight across the bead at a 90 degree angle work in parallel to permit maximum flexing without sawing or grinding.

Bridgestone's special combination of resilient fabric plies with girdling steel belts provides a rare degree of long-run security and comfort.

Among 3,200 types of Bridgestone tires do we build the best radial in America? You be the judge. Visit your Bridgestone dealer today.

Check the Yellow Pages for your local Bridgestone Tire Dealer.

BRIDGE STONE TIRES

The time-honored quality tire.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Bridgestone Tire Company of America, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of California with its principal offices and place of business located at 2160 W. 190th St., Torrance, Calif.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Bridgestone Tire Company of America, Inc., a corporation, its successors and assigns, officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of any product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any automobile tire has any safety or performance characteristic or is superior in quality or performance to other tires, either overall or with respect to any such characteristic, unless at the time such representation is first disseminated, the representation is fully and completely substantiated by competent scientific tests and respondent has relied upon such tests. *Provided, furthermore,* That with respect to any representation concerning the safety of automobile tires which representation is not expressly limited to a specific safety characteristic(s) the basis for such a representation shall include, at the minimum, tests for the following characteristics: (a) stopping; (b) cornering; (c) puncture protection; and (d) high speed performance.

2. Failing to provide for the maintenance of, in conjunction with Paragraph One of this order, the results of each test, the original test data collected in the course of each test, and a detailed description of how the test was performed, all of which shall be available in written form for inspection, upon reasonable notice, for at least three years following the final use of the representation.

3. Making any representation, directly or by implication, regarding the safety or performance characteristics of any product, unless at the time such representation is first disseminated there exists a reasonable basis for such representation and respondent relies upon such basis. *Provided, however,* That with respect to automobile tires, the only reasonable basis for such a representation shall be competent scientific tests as specified in Paragraph One of this order.

4. Failing to provide for the maintenance of, in conjunction with Paragraph Three of this order, all documentation in substantiation of any representation in advertising disseminated, by respondent, all of which shall be available in written form for inspection upon reasonable notice, for at least three years following the final use of the representation.

II

It is further ordered, That for the purpose of Paragraph One of Part I of this order:

1. A claim of "security" shall be construed as a safety claim.

2. A representation as to the quality or performance characteristics of any automobile tire implies that it is superior in quality or performance to any other automobile tire or all other automobile tires if it is phrased in the comparative or superlative degree, or if any

advertising containing such representation conveys a net impression of comparative superiority.

III

It is further ordered, That respondent Bridgestone Tire Company of America, Inc., shall forthwith deliver a copy of this order to each of its operating departments, divisions, and subsidiaries engaged in the advertising, offering for sale, sale, or distribution to the public at retail of automobile tires and to the manager of each present and every future retail outlet owned and operated by said respondent.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation that may affect the compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

IN THE MATTER OF

GENERAL FOODS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2733. Complaint, Oct. 1, 1975-Decision, Oct. 1, 1975

Consent order requiring a White Plains, N.Y., producer, distributor, and seller of food products, among other things to cease using depictions and descriptions, which have the capacity to influence children to engage in harmful activities—specifically, representing that a plant is edible in its raw state (1) where the visual impression is conveyed that the plant was not grown for human consumption; or (2) where a raw plant is shown being consumed and it is specifically described as a "wild" plant.

Appearances

For the Commission: *Stewart A. Block.*

For the respondent: *Bruce L. Bozeman*, White Plains, N.Y. and *John Kovin, Clifford, Warnke, Glass, McIlwain & Finney*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the General Foods Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint, the following definitions apply:

1. The term "commerce" means commerce as defined by the Federal Trade Commission Act, as amended.

2. The term "false advertisement" means false advertisement as defined by the Federal Trade Commission Act, as amended.

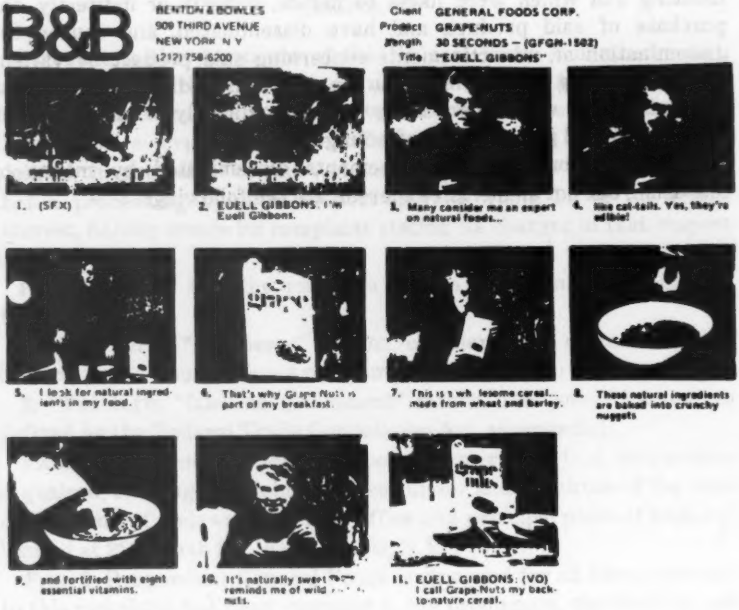
PAR. 2. Respondent General Foods Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 250 North St., White Plains, N.Y.

PAR. 3. Respondent General Foods is now, and for all times relevant to this complaint has been, engaged in the production, distribution, and sale of a variety of food products, including but not limited to "Post Grape Nuts," a ready-to-eat breakfast cereal (hereinafter referred to as Post Grape Nuts). Said product is a "food" as defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, respondent General Foods Corporation causes Post Grape Nuts in its product package to be transported from its place of business to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent General Foods Corporation maintains and at all times mentioned herein has maintained, a substantial course of trade in said product in or affecting commerce. The volume of business in or affecting commerce has been and is substantial.

PAR. 5. In the course and conduct of its aforesaid business, respondent General Foods Corporation has disseminated, and caused the dissemination of, certain advertisements concerning the said product by the United States mails and by various means in or affecting commerce, including but not limited to, by means of television broadcasts transmitted by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product, and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in or affecting commerce.

PAR. 6. Among the advertisements disseminated by means of television, but not all inclusive thereof, are the following:



B&B

BENTON & BOWLES
909 THIRD AVENUE
NEW YORK N Y
(212) 758-6200

Client GENERAL FOODS CORP.
Product GRAPE-NUTS
Length 30 SECONDS – (GFGN-1502)
Title "EUELL GIBBONS"

1. (SFX)

2. EUELL GIBBONS: I'm Euell Gibbons.

3. Many consider me an expert on natural foods...

4. like cat-tails. Yes, they're edible!

5. I look for natural ingredients in my food.

6. That's why Grape-Nuts is part of my breakfast.

7. This is a wholesome cereal... made from wheat and barley.

8. These natural ingredients are baked into crunchy nuggets

9. and fortified with eight essential vitamins.

10. It's naturally sweet [illegible] reminds me of wild [illegible] nuts.

11. EUELL GIBBONS: (VO) I call Grape-Nuts my back-to-nature cereal.

[illegible] TELEVISION

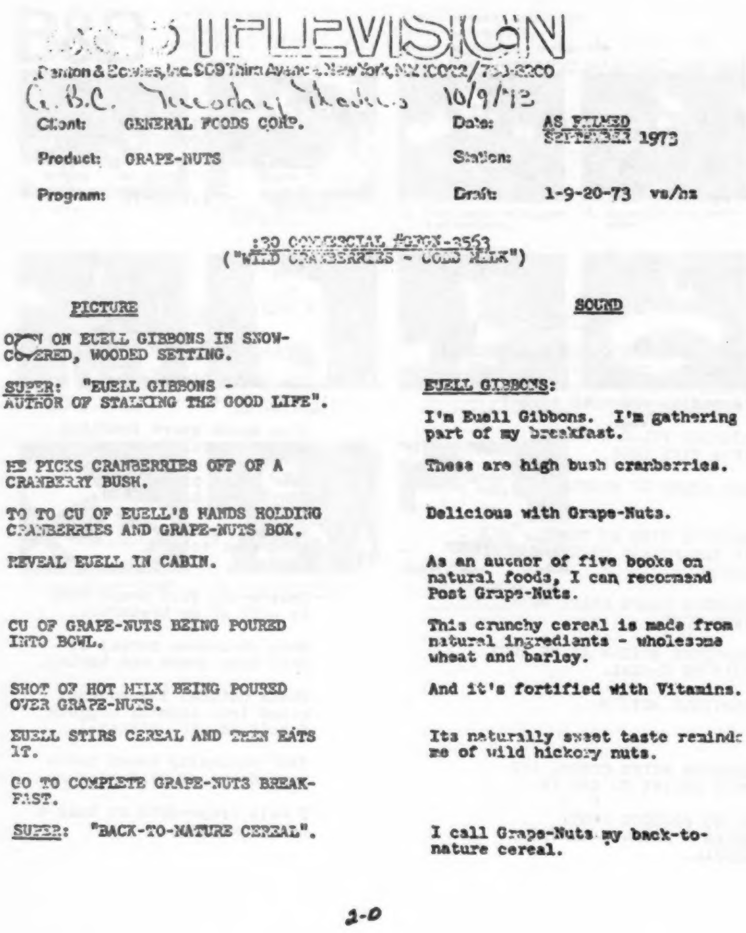
Benton & Bowles, Inc. 909 Third Avenue, New York, N.Y. 10022/753-8200

Client:	GENERAL FOODS	Date:	AS FILMED OCTOBER 1972
Product:	POST GRAPE-NUTS	Station:	
Program:		Draft:	1-11-1-72 gs/

:30 COMMERCIAL #GFGN-3252
("EUELL GIBBONS PINE TREE")

PICTURE	SOUND
	EUELL GIBBONS:
OPEN ON EUELL GIBBONS IN FOREST OF TALL PINES. SUPER: EUELL GIBBONS AUTHOR OF "STALKING THE GOOD LIFE."	I'm Euell Gibbons.
GIBBONS PULLS A BRANCH FROM PINE TREE.	I've spent years learning about natural foods.
AND HOLDS UP BRANCH.	Ever eat a pine tree? Many parts are edible.
GIBBONS SITS AT TABLE IN THE FOREST WITH BREAKFAST ITEMS.	Natural ingredients are important to me.
GIBBONS POURS GRAPE NUTS INTO BOWL.	That's why Post Grape Nuts is part of my breakfast.
CONTINUE ACTION AS HE ADDS MILK TO CEREAL.	This wholesome cereal is made from wheat and barley.
CONTINUE ACTION.	These natural ingredients a baked into crunchy nuggets fortified with vitamins.
GIBBONS MIXES CEREAL AND THEN BEGINS TO EAT IT.	Its' naturally sweet taste reminds me of wild hickory
GO TO PRODUCT SHOT. SUPER: "BACK-TO-NATURE CEREAL.	I call Grape-Nuts my back-t nature cereal.

T-18(R2) 2M 3/70



TELEVISION

Benton & Bowles, Inc. 909 Third Avenue New York, N.Y. 10022/758-8200

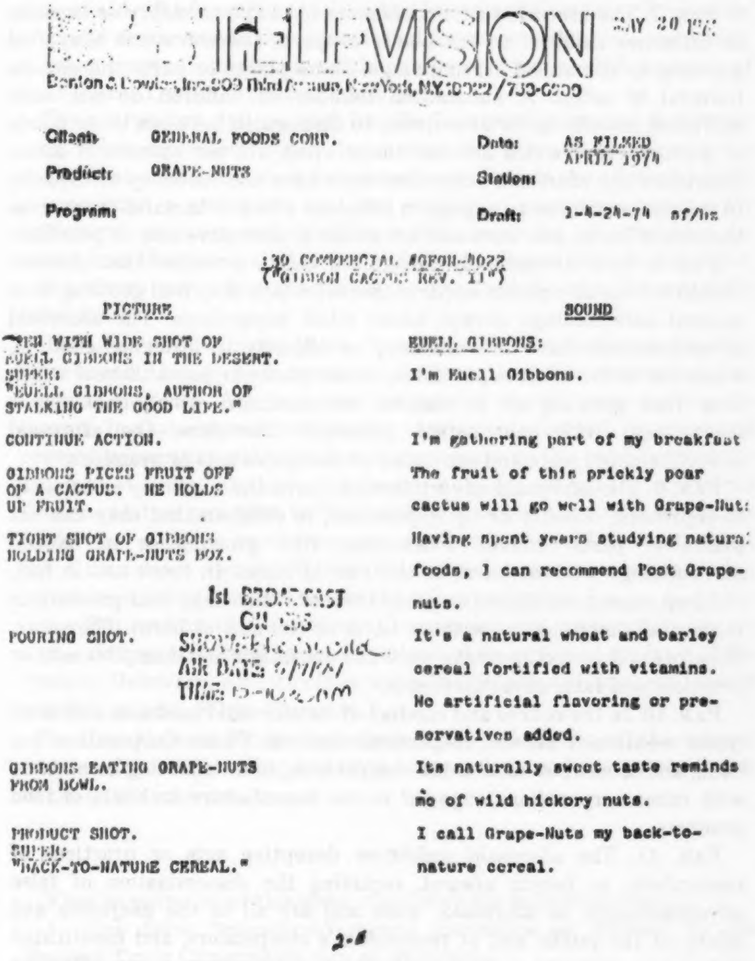
G.B.C. Tuesday [illegible] 10/9/73

Client:	GENERAL FOODS CORP.	Date:	AS FILMED SEPTEMBER 1973
Product:	GRAPE-NUTS	Station:	
Program:		Draft:	1-9-20-73 vs/hz

:30 COMMERCIAL #GNGX-3563
("WILD CRANBERRIES - COLD MILK")

PICTURE	SOUND
OPEN ON EUELL GIBBONS IN SNOW-COVERED, WOODED SETTING.	
SUPER: "EUELL GIBBONS - AUTHOR OF STALKING THE GOOD LIFE".	EUELL GIBBONS: I'm Euell Gibbons. I'm gathering part of my breakfast.
HE PICKS CRANBERRIES OFF OF A CRANBERRY BUSH.	These are high bush cranberries.
TO TO CU OF EUELL'S HANDS HOLDING CRANBERRIES AND GRAPE-NUTS BOX.	Delicious with Grape-Nuts.
REVEAL EUELL IN CABIN.	As an author of five books on natural foods, I can recommend Post Grape-Nuts.
CU OF GRAPE-NUTS BEING POURED INTO BOWL.	This crunchy cereal is made from natural ingrediants - wholesome wheat and barley.
SHOT OF HOT MILK BEING POURED OVER GRAPE-NUTS.	And it's fortified with Vitamins.
EUELL STIRS CEREAL AND THEN EATS IT.	Its naturally sweet taste reminds me of wild hickory nuts.
GO TO COMPLETE GRAPE-NUTS BREAKFAST.	
SUPER: "BACK-TO-NATURE CEREAL".	I call Grape-Nuts my back-to-nature cereal.

2-0



TELEVISION MAY 20 197

Benton & Bowles, Inc. 909 Third Avenue, New York, N.Y. 10022 / 733-6000

Client:	GENERAL FOODS CORP.	**Date:**	AS FILMED APRIL 1974
Product:	GRAPE-NUTS	**Station:**	
Program:		**Draft:**	3-4-24-74 sf/bs

:30 COMMERCIAL #GFGN-4022
("GIBBONS CACTUS REV. II")

PICTURE	SOUND
OPEN WITH WIDE SHOT OF EUELL GIBBONS IN THE DESERT. SUPER: "EUELL GIBBONS, AUTHOR OF STALKING THE GOOD LIFE."	EUELL GIBBONS: I'm Euell Gibbons.
CONTINUE ACTION.	I'm gathering part of my breakfast
GIBBONS PICKS FRUIT OFF OF A CACTUS. HE HOLDS UP FRUIT.	The fruit of this prickly pear cactus will go well with Grape-Nuts
TIGHT SHOT OF GIBBONS HOLDING GRAPE-NUTS BOX.	Having spent years studying natural foods, I can recommend Post Grape-nuts.
POURING SHOT.	It's a natural wheat and barley cereal fortified with vitamins. No artificial flavoring or preservatives added.
GIBBONS EATING GRAPE-NUTS FROM BOWL.	Its naturally sweet taste reminds me of wild hickory nuts.
PRODUCT SHOT. SUPER: "BACK-TO-NATURE CEREAL."	I call Grape-Nuts my back-to-nature cereal.

1st BROADCAST
ON CBS
SHOW: [illegible]
AIR DATE: [illegible]
TIME: [illegible]

2-8

PAR. 7. The aforesaid advertisements have the tendency or capacity to influence children to eat plants or parts thereof which they find growing or in natural surroundings. Some plants or parts thereof are harmful if eaten. A substantial number of children do not have sufficient knowledge or experience to distinguish between those plants or parts thereof which are and those which are not harmful if eaten. Therefore the aforesaid advertisements have the tendency or capacity to influence children to engage in behavior which is harmful or involves the risk of harm, and were and are unfair or deceptive acts or practices.

PAR. 8. It is a commonly recognized safety principle that children should not eat any plants or parts thereof which they find growing or in natural surroundings except under adult supervision. The aforesaid advertisements have the tendency or capacity to influence children, when not under adult supervision, to eat plants or parts thereof which they find growing or in natural surroundings, which behavior is inconsistent with said safety principle. Therefore, the aforesaid advertisements were and are unfair or deceptive acts or practices.

PAR. 9. The aforesaid advertisements have the tendency or capacity to represent, directly or by implication, to children that they can eat plants or parts thereof which they find growing or in natural surroundings without harm or the risk of harm. In truth and in fact, children cannot eat plants or parts thereof which they find growing or in natural surroundings without harm or the risk of harm. Therefore, the aforesaid advertisements were and are unfair and deceptive acts or practices and false advertisements.

PAR. 10. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent General Foods Corporation has been, and is now, in substantial competition, in or affecting commerce, with other corporations engaged in the manufacture and sale of food products.

PAR. 11. The aforesaid unfair or deceptive acts or practices of respondent, as herein alleged, including the dissemination of false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or deceptive acts or practices in or affecting commerce, in violation of Sections 12 and 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent General Foods Corporation is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 250 North St., White Plains, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purposes of this order, the following definitions apply:

1. The term "commerce" means commerce as defined by the Federal Trade Commission Act, as amended.

2. The term "plant" means any whole plant or any constituent part thereof.

I

It is ordered, That respondent General Foods Corporation, a corporation, (hereinafter referred to as respondent), its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in or affecting commerce of any product, forthwith cease and desist from, directly or indirectly:

A. Representing, through depictions, descriptions, or otherwise, that a plant is suitable for human consumption in its raw state in an advertisement containing a visual depiction of (1) the plant in its growing state or natural surroundings which depiction is not a clear portrayal of conditions of domestic cultivation for human consumption or (2) the consumption of a raw plant described in the advertisement as wild.

B. Representing through depictions, descriptions, or otherwise, that a plant is suitable for human consumption in its raw state in an advertisement containing a visual depiction of the plant in its growing state or natural surroundings where said plant is not the advertised product or an ingredient, or a characterizing flavor, or source thereof, in the advertised product.

C. Representing, through depictions, descriptions, or otherwise, that any given thing or things, other than things that are commonly recognized as foods or lawful food additives, are suitable for human consumption as a food where it is reasonably foreseeable, through reasonable inquiry, that such representation has the tendency or capacity to influence members of the audience in reasonably good health to engage in behavior which creates an imminent risk of physical harm to those persons or to others.

II

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

In the Matter of

GER-RO-MAR, INC. T/A SYMBRA'ETTE, ET AL.

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8872. Decision, July 23, 1974-Modified Order, Oct. 2, 1975

Order modifying an earlier order dated July 23, 1974, 84 F.T.C. 95, 39 F.R. 35133, pursuant to order of the United States Court of Appeals for the Second Circuit dated June 16, 1975, Trade Reg. Rep. ¶ 60,368 at 66,588 (1975 Trade Cases), IX S&D ——, by setting aside order paragraphs 1 and 2 proscribing an open-ended, multi-level (pyramid) marketing plan to recruit distributors for its products.

Appearances

For the Commission: *Jerome Steiner* and *Ralph E. Stone*.
For the respondents: *Rosenberg & Wiseman*, San Jose, Calif.

Order Modifying Order to Cease and Desist

Respondents having filed in the United States Court of Appeals for the Second Circuit on Oct. 11, 1974, a petition to review and set aside an order to cease and desist issued herein on July 23, 1974 [84 F.T.C. 95], and the court having rendered its decision and its judgment on June 16, 1975, affirming the order to cease and desist, except for numbered Paragraphs 1 and 2 of the order which it directed be set aside;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court to read as follows:

ORDER

It is ordered, That respondent Ger-Ro-Mar, Inc., a corporation doing business as Symbra'ette, whose corporate name is now Symbra'ette, Inc., and officers thereof, and respondent Carl G. Simonsen, individually and as an officer of said corporation, or corporations, and respondents' agents, representatives, employees, successors, and assigns, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution of brassieres, girdles, lingerie, wigs, or of any other products, or of distributorships or franchises, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Operating any marketing or sales plan or program unless respondents agree to and notify participants that they will promptly

repurchase all or any part of any initial order of merchandise made by any participant, upon written request of the participant mailed within 30 days (or a greater period of time if respondents elect) of the receipt of the initial order by the participant, at the price actually paid by the participant for the merchandise; *Provided, however,* That respondents may insist that prior to making repurchase, the merchandise be returned to respondents' place of business, postage or shipping prepaid, in a resaleable condition, said merchandise to be shipped within 30 days (or a greater period of time if respondents elect) of the date on which written request for repurchase is received.

2. Representing, directly or by implication, or by use of hypothetical examples or representations of past earnings of participants, that participants in any marketing or sales program will earn or receive, or have the reasonable expectancy of earning or receiving, any stated gross or net amounts, unless in fact, a majority of participants in the community or geographic area in which such representations are made, have achieved the stated gross or net amounts represented, and the representations accurately reflect the amount of time required by such participants to achieve such gross or net amounts.

3. Misrepresenting in any manner, directly or by implication, or placing in the hands of others the means or instrumentalities for misrepresenting, the financial gains reasonably achievable by participants in any marketing or sales plan or program, or the commercial feasibility thereof.

4. Failing to maintain adequate records (a) which disclose the facts upon which any claims of the type discussed in paragraphs 2 and 3 of this order are based; and (b) from which the validity of any claim of the type discussed in Paragraphs 2 and 3 of this order can be determined.

5. Requiring that an individual pay a valuable consideration in return for the right to participate in any marketing or sales program, without first disclosing to such prospective participant in writing the number of other participants in the marketing area in which such prospect plans to operate.

6. Representing that the supply of available participants in respondents' marketing program is inexhaustible or virtually inexhaustible.

7. Entering into, maintaining or enforcing any contract, agreement, combination, understanding, or course of conduct which has as its purpose or effect to require any individual to resell at any particular price a product which he or she has purchased, *Provided,* That in those States having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

8. Publishing or distributing, directly or indirectly, any resale price

list, product price list, order form, report form, promotional material or any other document which employs resale prices for commodities sold by respondents without stating clearly and conspicuously in conjunction therewith the following:

The resale prices quoted herein are suggested prices only.

Provided, That in those States having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

9. Entering into, maintaining, or enforcing any contract, agreement, combination, understanding, or course of conduct which has as its purpose or effect to require any individual to refrain from reselling products which he or she has purchased, to any specified person, class of persons, business, or class of businesses.

It is further ordered, That respondents deliver a copy of this order to all present and future dealers, distributors, or participants in any marketing or sales plan or program they operate, or who are engaged in the sale of respondents' products or services, and secure from each a signed statement acknowledging receipt of this order.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, incorporation, or sale resulting in the emergence of a successor firm, partnership, or corporation, or any other change which may affect compliance obligations arising out of this order.

It is further ordered, That Carl G. Simonsen, the individual respondent named herein, promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That each of the respondents herein and their successors and assigns shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with all of the provisions of this order.

IN THE MATTER OF

UNITED BUILDERS, INC., ET AL.

Docket 9043. Order, Oct. 3, 1975

Order directing the chief administrative law judge to reassign the matter on temporary or permanent basis to another administrative law judge.

Appearances

For the Commission: *Allan M. Huss, Aaron H. Bulloff* and *Sharon J. Devine.*

For the respondents: *John Carrico* and *Stanley Preiser*, Charleston, W. Va.

ORDER

The complaint in this matter alleges, in part, that customers of respondents have been denied proper notice of certain rescission rights created by the Truth in Lending Act. It is possible that, under the terms of that Act, those alleged rights may expire three years after the dates of the transactions from which they arose. If so, this three-year limitation period could frustrate, in part or in whole, the operation of a final order which might be entered in this matter, or the operation of an order or judgment of a court which might be entered in part as a consequence of the Commission disposition of this matter. Because of this, delay in the hearing of this matter is exceptionally serious.

Judge Hinkes' order postponing prehearing conference entered in the present matter on Sept. 16, 1975, read together with his motion to modify Commission order of Sept. 16, 1975 entered in the matter of Kellogg Company, *et al.*, Docket No. 8883, on Sept. 19, 1975, indicates to the Commission that further proceedings in this case before Judge Hinkes will not take place as expeditiously as the aforementioned circumstances require. Accordingly,

It is ordered, That the chief administrative law judge, reassign this matter on a temporary or permanent basis to another administrative law judge.

IN THE MATTER OF

JAMES NEECE T/A CARPET SHOWCASE, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, TRUTH IN LENDING AND TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-2735. Complaint, Oct. 3, 1975-Decision, Oct. 3, 1975

Consent order requiring a Beaumont, Tex., distributor and installer of carpeting and floor coverings, among other things to cease using false and deceptive advertisements and sales techniques; failing to disclose the quantity or cost per unit of carpeting or floor coverings; intimidating customers into accepting defective merchandise; in connection with the extension of consumer credit, violating the Truth in Lending Act by failing to disclose to consumers such information as required by Regulation Z of said Act; misbranding textile fiber products and failing to maintain proper records of the fiber content of such products. Further, the order requires respondent to provide a 3-day cooling off period to every customer; to notify each advertising medium used by respondent that the Federal Trade Commission has found that he engages in unfair and deceptive acts; and to refund money to any customer where investigation reveals the transaction involved violations of the order.

Appearances

For the Commission: *Richard H. Gateley.*

For the respondent: *Harry S. Long* and *Michael D. Matheny,* Beaumont, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Truth in Lending Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that James Neece, an individual, trading and doing business as Carpet Showcase, hereinafter referred to as respondent, has violated the provisions of said Acts, and the implementing regulations promulgated thereunder and the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent James Neece is an individual trading and doing business as Carpet Showcase, a proprietorship existing and doing business under and by virtue of the laws of the State of Texas, with his principal office and place of business located at 3705 Highland Ave., Beaumont, Tex.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of his business as aforesaid, respondent now causes, and for some time last past has caused, his said merchandise, when sold, to be shipped from his place of business located in the State of Texas to purchasers thereof located in the State of Texas and various other States and maintains and at all times mentioned herein has maintained a course of trade in commerce or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his aforesaid business, and for the purpose of inducing the purchase of his carpeting and floor coverings, the respondent has made, and is now making, numerous statements and representations by repeated advertisements dissiminated in various media of general circulation including advertisements transmitted over television stations having the capacity to broadcast into States other than the State of Texas and by oral and written statements and representations of his salesmen to prospective purchasers with respect to his products and services.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

TO DO THIS JOB, WE HAD TO ORDER A TRUCKLOAD MORE CARPETING THAN WE NEEDED, SO HERE'S YOUR CHANCE TO MAKE A FABULOUS SAVINGS ON THIS BEAUTIFUL CARPETING IN *YOUR HOME*. HURRY — OFFER IS LIMITED TO CARPETING ON HAND.

DURING JULY CARPET SHOWCASE WILL INSTALL THE CARPETING, WITH A THICK PAD, AT NO EXTRA COST TO YOU. FREE INSTALLATION, FREE PADDING, DURING JULY ONLY.

TAKE ADVANTAGE OF OUR BIG JULY SPECIAL, OFFER LIMITED TO 100 MILE RADIUS OF BEAUMONT. THAT'S RIGHT INSTALLATION AND PADDING ABSOLUTELY FREE.

DURING AUGUST WE HAVE A WONDERFUL OFFER FOR YOU: PICK THE CARPET YOU WANT * * * AND DEDUCT 15% OFF THE PRICE FOR A BIG SAVINGS. AND OUR REVOLVING PLAN IS SO EASY TO USE.

IT WAS THE BIGGEST OFFER CARPET SHOWCASE EVER MADE, AND WE'RE GONNA REPEAT IT BECAUSE YOU DEMANDED IT. AGAIN IN SEPTEMBER * * * SELECT THE CARPET YOU WANT, AND CARPET SHOWCASE WILL INSTALL IT, WITH A THICK PAD, AT NO EXTRA COST TO YOU. FREE INSTALLATION, FREE PADDING * * * DURING SEPTEMBER ONLY.

THIS OFFER LIMITED TO 100 MILE RADIUS OF BEAUMONT AND USE OUR REVOLVING CHARGE PLAN.

CALL US FOR FREE ESTIMATE OR BRING IN YOUR ROOM MEASUREMENTS * * * WE FINANCE * * * WITH NO MONEY DOWN.

WE FINANCE NO MONEY DOWN * * * AND WE DO INSTALL TOMORROW IF YOU BUY TODAY.

OUR CONVENIENT REVOLVING CHARGE ACCOUNT MEANS YOU CAN HAVE THAT CARPET RIGHT NOW. BUY FROM CARPET SHOWCASE TODAY, WE INSTALL TOMORROW.

WE HAVE A WIDE SELECTION FOR YOU TO CHOOSE FROM, AND WE CAN SAVE YOU MONEY, INCLUDING *FREE* INSTALLATION UP TO 100 MILES FROM BEAUMONT. YOU DON'T NEED CASH * * * USE OUR REVOLVING CHARGE ACCOUNT THAT'S SO CONVENIENT.

USE OUR REVOLVING CHARGE ACCOUNT * * * EASY BUDGET PLAN.

PAR. 5. By and through the use of the above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the advertising and oral statements and written statements and representations of respondent's salesmen to customers and prospective customers, respondent has represented, and is now representing, directly or indirectly, or by implication that:

1. Respondent is making a bona fide offer to sell the carpeting and floor coverings on the terms and conditions stated.

2. By and through the use of the terms "15% OFF," "SPECIAL" and other words of similar import and meaning not set out specifically herein, that said carpeting and floor coverings may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondent's regular selling prices.

3. By and through the use of the words "FREE INSTALLATION" and "FREE PADDING" and other words of similar import and meaning, not set out specifically herein, that installation and padding of respondent's carpets and floor coverings is provided without cost or obligation to respondent's customer.

4. By and through the use of the words "WE FINANCE NO MONEY DOWN" and "USE OUR REVOLVING CHARGE ACCOUNT * * * EASY BUDGET PLAN," and other words of similar import and meaning not set forth specifically herein, purchasers of respondent's products are granted easy credit terms, without regard to their financial status or ability to pay and that respondent is in the business of extending credit rather than arranging credit for his customers through financial institutions such as finance companies and banks.

PAR. 6. In truth and in fact:

1. Respondent is not making a bona fide offer to sell carpeting and floor coverings on the terms and conditions stated. To the contrary,

said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting and floor coverings. Members of the purchasing public responding to such offers often visit respondent's place of business to select carpeting and floor coverings from sample merchandise exhibited by respondent or his salesmen. Such persons are later called upon in their homes by respondent or his salesmen and negotiate a contract for the sale, delivery and installation of said merchandise without regard for the terms and conditions stated in respondent's offers aforementioned. In addition, unknown to prospective purchasers, respondent installs or causes to be installed carpeting or floor coverings of a grade and quality different than that contracted for by said prospective purchasers.

2. Respondent's products are not being offered for sale at special or reduced prices. To the contrary, the prices at which respondent's products are sold pursuant to such offers are identical to the prices charged by respondent in the regular course of business and therefore do not represent a genuine bargain or saving.

3. The cost of installation and padding is not "free" but is added to the cost of respondent's carpeting and floor coverings and is thereby included in the price paid by purchasers for respondent's products. In some instances, carpeting installed by or on behalf of respondent has rubberized backing which is bonded to the carpeting.

4. Purchasers of respondent's products are not granted easy credit terms without regard to their financial status or ability to pay. Respondent does not extend credit to his customers but arranges for the extension of credit using the services of financial institutions including finance companies and banks.

Therefore, the statements and representations as set forth in Paragraphs Four and Five, hereof, were and are false, misleading and deceptive.

PAR. 7. In the further course and conduct of his business as aforesaid, and in furtherance of a sales program for the purpose of inducing the purchase of his carpet and floor coverings, respondent, his salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Five, above, respondent or his representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and the consequences thereof.

PAR. 8. In the further course and conduct of his aforesaid business, respondent now induces and has induced purchasers to pay substantial sums of money to respondent without disclosing to such purchasers the price per square yard, the number of square yards of carpeting or floor coverings contracted for or the cost of installation and padding. These facts, if known to certain prospective purchasers, would likely affect their decision as to whether to buy or use the products and services of respondent. Therefore, respondent's failure to make such disclosures is an unfair or deceptive act or practice.

PAR. 9. In the course and conduct of his aforesaid business, respondent is using a contract providing, among other things, that a purchaser repudiating his purported obligations under such contract is liable for the amount due under the contract as well as a penalty of thirty percent of the monetary obligation evidenced thereby in addition to attorney's fees necessary to enforce collection.

The contract is oftentimes used by respondent to intimidate purchasers who have executed said contracts into accepting carpeting and floor coverings which are of a grade and quality different than that contracted for, which are defective in some respect or which are improperly installed.

The utilization of the said contract, and the intimidations by respondent have misled purchasers into the mistaken and erroneous belief that they must accept respondent's products without recourse or legal redress and have, or may, unlawfully restrict, restrain and hinder competition in the selling of carpet and floor coverings. Therefore, the acts and practices alleged herein are false, misleading and unfair and a continuing violation of Section 5 of the Federal Trade Commission Act.

PAR. 10. In the course and conduct of his business as aforesaid, and at all times mentioned herein, respondent has been and now is, in substantial competition in commerce, with corporations, firms and individuals in the sale, distribution and installation of carpeting and floor coverings and service of the same general kind and nature as that offered by respondent.

PAR. 11. The use by respondent of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices and his failure to disclose material facts and his use of contracts as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said state- purchase of substantial quantities of respondent's products and services by reason of said erroneous and mistaken beliefs.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, have caused and are now causing substantial pecuniary losses to persons utilizing respondent's products and services and are all to the prejudice and injury of the public and to respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 13. In the ordinary course and conduct of his business as aforesaid, respondent regularly arranges for the extension of, or offers to arrange for the extension of, consumer credit, as "consumer credit" and "arrange for the extension of credit" are defined in Sections 226.2 (k) and 226.2 (f) of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 14. Subsequent to July 1, 1969, respondent, in the ordinary course of business as aforesaid, and in connection with his credit sales, as "credit sale" is defined in Regulation Z, has caused and is causing customers to execute binding retail charge agreements.

PAR. 15. In order to promote the sale of carpet and floor coverings, respondent disseminates advertisements, as "advertisement" is defined in Section 226.2 (b) of Regulation Z, in various media. These advertisements aid, promote or assist directly or indirectly the extension of consumer credit. Certain of said advertisements which were published, broadcast or delivered subsequent to July 1, 1969, stated that:

A. No downpayment was required without also stating the following items and terminology described under Section 226.8 of Regulation Z, as required by Section 226.10 (d) (2) thereof:

1. The cash price or amount of the loan, as applicable;
2. The number and amount of payments scheduled to repay the indebtedness if the credit is extended;
3. The amount of the finance charge expressed as an annual percentage rate; and
4. The deferred payment price.

B. No downpayment would be required in connection with any extension of credit when the creditor usually and customarily required a downpayment, in violation of Section 226.10(a)(2) of Regulation Z.

PAR. 16. In the further course and conduct of his business as aforesaid, and in connection with credit sales, the respondent has failed to preserve evidence of compliance with the requirements of Regulation Z for two years after the date of each disclosure as required by Section 226.6(i) of Regulation Z.

PAR. 17. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failures to comply with provisions of Regulation Z, constitute violations of that Act, and pursuant to Section 108 thereof, respondent thereby is violating the Federal Trade Commission Act.

COUNT III

Alleging violations of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 18. Respondent is now and has been engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including carpeting and floor coverings and has sold, offered for sale, advertised, delivered, transported, and caused to be transported, textile fiber products which have been advertised or offered for sale in commerce, and has sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original State or contained in other textile fiber products, as the terms "commerce" and "textile fiber products" are defined in the Textile Fiber Products Identification Act.

PAR. 19. Respondent is misbranding textile fiber products by failing to affix a stamp, tag, label or other means of identification to each such textile fiber product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act; or as an alternative to the foregoing, where properly labeled samples, swatches, or specimens are used to effect the sale of articles of carpeting or floor covering or other household textile articles which are manufactured specifically for a particular customer after the sale is consummated, and such articles of carpeting or floor covering or other household textile articles are of the same fiber content as the samples, swatches or specimens from which the sale was effected, failing to provide an invoice or other paper to accompany them showing the information otherwise required to appear on the label, as allowed by Rule 21(b) of the rules and regulations promulgated under the Textile Fiber Products Identification Act, effective Mar. 30, 1960, as amended.

PAR. 20. Respondent has failed to maintain and preserve proper records showing the fiber content of his textile fiber products, in that said respondent substituted stamps, tags, labels or other identification pursuant to Section 5 (b) of the Textile Fiber Products Identification

Act and failed to maintain and preserve such records as would show the information set forth on the stamps, tags, labels or other identification removed by him, together with the name or names of the person or persons from whom such textile fiber products were received, in violation of Section 6(b) of the Textile Fiber Products Identification Act and Rule 39 of the rules and regulations promulgated under the Textile Fiber Products Identification Act, effective Mar. 30, 1960, as amended.

PAR. 21. The acts and practices of respondent as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, and unfair methods of competition, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof and the respondent having been furnished thereafter with a copy of a draft of Complaint which the Dallas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and Counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent James Neece is an individual trading and doing business as Carpet Showcase, a proprietorship existing and doing business under and by virtue of the laws of the State of Texas, with its

office and principal place of business located at 3705 Highland Ave., Beaumont, Tex.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent James Neece, individually and trading and doing business as Carpet Showcase, or under any other name or names, his successors and assigns, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale, distribution or installation of carpeting and floor coverings, or any other article of merchandise, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of carpeting or other merchandise or services.

2. Making representations by any means purporting to offer merchandise for sale when the purpose of the representations is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at a higher price or of a grade or quality different than that contracted for by prospective customers.

3. Representing by any means that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

4. Using the words "15% OFF," "SPECIAL" or any other word or words of similar import or meaning not set forth specifically herein unless the price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondent for a reasonably substantial period of time in the recent regular course of his business.

5. Representing by any means that any merchandise or service is furnished "free" or at no cost to the purchaser.

6. Representing by any means quantities of carpet or floor coverings in a unit of measurement not usually and customarily employed in the retail advertising, offering for sale or sale of carpeting or floor coverings.

7. Using the terms "WE FINANCE — NO MONEY DOWN,"

"USE OUR REVOLVING CHARGE ACCOUNT * * * EASY BUDGET PLAN," or any other terms of similar import or meaning not set forth specifically herein, or representing by any means that credit is extended to customers without regard to their financial status or ability to pay or that respondent extends credit to his customers rather than arranging for the extension of credit through financial institutions including finance companies and banks.

8. Contracting for any sale whether in the form of credit acceptance, conditional sales contract, promissory note or otherwise which shall become binding on the customer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

9. Failing to make the following disclosures in connection with the sale or offering for sale of carpet, floor coverings or similar products on each instrument utilized by respondent that requires payment of any consideration, at any time, to respondent or any third parties, by respondent's clients. Said disclosures shall be in more conspicuous print than all other language in said instrument, but in no case shall they be smaller than 12-point upper case type. *Provided*, That said disclosures and instrument shall be delivered to prospective customers at least three days, excluding Sundays and legal holidays, prior to the time prospective customers execute said instruments or pay any consideration to respondent. *Provided, further*, That said disclosures shall be made on the contract or other binding instrument to be executed by prospective customers. The disclosures shall contain the following information in the sequence set forth and be set off from the text of the instrument by a black border and immediately above the line for the prospective customers' signatures:

A. The number of square yards of each style of carpeting or floor covering to be purchased by the customer.

B. The price per square yard of each style of carpeting or floor coverings to be purchased by the customer; excluding the cost of padding and the cost of installation.

C. The cost for installing one square yard of such carpeting or floor coverings.

D. The cost of padding for one square yard of carpeting or floor coverings.

E. The cost of installing each style of carpet or floor covering, such figure to be obtained by multiplying the number of square yards as disclosed in subparagraph A above by the cost per square yard as disclosed in subparagraph C above.

F. The cost of padding to be furnished for the carpet or floor coverings, such cost to be obtained by multiplying the number of square yards as disclosed in subparagraph A above by the cost per square yard as disclosed in subparagraph D.

G. The total price for each style of carpeting or floor coverings which shall be obtained by multiplying the number of square yards as disclosed in subparagraph A above by the cost per square yard as disclosed in subparagraph B above and to this amount adding the sum of the cost of padding as disclosed in subparagraph F and the cost of installation, as disclosed in subparagraph E.

H. A notice in the following form:

NOTICE

IF YOU ARE OBTAINING CREDIT IN CONNECTION WITH THIS PURCHASE, YOU WILL BE REQUIRED TO SIGN A PROMISSORY NOTE, A SALES CONTRACT OR OTHER INSTRUMENT OF INDEBTEDNESS WHICH MAY BE PURCHASED FROM THE SELLER BY A BANK, FINANCE COMPANY OR ANY OTHER THIRD PARTY. IF SUCH IS THE CASE, YOU WILL BE REQUIRED TO MAKE YOUR PAYMENTS TO SOMEONE OTHER THAN THE SELLER. YOU SHOULD BE AWARE THAT IF THIS HAPPENS YOU MAY HAVE TO PAY THE NOTE, CONTRACT OR OTHER INSTRUMENT OF INDEBTEDNESS IN FULL TO ITS NEW OWNER EVEN IF YOUR PURCHASE CONTRACT IS NOT FULFILLED.

10. Representing by any means that persons executing contracts or other binding instruments with respondent may be or are liable to pay a penalty of thirty percent of the amount of the contract or any other liquidated sum upon cancellation of said contracts or other binding instruments; *Provided*, That respondent may make such representations concerning a customer's liabilities as may be allowed by State law.

11. Utilizing any instrument including a completion certificate, or using coercion, threats, intimidations or any means which may lead a customer to accept merchandise which is of a price, grade or quality different than that contracted for, which is defective in some respect or which is improperly installed.

12. Failing, in all pamphlets, brochures and other promotional material to make the following disclosures in the manner and form provided for herein.

(a) At the time advertising is submitted to any advertising agency and newspaper or other printed publication, respondent shall provide a copy of the following notice to each such publication:

NOTICE

The Federal Trade Commission has found that _____ (*Name of Respondent*) has engaged in unfair and deceptive acts and practices. A copy of the Commission's news release is available from _____ (*Name of Respondent*) upon request.

(b) At the time advertising is submitted to any radio or television station, respondent shall provide a copy of the following notice to each such station:

NOTICE

The Federal Trade Commission has found that ______ (*Name of Respondent*) has engaged in unfair and deceptive acts and practices. A copy of the Commission's news release is available from ______ (*Name of Respondent*) upon request. Your attention is directed to an agreement between the Federal Trade Commission and the Federal Communications Commission dated April 27, 1972.

13. Failing to maintain for a period of three (3) years after any advertisements are disseminated, records disclosing:

(a) The date or dates each advertisement was published; and

(b) The name and address of the advertising agencies and the newspapers, other publications or broadcast media disseminating said advertisement.

14. Advertising, offering for sale, selling or distributing any carpeting or floor coverings using a unit of measurement which tends to exaggerate the size or quantity of carpet or floor coverings being offered by respondent.

15. Failing to maintain and produce for inspection and copying for a period of three (3) years following the date of execution of any contract or other binding instrument, the contract or other binding instrument and adequate records which disclose the facts upon which the cost of carpeting, installation and padding as set forth in Paragraph 9 is based and from which the validity of such cost can be determined.

It is further ordered, That respondent forthwith cease and desist from:

(a) Including in any contract, binding instrument or other document any waiver, limitation or condition on the rights of customers or prospective customers under this order.

(b) Misrepresenting the rights of a customer or prospective customer under this order.

II

It is further ordered, That respondent James Neece, individually and trading and doing business as Carpet Showcase, or under any other trade name or names, his successors and assigns, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit or advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the

Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Causing to be disseminated to the public in any manner whatsoever any advertisement to aid, promote or assist directly or indirectly any credit sale or other extension of consumer credit, other than open end credit, which advertisement represents, directly or by implication:

(a) That no downpayment is required, the amount of the downpayment or the amount of any installment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z;

(1) the cash price or the amount of the loan, as applicable;

(2) the amount of the downpayment required or that no downpayment is required, as applicable;

(3) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(4) the amount of the finance charge expressed as an annual percentage rate; and

(5) the deferred payment price or the total of payments, as applicable.

2. Representing in any advertisement, directly or by implication, that no downpayment or that a specified downpayment will be accepted in connection with any extension of credit, unless the creditor usually and customarily accepts or will accept downpayments in that amount as required by Section 226.10(a)(2) of Regulation Z.

3. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

4. Failing to preserve evidence of compliance with the requirements imposed under Regulation Z, other than advertising requirements under Section 226.10, for a period of not less than two years after the date each disclosure is required to be made and to make available all records and evidence of compliance regarding Regulation Z to the Federal Trade Commission or its staff on request.

III

It is further ordered, That respondent James Neece, individually and trading and doing business as Carpet Showcase, or under any other trade name or names, his successors and assigns, and respondent's agents, representatives, and employees, directly or through any corporate, subsidiary, division, or other device, in connection with the introduction, delivery for introduction, sale, advertising, and offering for sale in commerce and in the transportation or causing to be transported in commerce, of any textile fiber product including any carpeting and floor coverings; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

1. Misbranding such textile fiber products by failing to affix a stamp, tag, label or other means of identification to each such textile fiber product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act; or as an alternative to the foregoing, where properly labeled samples, swatches, or specimens are used to effect the sale of articles of carpeting or floor covering or other household textile articles which are manufactured specifically for a particular customer after the sale is consummated, and such articles of carpeting or floor covering or other household textile articles are of the same fiber content as the samples, swatches or specimens from which the sale was effected, failing to provide an invoice or other paper to accompany them showing the information otherwise required to appear on the label, as allowed by Rule 21(b) of the rules and regulations promulgated under the Textile Fiber Products Identification Act, effective Mar. 30, 1960, as amended.

2. Failing to maintain and preserve, as required by Section 6(b) of the Textile Fiber Products Identification Act and by Rule 39 of the rules and regulations promulgated thereunder, such records of the fiber content of textile fiber products as will show the information set forth on the stamps, tags, labels or other identification removed by respondent, together with the name or names of the person or persons from whom such textile fiber products were received, when substituting stamps, tags, labels or other identification pursuant to Section 5(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondent make no representations or engage in any course of conduct which is inconsistent with or detracts from the effectiveness of this order.

It is further ordered:

1. That respondent deliver, by hand, a copy of this order to each of his present or future salesmen, independent contractors, sales agents, employees or any other person who sells or promotes the sale of respondent's product or service.

2. That respondent provide each person so described in subparagraph 1 above with a form returnable to respondent, fully stating an intention to be bound by and conform their sales practices to the requirements of this order and retain such form for a period of three (3) years after it is executed by said persons;

3. That respondent inform each person described in subparagraph 1 above that respondent shall not use any such person, or the services of any such person, until such person agrees to and files notice with respondent to be bound by the provisions contained in this order;

4. That in the event such person will not agree to file such notice with respondent and be bound by the provisions of this order, respondent will not use such person, or the services of such person;

5. That respondent institute a program of continuing surveillance adequate to reveal whether the sales practices of each of said persons described in subparagraph 1 conform to the requirements of this order; and

6. That respondent discontinue dealing with any person described in subparagraph 1 of this order who engages in acts or practices prohibited by this order.

It is further ordered, That the respondent shall forthwith deliver a copy of this order to cease and desist to all present and future parties employed or utilized by respondent engaged in the arranging or consummation of any extension of consumer credit or in any aspect of the preparation, creation or placing of advertising and that respondent secure a signed statement from each such party that he has read and understands such order. Such statement shall be retained for at least three (3) years and made available to the Federal Trade Commission or its staff upon request.

It is further ordered, That respondent, upon receipt of a complaint from a customer alleging facts that indicate this order may have been violated, refund all monies paid by such customer where respondent determines, after a good faith investigation, that one or more paragraphs of this order may have been violated in connection with such customer's transaction with respondent. This paragraph shall not apply to transactions prior to the date this order became final. Respondent shall not engage in any course of conduct which contravenes the refund rights of any customers provided by this order.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in his business organization such as dissolution, assignment or sale or transfer of all or a substantial part of the business or assets to any other person, partnership or corporation, or any other change in the business organization which may affect compliance obligations arising out of the order.

It is further ordered, That in the event the Federal Trade Commission promulgates a trade regulation rule applicable to respondent that this order shall be deemed modified to the extent it contravenes said rule.

It is further ordered, That the respondent named herein promptly notify the Commission of discontinuance of any business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the matter and form in which he has complied with this order.

IN THE MATTER OF

LEAR SIEGLER, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8953. Complaint, Jan. 24, 1974-Decision, Oct. 6, 1975

Consent order requiring a Santa Monica, Calif., firm offering courses in computer programming and computer operations, among other things to cease misrepresenting aspects of their courses such as the significance or importance of their courses; the qualifications of students completing their courses to obtain employment in areas for which they have been trained; the demand for graduates of their courses; and employment services provided respondent's students. Further, respondent is required to contact past participants in their courses and provide them with a questionnaire to be returned to respondent and to make restitution to those prior students determined to be eligible under the provisions of the order.

Appearances

For the Commission: *Charles L. Hall* and *D. McCarty Thornton IV*.

For the respondents: *Robert J. Hoerner, Jones, Day, Cockley & Reavis*, Cleveland, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Lear Siegler, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Lear Siegler, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3171 S. Bundy Dr., in the city of Santa Monica, State of California. Respondent is now, and for some time last past has been, engaged in the formulating, development, offering for sale, sale and distribution of courses of instruction intended to prepare graduates thereof for entry-level employment in positions involving the commercial application of data processing, including computer programming and computer operations, and courses of instruction in other fields. Respondent's volume of business in said courses of instruction has been, and is, substantial.

PAR. 2. Respondent conducts its business of offering for sale, sale and distribution of courses of instruction through resident training facilities organized as branches of its unincorporated education division. Through said branch facilities, as aforesaid, respondent places into operation and implements a sales program whereby members of the general public by means of advertisements placed in broadcast and printed media of general circulation, and by means of brochures, pamphlets and other promotional literature disseminated through the United States mails or by other means, and through the use of salesmen and sales personnel, and by means of statements, representations, acts and practices as hereinafter set forth, are induced to sign contracts or enrollment agreements for a course of resident training of a stated length of time and for a stated tuition cost.

Respondent arranges or assists in the arrangement of credit and deferred payment terms for the financing of said executed contracts and accepts the revenues flowing therefrom or accepts the proceeds thereof.

In the manner aforesaid, respondent dominates, directs and controls, and accepts the pecuniary and other benefits flowing from the acts and practices hereinafter set forth.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, said aforementioned courses of instruction to be disseminated to said aforementioned branch facilities located in various States of the United States other than the State of origination of said course. Respondent transmits and receives, and causes to be transmitted and received, in the course of the sale of, distribution of and financing of its courses of instruction among and between the several States of the United States, retail installment contracts, credit applications, checks, monies or other commercial paper. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said courses of instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, and to induce the purchase of its courses of instruction by members of the general public, respondent and its branch facilities and the salespersons at the branch facilities have disseminated, or caused the dissemination of, via the United States mails or other means, radio, television, newspaper, print media or other forms of advertising. In conjunction therewith, respondent and its branch facilities and the salespersons at the branch facilities have made certain statements and representations respecting the job placement percentage for graduates of respondent's courses, the assurance that respondent's graduates attain employment in positions for which they are trained, the types of positions and salaries for which graduates of respondent's courses will be qualified, the holding out or offering of employment and statistical data or numerical estimates dealing with the number of positions or job openings available or projected to be available in the field of electronic data processing.

Typical of the statements and representations in said advertisements, but not all inclusive thereof, are the following:

A. Radio and Television:

> The Apollo moonwalk project has created a job for you. All you have to have is the initiative to take your place in expanding aeronautical space field. The key is to train now as a computer programmer. * * * Incidently the job placement rate at Lear-Siegler Institute is now 98.4% upon graduation.

B. Newspaper and Direct Mail:

> NOW, YOU can select your career as a trained Computer Programmer, Operator or Analyst.

* * * * * * *

	Salaries Reported	
	Computer Operator	Computer Programmer
Business Automation	$7,000—$9,700	$6,500—$11,000

* * * * * * *

Job Insurance

Special Training Is The Answer. Most Of The Nation's 6% Unemployed Are Untrained. * * * Our Graduates Are The Most Employable.

* * * * * * *

Jobs Available For The Well Trained
Day & Evening Classes Now Forming.

* * * * * * *

Top Paying Positions For Well Trained Men & Women.
Decide Today To Prepare Yourself For a High Paying Prestige Position. * * *

* * * * * * *

Computer Operators Needed. Classes Starting Now.

* * * * * * *

500,000 computer specialists will be needed by 1972. There is an urgent yet unfilled need for trained programmers, operators and anaylsts.

* * * * * * *

The Urgent Need For Trained Specialists. The demand for qualified people in the data processing field is urgent. Today there are more jobs than there are specialists to fill them. * * * 70,000 trained men and women are needed now. * * *

* * * * * * *

Free Nationwide Placement Assistance

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondent and its branch facilities and the salespersons of the branch facilities have represented, directly or by implication, that:

1. There is an urgent need or demand for all or most of respondent's graduates in positions for which respondent trains such persons.

2. Respondent had a reasonable basis from which to conclude that:
(a) there was at the time such representations were made, or
(b) would be at the time that persons then enrolling graduated from respondent's courses,
an urgent need or demand for all or most of respondent's graduates in positions for which respondent trains such persons.

3. All that is necessary for the placement of respondent's graduates as programmers in scientific applications is the completion of respondent's course in computer programming.

4. The position of systems analyst is an entry-level employment objective of respondent's courses of instruction.

5. All or substantially all of respondent's graduates are able, on graduation, to secure the positions for which respondent has trained them.

6. Inquiries are being solicited for the ultimate purpose of offering employment to qualified applicants who will be trained in the skills required.

7. Respondent's graduates who seek employment in the field of electronic data processing do not find it necessary, in many instances, to seek said employment through sources other than respondent's placement office.

8. Respondent's graduates will qualify as experienced job applicants because of the computer training they receive while enrolled in respondent's courses.

9. The placement assistance furnished by respondent is free.

PAR. 6. In truth and in fact:

1. At the time it was so represented there was not an urgent need or demand for all or most of respondent's graduates, in positions for which respondent trains such persons.

2. Respondent had no reasonable basis from which to conclude that:

(a) There was at the time such representations were made, or

(b) would be at the time that persons then enrolling graduated from respondent's courses,

an urgent need or demand for all or most of respondent's graduates in positions for which respondent trains such persons.

3. In many instances a college degree in a science or mathematical discipline is necessary for the placement of respondent's graduates as a programmer in scientific applications.

4. The position of systems analyst is not an entry-level employment objective of respondent's course of instruction.

5. All or substantially all of respondent's graduates are not able, on graduation, to secure the positions for which respondent has trained them.

6. Inquiries are not solicited for the ultimate purpose of offering employment to qualified applicants, but are solicited for the sole purpose of obtaining leads to prospective purchasers of respondent's courses of instruction.

7. Respondent's graduates who seek employment in the field of electronic data processing do find it necessary, in many instances, to seek said employment through sources other than respondent's placement office.

8. Respondent's graduates do not qualify as experienced job applicants because of the computer training they receive while enrolled in respondent's courses. Most employers interviewing respondent's

graduates who are looking for experienced applicants are not willing to suspend the requirement of experience because an applicant has completed respondent's course of computer training.

9. The placement assistance furnished by respondent is not free, but rather included in the tuition cost of respondent's courses.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were, and are, false, misleading or deceptive acts or practices.

PAR. 7. In the further course and conduct of their business, and in furtherance of their purpose of inducing the purchase of their courses by the general public, respondent and its branch facilities, directly or indirectly, have held out commissioned salespersons to be qualified or trained vocational counselors. Respondent thereby has falsely and deceptively represented that such persons were in a position to give disinterested advise to prospective students as to the best career choice for them, when in fact such persons had a direct or indirect economic interest in whether the applicants enrolled at respondent's branch facilities. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 8. Through the use of the aforesaid advertisements and otherwise, respondent has represented, directly and by implication, that persons completing respondent's course in computer operations or computer programming will thereby have attained the prerequisites necessary to qualify them for employment as operators or programmers at salaries within a specified range. Respondent failed to disclose in such advertising or through its sales representatives: (1) most of respondent's graduates from said courses who attained entry-level employment as computer operators or computer programmers earn salaries below or only slightly above the minimum salary figure used in the aforementioned specified salary ranges and (2) few, if any, of the graduates from said courses who attained entry-level employment as computer operators or computer programmers earn salaries at or near the maximum salary figure used in the aforementioned specified salary ranges. Knowledge of such facts would indicate the salary a graduate could expect to earn for the next several years. Thus, respondent has failed to disclose material facts, which if known to a consumer would be likely to affect his or her consideration of whether or not to purchase such courses of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. Through the use of the aforesaid advertisements and otherwise, respondent has represented, directly or by implication, that there was at the time of the representation or would be at the time of graduation from respondent's courses an urgent need or demand for respondent's graduates in positions for which respondent trains such persons. At the time of the said representations respondent had no reasonable basis adequate to support such representations. Therefore, the aforesaid acts and practices were, and are, unfair acts or practices.

PAR. 10. Respondent offered for sale courses of instruction intended to prepare graduates thereof for entry-level employment in positions involving the commercial application of data processing, including computer programming and computer operations, without disclosing in advertising or through their sales representatives: (1) the percentage of recent graduates of each school for each course offered, that were able to obtain employment in the positions for which they were trained; (2) the employers that hired any such recent graduates for each course offered; (3) the initial salary any recent graduates received for each course offered; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Knowledge of such facts would be an indication of the probability of graduating from respondent's courses and would indicate the possibility of securing future employment upon graduation and the nature of such employment. Thus, respondent has failed to disclose material facts, which if known to a consumer, would be likely to affect his or her consideration of whether or not to purchase such courses of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 11.

(a) Respondent as aforesaid, has been, and is now failing to disclose material facts while using other false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondent substantial sums of money to purchase courses of instruction whose value to the said person for future employment in the jobs for which training was offered was virtually worthless. Respondent has received the said sums and has failed to offer to refund and has refused to refund such money to such purchasers of its courses.

The use by respondent of the aforesaid practices and its continued retention of said sums, as aforesaid, is an unfair act or practice.

(b) In the alternative and separate from subparagraph (a) above, respondent, who is in substantial competition in commerce, with corporations, firms and individuals engaged in the sale of courses of vocational instruction, has been and is now, as aforesaid, failing to disclose material facts while using false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondent substantial sums of money to purchase courses of instruction.

The effect of using these aforesaid acts and practices to secure substantial sums of money is or may be to substantially hinder, lessen, restrain or prevent competition between the respondent and the aforesaid competitors.

PAR. 12. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of courses of instruction covering the same or similar subjects.

PAR. 13. The use by respondent of the aforesaid false, misleading, unfair or deceptive statements, representations, acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true, and to induce a substantial number thereof to purchase respondent's courses by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with a copy of the complaint the Commission issued, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint issued, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Lear Siegler, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3171 S. Bundy Dr., Santa Monica, Calif.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent, Lear Siegler, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the creating, advertising, promoting, offering for sale, sale or distribution of courses of study, training or instruction in the field of electronic data processing or any other course in any field in commerce or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, orally, in writing, or in any other manner, directly or by implication, that:

(a) The training offered to students enrolled in any computer programming course or any similar course of instruction offered by respondent is, by itself, sufficient to qualify a graduate thereof for the scientific application of computer programming; or misrepresenting, in any manner, the significance or importance of any course of instruction in qualifying any person for employment in a particular field of endeavor.

(b) The position of systems analyst is an entry level employment objective of any course of instruction offered by respondent; or misrepresenting, in any manner, the nature or type of position for which a graduate of any course of instruction will be qualified or in which such a graduate will achieve employment.

(c) Any school, location or facility at which respondent conducts business or offers any course of instruction has a stated placement rate, ratio or percentage, unless any such placement rate, ratio, or percentage is, in fact, the current and actual placement rate, ratio, or percentage at such school, location or facility, computed in the manner set forth in Paragraph 6(b) of Part I of this order.

(d) Persons completing respondent's courses in computer operations and computer programming will thereby have received the training and experience required to qualify them for employment at salaries earned by experienced operators and programmers; or representing, orally or in writing, that any amount of salary or other remuneration will or may be earned by any person completing any course offered by respondent, unless respondent in each and every instance has in good faith conducted a statistically valid survey which establishes the validity of any such claim at all times and in all locations where the representation is made.

(e) All or substantially all graduates of any course of instruction offered by respondent will upon graduation, obtain jobs in the positions for which they have been trained; or misrepresenting, in any manner, the ease with which graduates of any course will attain employment, or the effectiveness of any course of training or instruction in preparing or qualifying any graduate for employment.

(f) Inquiries are solicited for the purpose of offering employment to qualified applicants; or misrepresenting, orally or in writing, that employment is being held out or made available in any respect.

(g) (1) There is a substantial demand, or a demand of any size or proportion, for persons completing any of the courses offered by respondent in the areas of computer programming, computer operations or computer technology, or any other course in any field,

(2) or otherwise representing that opportunities for employment, or opportunities of any type or number are available to such persons,
except as hereinafter provided in Paragraph 6(b) of this order. *Provided, however,* That respondent shall cease and desist making such representations unless the respondent in each and every instance:

(a) Until the passage of a base period to be determined pursuant to Paragraph 6(b) of Part I of this order, after the establishment of a new school location by respondent in any metropolitan area or county, whichever is larger, where it did not previously operate a school, and after the introduction by respondent of any new course of instruction at any school or location, shall:

(i) Have in good faith conducted a statistically valid survey which establishes the validity of any such representation at all times when the representation is made, and

(ii) have disclosed in immediate and conspicuous conjunction with any such representation, that:

> All representations of potential employment demand or opportunities for graduates of this school (course) are merely estimates. This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

(b) After the passage of a base period to be determined pursuant to Paragraph 6(b) of Part I of this order, and until two years after the establishment of a new school location by respondent in any metropolitan area or county, whichever is larger, where it did not previously operate a school, and after the introduction by respondent of any new course of instruction at any school or location, shall:

(i) Make any such representations in the form and manner provided in Paragraph 6(b) of Part I of this order, and

(ii) disclose in immediate and conspicuous conjunction with any such representation, that:

> This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

2. Using, orally, in writing or in any other manner, at any time statistical data or numerical estimates, derived from any source whatsoever, respecting present or future occupational demand or the growth of employment or the salaries earned in the field of electronic data processing, or in any other field or misrepresenting in any manner the meaning, application, relevancy or import of any statistical data or statistical projections of any type from any source.

3. Representing, orally, in writing or in any other manner, directly or by implication, that:

(a) Any school, location or facility operated by respondent maintains a full-time placement office unless in each and every instance such placement office is staffed with personnel whose function is to furnish placement assistance and requests for placement assistance are handled without referral to employment agencies or other third parties.

(b) Graduates of any course of instruction offered by respondent are not required to actively seek employment opportunities through sources other than respondent's placement office; or misrepresenting in any manner the requirements, duties, obligations or responsibilities imposed upon any person who seeks placement assistance; or misrepresenting in any manner the capabilities or functions of any placement office, referral service or any other type of assistance in obtaining employment for persons completing any said course.

(c) The placement assistance furnished by respondent is free or without cost; or misrepresenting in any manner the cost of any placement assistance or service.

(d) Graduates of any course of instruction offered by respondent in the field of electronic data processing will be regarded as equivalent to experienced job applicants as a result of the computer training received during the course of their enrollment; or misrepresenting in any manner the value, benefit, advantages or seniority which accrues to any graduate of any course of instruction offered by respondent.

4. Failing to keep adequate records which may be inspected by the Commission staff members upon reasonable notice:

(a) Which disclose the facts upon which any placement percentages or claims, or other representations of the type described in Paragraphs 1 and 6 of this order are based; and

(b) From which the validity of any placement percentages or claims, or other representations of the type described in Paragraphs 1 and 6 of this order can be determined.

5. Representing, orally, in writing or in any other manner, directly or by implication that any person engaged in connection with the promotion, offering for sale, sale, distribution or other solicitation of any course of instruction offered by respondent is a trained vocational counselor; or misrepresenting in any manner the training, experience, title, qualifications or status of any person engaged in connection with the promotion, offering for sale, sale, distribution or other solicitation of any course of instruction, or the import or meaning of any advice given by or any other statement made by any such person; or misrepresenting the nature of any encounter between respondent's employees and prospective students for respondent's courses of instruction.

6. Failing to send by certified mail, return receipt requested, to each person who shall contract with respondent for the purchase of any vocational school course of instruction, a written notice printed in at least ten (10) point type which shall disclose in substantially the same form as provided in Appendix A the following information and none other:

(a) The title "IMPORTANT INFORMATION" printed in boldface type across the top of the form;

(b) paragraphs reciting the following information to be computed in the manner and form set forth below for the applicable base period as hereinafter defined in subparagraph (6):

(1) For each different course of instruction offered by respondent for each school, location or facility at which respondent offers said courses of instruction;

the dates of the "base period" as computed in (b)(6);

the total number of students who graduated during such base period;

the numbers and percentages of total graduates who attained employment in the fields for which such graduates were trained. Such information must include an accurate description of each position in which such graduates attained employment.

(2) As to the same graduates used to compute the placement and employment statistics in (b)(1) above, a list of all employers which hired any such graduates during the base period, the number of such graduates hired by each firm or employer and the positions in which said graduates were hired.

(3) As to the same graduates used to compute the statistics in (b)(1)

and (b)(2) above, the annual salary or income of said graduates. Such salary or income shall be classified by number of graduates attaining employment in each position described in (b)(1) at starting salaries expressed in consecutive categories of one thousand dollar amounts, in the form described in Appendix A.

(4) In compiling the foregoing information respondent shall not include any such graduates who respondent knows have not retained such positions for more than one month from the initial date of employment. Respondent may use information supplied to it by graduates, employers, or other sources and shall not be required to obtain such information independently.

(5) For each course of instruction for which respondent is required to disclose information pursuant to subparagraphs (b)(1) through (b)(4), the total number of students who enrolled in said course and were scheduled to graduate during the base period and the number and percentage of the enrollees in said course who failed to complete the course of instruction. The term, "failure to complete," shall encompass those enrollees who:

(A) Withdrew;

(B) failed the course (*i.e.*, were academically terminated);

(C) did not complete the course within the base period in which they were scheduled to graduate and must take (a) make-up exam(s) in order to graduate;

(D) completed the course but did not receive a graduation certificate due to their failure to pay the balance of the tuition; or

(E) for any other reason, did not successfully complete the course within the base period in which they were scheduled to graduate.

(6) "Base Period" shall mean a six (6) month period beginning eight (8) months before and ending two (2) months before the date on which respondent must begin to disseminate the necessary statistics with respect to the base period.

There shall be a one month period immediately following the close of a base period during which respondent shall gather the necessary statistics with respect to said base period. These statistics will relate to those graduates who successfully completed the particular course of instruction during the base period and who obtained employment during the base period or the one month period thereafter. Respondent may not include in the computation of the statistics for the base period any persons who graduate during the month after the base period and who find jobs during said one month period. Such persons will be included in statistics for the base period during which they graduate.

At the end of the first month period immediately following the close of a base period, respondent shall be allowed a second one-month period to calculate and prepare for distribution the necessary statistics with respect to said base period.

On the first of each month, respondent shall begin to distribute statistics relating to the base period for the period beginning eight (8) months before and ending two (2) months before the first day of each month. Respondent shall continue to distribute said statistics until the first day of the next month and not thereafter.

For any six (6) month period during which respondent has no graduates for a particular course of instruction, respondent may continue to distribute the statistics with respect to the prior base period for said course of instruction until such time as respondent has graduates of said course of instruction and has had one month in which to gather statistics with respect to those graduates and a second month during which to calculate and prepare for distribution the necessary statistics.

Appendix B contains a sample base period calculation.

Provided, however, That subparagraph (b)(1) through (b)(6) above shall be inapplicable to any newly established school that respondent may establish in any metropolitan area or county, whichever is larger, where it did not previously operate a school, or to any course newly introduced by respondent, until such time as the new school or course has been in operation for the base period defined in subparagraph (b)(6) above. The following statement shall be included in such notice during such period:

> All representations of potential employment or salaries are merely estimates. This school (course) has not been in operation (offered) long enough to indicate what, if any, actual employment or salary may result upon graduation from this school (course).

After such time as the new school or course has been in operation for the base period (subparagraph (b)(6) above), and until two years after the establishment of a new school location in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or after the introduction of any new course by respondent, the following statement shall be included in such notice:

> This school (course) has not been in operation (offered) long enough to indicate what, if any, actual employment or salary you may expect to achieve upon graduation from this school (course).

7. Contracting for any sale of any course of instruction in the form of a sales contract or other agreement which shall become binding prior to the purchaser affirming the enrollment contract by signing and returning to respondent the affirmation form specified in Paragraph 8, within ten (10) days of his receipt of that form. If the purchaser fails to affirm the enrollment contract within the ten (10) day period, respondent shall consider the contract null and void and within ten (10) business days of the expiration of the affirmation period shall refund

all monies paid by the purchaser and cancel and return to the purchaser any evidence of indebtedness.

8. Failing to send by certified mail, return receipt requested, to each person who shall contract with respondent for the purchase of any course of instruction, a one page form, in duplicate that contains the following unsigned affirmation statement printed in bold face type of at least ten (10) points:

NOTICE TO THE PURCHASER

THE ENROLLMENT CONTRACT THAT YOU SIGNED WITH (NAME OF SCHOOL) ON (DATE) TO ENROLL IN (NAME OF COURSE) IS NOT EFFECTIVE OR VALID UNLESS YOU FIRST SIGN THIS STATEMENT AND RETURN IT TO THE ABOVE-NAMED SCHOOL WITHIN TEN (10) DAYS FROM THE TIME THAT YOU RECEIVED THIS STATEMENT. YOU ARE FREE TO CANCEL YOUR ENROLLMENT AND RECEIVE A FULL REFUND OF ANY MONIES YOU HAVE PAID TO THE SCHOOL BY NOT SIGNING OR MAILING THIS STATEMENT WITHIN TEN (10) DAYS. AT THE EXPIRATION OF THIS TEN (10) DAY PERIOD THE SCHOOL HAS TEN (10) BUSINESS DAYS TO SEND YOU YOUR REFUND (IF ANY) AND TO CANCEL AND RETURN TO YOU ANY EVIDENCE OF INDEBTEDNESS THAT YOU SIGNED. HOWEVER, IF YOU DO WANT TO ENROLL IN THE ABOVE-NAMED SCHOOL, YOU SHOULD SIGN YOUR NAME BELOW AND MAIL THIS STATEMENT TO THE SCHOOL WITHIN TEN (10) DAYS. KEEP THE DUPLICATE COPY FOR YOUR OWN RECORDS.

______________	______________
DATE	SIGNATURE

The affirmation form shall not contain any information or representation other than the information specified in this paragraph, and the form shall be mailed in the same envelope that is used to mail placement information as required by Paragraph 6. The affirmation form and said placement information shall be sent by respondent no later than the next day after the person shall have contracted for the purchase of any course of instruction. During such period provided for in this paragraph, respondent shall not initiate contact with such person other than that required by this paragraph.

9. Making any representations of any kind whatsoever in connection with the creating, advertising, promoting, offering for sale, sale or distribution of courses of study, training or instruction in the field of electronic data processing or any other course offered to the public in any field in commerce, for which respondent has no reasonable basis prior to the making or dissemination thereof.

10. Using course names and descriptions which either directly or by implication indicate that respondent's courses are designed to prepare students for certain entry-level positions when in fact a substantial

number of graduates of such courses do not achieve such entry-level positions.

II

1. *It is further ordered*, That:

(a) Respondent herein deliver, by registered mail, a copy of this decision and order to each of its present and future employees, salesmen, agents, solicitors, independent contractors or to any other person or entity which promotes, offers for sale, sells or distributes any course of instruction included within the scope of this order;

(b) respondent herein provides each person or entity so described in subparagraph (a) above with a form returnable to respondent clearly stating his or her intention to be bound by and to conform his business practices to the requirements of this order; retain said statement during the period said person or entity is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request;

(c) respondent herein informs each person or entity so described in subparagraph (a) above that respondent will not use or engage or will terminate the use or engagement of any such party, unless such party agrees to and does file notice with respondent that he or she will be bound by the provisions contained in this order;

(d) if such party as described in subparagraph (a) above will not agree to so file the notice set forth in subparagraph (b) above with respondent and be bound by the provisions of the order, respondent shall not use or engage or continue the use or engagement of, such party to promote, offer for sale, sell or distribute any course of instruction included in this order;

(e) respondent herein informs the persons or entities described in subparagraph (a) above that respondent is obligated by this order to discontinue dealing with or to terminate the use or engagement of persons or entities who continue on their own the deceptive acts or practices prohibited by this order;

(f) respondent herein institutes a program of continuing surveillance adequate to reveal whether the business practices of each said person or entity described in subparagraph (a) above conform to the requirements of this order;

(g) respondent herein discontinues dealing or terminates the use or engagement of any person or entity described in subparagraph (a) above, as revealed by the aforesaid program of surveillance, who continues on his own or her own any act or practice prohibited by this order.

2. *It is further ordered*, That respondent herein present to each

interested applicant or prospective student immediately prior to the commencement of any interview or sales presentation during which the purchase of or enrollment in any course of instruction offered by respondent herein is discussed or solicited, a 5" x 7" card containing only the following language:

YOU WILL BE TALKING TO A SALESPERSON

3. *It is further ordered*, That the respondent, Lear Siegler, Inc., shall forthwith distribute a copy of this order to each of its domestic operating divisions.

4. *It is further ordered*, That respondent, Lear Siegler, Inc. shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in respondent which may affect compliance obligations arising out of this order.

III

It is further ordered, That:

1. Respondent shall submit to the Commission, within five (5) days after the date this order is served on respondent (hereinafter "date of service"), a notarized affidavit, executed by respondent's corporate manager of regulatory agency relations, to the effect that respondent has made or has caused to be made a good faith search of documents that pertain to purchasers of respondent's computer courses of instruction, and that respondent, to the best of his knowledge, has previously or simultaneously with said affidavit submitted to the Commission the names of all computer course purchasers covered by this agreement.

2. Respondent or its designee shall make an inquiry in writing on the one hundred and twentieth (120th) day after the date of service, in the language, manner and form shown in Appendices C and D, via certified mail with return receipt requested and with a self-addressed, postage prepaid envelope, to the home address of each former purchaser of one of respondent's computer courses who appears on a list of such purchasers to be supplied to respondent by the Commission within sixty (60) days after the date of service.

3. With respect to each purchaser whose mailed inquiry is returned undelivered or whose aforesaid return receipt card is not returned, respondent or its designee shall have a duty to mail on the one hundred and forty-fifth (145th) day after the date of service the same inquiry via first class mail to such purchaser's business address that is included

in the aforesaid list of purchasers supplied to respondent by the Commission.

4. On the two hundred and seventieth (270th) day after the date of service, respondent shall pay a refund, by check or otherwise, in an amount derived in accordance with Part III of this order, to each "eligible class member" determined in accordance with Part III of this order.

5. "Eligible class member" means only those persons who:

(a) Enrolled during the period of time from July 1, 1970 to Dec. 31, 1973 in respondent's computer programming or computer operations courses; and

(b) did not have his or her course tuition paid in full by a State or local department or division of vocational rehabilitation; and

(c) completed all of the data processing classes of the computer course for which he or she enrolled; and

(d) (1) sought employment in the position for which he or she was trained, or

(2) for reasons related to the sufficiency or quality of the training, or job demand, elected not to seek employment in the position for which he or she was trained; and

(e) (1) after completion of respondent's computer programming classes, did not attain employment as a systems analyst, computer programmer, or combination computer programmer and operator; or instructor of systems analysis, computer programming, combination computer programming and operations; or a manager or supervisor of persons engaged in computer programming; or in a position whose duties were or are equivalent to a systems analyst, computer programmer, or combination computer programmer and operator; or

(2) after completion of respondent's computer operations classes, did not attain employment as a systems analyst, computer programmer, combination computer programmer and operator, or computer operator; or instructor of systems analysis, computer programming, combination computer programming and operations, or computer operations; or a manager or supervisor of persons engaged in computer programming or operations; or in a position whose duties were or are equivalent to a systems analyst, computer programmer, or combination computer programmer and operator, or computer operator; or

(3) attained one of the employment positions for which he or she was trained as listed in subsection (e) (1) and (2) only after receiving further training in computer programming or computer operations at a college or another vocational school, which training was not paid for in full by his or her employer.

6. Each refund shall be accompanied by a letter in the language,

manner and form shown in Appendix E; and a notice in the language, manner and form shown in Appendix F shall be sent via first class mail, with the sender's return address on the face of the envelope, to the last known home address of all persons whose returned questionnaire show them to be ineligible for a refund under Part III of this order.

7. Respondent shall make pro rata refund payments to each eligible class member based upon the proportion that total tuitions paid by or for all such members bear to the total amount available for refunds as provided in Part III of this order, except that members whose tuition was paid in part by a State or local department or division of vocational rehabilitation shall receive a pro rata refund based only on that amount of their tuition not paid by a State or local department or division of vocational rehabilitation. In no event shall any member receive an amount greater than the tuition paid by or for such member.

8. Respondent shall ultimately provide a sum of no greater than seven hundred fifty thousand dollars ($750,000) solely to carry out its obligations to provide refunds and pay administrative costs under Part III of this order. Of this sum, five thousand dollars ($5,000) shall be set aside for payment of administrative costs incurred by respondent or its designee in complying with Part III of this order. Any unused administrative funds shall remain the property of respondent.

9. It is agreed that respondent shall file, within one hundred and eighty (180) days after the date of service, under Rule 3.61(d) of the Commission's Rules of Practice, a written request for advice as to whether its determination of who is an eligible class member complies with the terms of this order provision; and that respondent shall submit simultaneously with its request all Appendix D questionnaires it has received as of the date said request for advice is filed. Respondent shall also, at this time, present any challenges to the factual accuracy of any questionnaire together with substantiating material; such challenges and substantiating material shall be presented solely as a means of assisting the Commission in affording respondent an advisory opinion pursuant to said Rule 3.61(d); *Provided*, That the Commission shall render its advice to respondent and return all Appendix D questionnaires to respondent within two hundred and forty (240) days after the date of service.

10. Respondent or its designee shall contact and deliver a refund check to each eligible class member or his legal representative. For such purpose, respondent shall, among other things, request the last known address of the eligible class member from the Postal Service, telephone the eligible class member or request the assistance of the Social Security Administration; *Provided*, That should the administrative fund referred to in Paragraph 8 be exhausted, each eligible class

member shall have deducted from the total refund amount due him all additional costs incurred by respondent or its designee under this paragraph.

11. Respondent shall, on the two hundred and eightieth (280) day after the date of service, file with the Commission a report in writing setting forth the manner and form in which it has complied with Part III of this order.

12. Respondent shall maintain records and documents for two (2) years after the date this order is served on respondent, which demonstrate that respondent has complied with Part III of this order.

13. It is agreed that should any duty required to be performed on a day certain under Part III of this order fall upon a non-business day, the parties herein may perform such duties on the next following business day.

APPENDIX A

IMPORTANT INFORMATION

Regarding Students of Harrison Business College, of Indianapolis, Indiana*.
Course: Computer Operations
Base Period: Jan. 1, 1974 through June 30, 1974
Information Regarding Post-Graduate Employment of Graduates:

	Number	*Percent*
Total graduates	80	100%*
Total graduates obtaining employment as computer operators	16	20%

Employers Hiring Persons Who Graduated From Harrison Business College of Indianapolis, Ind. From Jan. 1, 1974 Through June 30, 1974:

As Computer Operators	*Total Hired*
ABC Company	4
D ______ Company	4
H ______ & Sons	4
L ______ Company	4

Salary Information Regarding Persons Who Graduated From Harrison Business College of Indianapolis, Ind. From Jan. 1, 1974 Through June 30, 1974:
As Computer Operators

4	Graduate(s) began at a salary between $5,000 and 5,999
6	Graduate(s) began at a salary between $6,000 and 6,999
6	Graduate(s) began at a salary between $7,000 and 7,999

Information Regarding Total Number and Percentage - Who Failed to Complete This Course:

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* The examples of this appendix are for illustration and are not based on actual statistics.

Total number of students enrolled in this course and scheduled to graduate from Jan. 1, 1974 through June 30, 1974: 240
Total number who failed to complete this course: 160
Total percentage who failed to complete this course: 66%

APPENDIX B

Base Period 1 begins Jan. 1, 1974 and ends June 30, 1974.

During July, Respondent shall gather the statistics with respect to Base Period 1. These statistics shall include the required information regarding jobs obtained by the January-June graduates from January 1 through July 31. These statistics may not include any persons who graduate during July and who obtain employment before July 31. Those persons will be included in the statistics for Base Period 2. During August, Respondent shall calculate and prepare the Base Period 1 statistics for distribution.

On September 1, Respondent shall begin to disseminate statistics with respect to graduates for the period January 1 through June 30, and Respondent shall continue to use those statistics through September 30.

During August, Respondent shall gather the statistics with respect to Base Period 2, which begins Feb. 1, 1974, and ends July 31, 1974. These statistics shall include the required information regarding jobs obtained by the February-July graduates from February through August 31. During September, Respondent shall calculate and prepare for distribution the necessary statistics.

Beginning October 1, Respondent shall disseminate the necessary statistics for Base Period 2 and shall be prohibited from disseminating previous base period statistics.

APPENDIX C

(NAME)
(ADDRESS)

Re: Eligibility for partial reimbursement to certain former students of (School Name, City, State)

Dear (Name):

In settlement of a complaint brought by the United States Federal Trade Commission, Lear Siegler, Inc., has agreed to a Consent Order.

The purpose of the enclosed questionnaire is to determine whether or not you are eligible for a partial reimbursement of tuition. Of course, you are under no obligation to send in this questionnaire, but you *must* return this questionnaire to have your eligibility determined.

You may already have received and sent in a similar questionnaire to the Federal Trade Commission. That questionnaire was used in preparation of the Federal Trade Commission's adjudicative proceeding. Now that this proceeding has been settled, this questionnaire seeks *different* information, information which is necessary to determine your eligibility.

DIRECTIONS: Please mark or fill in the appropriate spaces on the questionnaire enclosed, and return it in the enclosed stamped addressed envelope. It is suggested that you fill out and mail in this questionnaire as soon as possible, but in any event no later than (date which represents the one hundred and seventieth day from the date of service). If you should misplace the envelope provided, please mail your questionnaire to the (Name and address of party on return envelope).

You must follow the directions and should answer all questions which apply to you

completely and *truthfully*, to the best of your knowledge. Questionnaires which are incomplete or improperly filled out could result in the loss of eligibility.

NOTE: The Order of the Commission does not affect any tuition loan obligations you may have incurred in connection with your attendance at a Lear Siegler school.

You will be notified whether or not you are eligible. Please send notification of any change in your home address to the (name and address on the return envelope).

Your cooperation is appreciated.

LEAR SIEGLER, INC.
By ______________
James N. Thayer
Vice President and Secretary

APPENDIX D

ELIGIBILITY QUESTIONNAIRE

RE: YOUR ATTENDANCE AT (NAME OF SCHOOL, CITY AND STATE.)

1. Did you enroll in a computer programming or computer operations course at the above-named school?

(CHECK ONE)
Yes .... ( )
No .... ( )

IF THE ANSWER IS "NO", DO NOT FILL IN THE REMAINDER OF THE QUESTIONNAIRE; TURN TO THE LAST PAGE, DATE AND SIGN ON THE APPROPRIATE LINES, AND RETURN THE QUESTIONNAIRE IN THE POSTAGE-PAID ENVELOPE.

2. For which course did you enroll? (CHECK ONE)
a. Computer programming .... ( )
b. Computer operations .... ( )
c. Other (PLEASE EXPLAIN) ...... ( )
____
____

3. Which class sessions did you attend? (CHECK ONE)
Day classes .... ( )
Evening classes .... ( )

4. In what month and year did you enter the school?
(You must give *both* month and year)
MONTH/YEAR _____ / _____

5. Did you complete all of the data processing classes included in the course for which you enrolled? (CHECK ONE)
No .... ( )
Yes .... ( )

6. When you left the school did you make any effort to seek a job in the computer field? (CHECK ONE)
No .... ( )
Yes (SKIP TO Q. 8) .... ( )

7. Please give the *most important* reason why you did *not* seek a job in the computer field: (*CHECK ONE ONLY*)
a. I took the course for advancement in my job and not for the purpose of seeking a job as a systems analyst, computer programmer or computer operator .... ( )
b. I preferred a job in another field (such as accountant or secretary) .... ( )

c. I decided I did not want a job in the computer field .... ( )

d. I decided I would not be able to find a job in the computer field due to a lack of on-the-job experience........( )

e. I decided I would not be able to find a job in the computer field due to insufficient training ....( )

f. I decided I would not be able to find a job in the computer field for the position for which I was trained due to a lack of a 2 or 4 year college degree ...... ( )

g. I married or started a family .... ( )

h. I was drafted or enlisted in the military service ....( )

i. I went to college or other schooling ...... ( )

j. Other (PLEASE DESCRIBE) ....( )

_____ ____________________ ____________________

_____ ____________________ ____________________

_____ ____________________ ____________________

8. Have you ever attained a job in the computer field at any time after you left the school? (CHECK ONE)

Yes .... ( )

No (SKIP TO Q. 13) .... ( )

9. What is the *highest* position you have attained in the computer field at any time since you left the school?

(Please check the position which is closest to the job you have or have had) (CHECK ONE)

a. Systems analyst ....( )

b. Computer programmer ...... ( )

c. Combination of computer programmer and operator ...... ( )

d. Computer operator ....( )

e. Other (PLEASE DESCRIBE JOB DUTIES) ....( )

_____ ____________________ ____________________

_____ ____________________ ____________________

10. Before you attained the above position in the computer field, did you take any further training in computer programming or computer operations at a college or at another vocational school? (CHECK ONE)

Yes ....( )

No (SKIP TO Q. 13) ...... ( )

11. Did your employer pay in full for such further training? (CHECK ONE)

Yes ...... ( )

No ....( )

12. In between your course at the above-named school and the further training you took, what is the *highest* position you attained in the computer field? (Please check the position which is closest to the job you had.) (CHECK ONE)

a. Systems analyst .... ( )

b. Computer programmer ...... ( )

c. Combination of computer programmer and operator ...... ( )

d. Computer operator .... ( )

e. None of the above .... ( )

13. How much in tuition was paid by you or on your behalf for the course you took? (Include all outstanding tuition loan obligations, but do not include interest charges)

AMOUNT: $ ____________

14. Did a state or local department or division of vocational rehabilitation pay any of the tuition for the course for which you enrolled? (CHECK ONE)

Yes .... ( )

No (SKIP TO Q. 16) ...... ( )

15. How much of your tuition was paid by a state or local department or division of vocational rehabilitation?

AMOUNT: $ ________________

16. Have you ever received a refund of any tuition money from the above-named school? (CHECK ONE)

Yes .... ( )
No (SKIP TO Q. 18) .... ( )

17. How much was the refund?

AMOUNT: $ ________________

18. Did you obtain a loan(s) for all or any part of your tuition? (CHECK ONE)

Yes .... ( )
No (SKIP TO "SIGNATURE") .... ( )

19. Please give the name and address of the financial institution who made the loan(s).

________________________ ________________________ ______
________________________ ________________________ ______

Please attach to this form any documents or copies of such documents that indicate you paid an amount of money for any course of instruction offered by the above school. If you cannot provide such documents, your eligibility to receive reimbursement will not be affected.

WARNING: It is a federal crime for anyone to knowingly and willfully make a false, fictitious or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. §1001.

________________________ ________________________
SIGNATURE **DATE**

________________________ ________________________
PRINT NAME HERE **SOCIAL SECURITY NO.**

HOME ADDRESS:

____
Number Street Apt.

____
City State Zip Code

HOME TELEPHONE:

____ — ____________

BUSINESS ADDRESS:

____
Employer's Name

____
Number Street

____
City State Zip Code

BUSINESS TELEPHONE:

____

APPENDIX E

IMPORTANT NOTICE

(NAME)
(ADDRESS)
DEAR (NAME)

Pursuant to an Order of the Federal Trade Commission issued on ______, Lear Siegler, Inc. has been directed to make [percentage] per cent refunds of tuition to certain students who had enrolled in computer programming or computer operations courses previously offered by our company.

The Order of the Commission contains the provisions identifying the class of persons eligible for refunds, and the procedures for making refunds. (You may obtain a copy of the Order without charge by writing to the Federal Trade Commission, Publications, Room 130, Washington, D.C. 20580. Refer to "*Lear Siegler, Inc.*, Docket No. C- 8953.")

In accordance with the provisions of the Order, it has been determined that you are entitled to a refund of $ ______. A check for this amount is enclosed.

Note: The Order of the Commission does not affect any tuition loan obligations you may have incurred in connection with your attendance at the Lear Siegler School.

LEAR SIEGLER, INC.

By: ______________
James N. Thayer
Vice President and Secretary

Enclosure.

[Return Address of Independent Contractor]

APPENDIX F

IMPORTANT NOTICE

Pursuant to an Order of the Federal Trade Commission issued on [*Oct. 6, 1975*], Lear Siegler, Inc. was directed to make partial reimbursements of tuition to certain students who had enrolled in computer programming or computer operations courses formerly offered by our company. The Order of the Commission contains the provisions identifying the class of persons eligible for reimbursements, and the procedures for making reimbursements.

In accordance with the provisions in the Order, it has been determined, based upon your responses to the "Eligibility Questionnaire," that you are not eligible for any reimbursement.

The Order specified that the class of purchasers entitled to reimbursement was limited to those persons who meet *all* of the following tests:

1. enrolled in a computer programming or a computer operations course at a Lear Siegler-owned school from July 1, 1970 through Dec. 31, 1973; and

2. completed all of the data processing classes of the computer course for which they enrolled; and

3. sought employment in the position for which they were trained, except if they elected not to seek employment in the position for which they were trained because of reasons related to sufficiency or quality of the course, or job demand; and

4. (a) for computer programming course enrollees, those persons who did not attain employment as a systems analyst, computer programmer, or combination computer

programmer and operator; or instructor of systems analysis, computer programming, combination computer programming and operations; or a manager or supervisor of persons engaged in computer programming; or in a position whose duties were or are equivalent to a systems analyst, computer programmer, or combination computer programmer and operator; or

(b) for computer operations course enrollees, those persons who did not attain employment as a systems analyst, computer programmer, combination computer programmer and operator, or computer operator; or instructor of systems analysis, computer programming, combination computer programming and operations, or computer operations; or a manager or supervisor of persons engaged in computer programming or operations; or in a position whose duties were or are equivalent to a systems analyst, computer programmer, combination computer programmer and operator, or computer operator; or

(c) persons who attained any one of the employment positions for which he or she was trained as listed above only after receiving further training in computer programming or computer operations at a college or another vocational school, which training was not paid for in full by their employer.

You may obtain a copy of the order without charge by writing to the Federal Trade Commission, Publications, Room 130, Washington, D. C. 20580, (refer to "Lear Siegler Inc., Docket No. [*D. 8953*]").

IN THE MATTER OF

TARA INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2736. Complaint, Oct. 6, 1975-Decision, Oct. 6, 1975

Consent order requiring a Fords, N.J., seller and distributor of swimming pools and swimming pool accessories, among other things to cease misrepresenting the availability of merchandise; using bait advertising; disparaging products offered for sale; misrepresenting reductions in prices; misrepresenting guarantees; failing to disclose customer's right to cancel contracts within specified time frames; and failing to make material disclosures as to the major structural components of their swimming pools.

Appearances

For the Commission: *John A. Crowley.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Tara Industries, Inc., a corporation, and James Mac Dermott, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Tara Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 554 New Brunswick Ave., Fords, N.J.

Respondent James Mac Dermott is an individual and an officer of Tara Industries, Inc. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of swimming pools and swimming pool accessories.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, the aforementioned swimming pools and swimming pool accessories, when sold, to be shipped from the places of business of their supplier in the United States to purchasers thereof located in States other than the State from which such shipments originate.

There is now, and has been, at all times mentioned herein, a substantial and continuous course of trade in said swimming pools and swimming pool accessories in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their products, respondents have made statements and representations with respect thereto in advertisements inserted in newspapers of general interstate circulation and by oral statements and representations made by respondents, their representatives, agents or employees with respect to the nature and limitations of their offers, their prices, their purchasers' savings and the quality of their products.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

ACT NOW
31' x 16'
Outside
15' x 24' x 4'
Swim

Prices will
NEVER BE LOWER!

SWIMMING POOL

Area only $549
Completely
Installed
Sensational PRE-SEASON OFFER
New
1973 SWIMMING POOL
Outside Dimensions 16'x31' Swim Area 15'x24' — 4' Deep
$689
Completely Installed
Sensational PRE-SEASON OFFER
New
1973 SWIMMING POOL
Outside Dimensions 16'x31'. Swim Area 15'x24' — 4' Deep
$889
Completely Installed

* * * Unconditionally guaranteed for 10 years.

* * * Swimming pools are maintenance free.

* * * Usual selling price $6000.

* * * Reduced Prices * * * use of Pools as models or demonstrators.

PAR. 5. By and through the use of the aforesaid statements and representations and others of similar import and meaning, but not specifically set out herein, respondents have represented and are now representing, directly or by implication that:

1. The offers set out in their advertisements are bona fide offers to sell swimming pools of the kind therein described and on the terms and conditions stated.

2. Their advertised offers of a swimming pool for $689 or $889 is a special or sale price and respondents' purchasers or potential purchasers are being offered a price for said pool which would effect a savings amounting to the difference between the special or sale price and some higher price at which such pool is usually and customarily sold.

3. Swimming pools sold by respondents are maintenance free.

4. Some swimming pools sold by respondents are unconditionally guaranteed for a period of ten years.

5. Certain swimming pools sold by respondents are usually sold at prices higher than those offered to potential purchasers and therefore respondents' purchasers are being offered a special or bargain price for said pools which would effect a savings amounting to the difference between the usual and customary price and the price at which the pools are being sold.

6. After the installation of their pool is completed, some purchasers who permit their pools to be used for demonstration and advertising

purposes by respondents in selling pools to other persons would receive an allowance or reduction in price.

PAR. 6. In truth and in fact:

1. The offers set out in respondents' advertisements are not bona fide offers to sell swimming pools of the kind therein described at the prices or on the terms and conditions stated but are made for the purpose of obtaining leads to persons interested in purchasing said pools. After obtaining such leads, respondent Mac Dermott, respondents' salesmen or representatives call upon such persons and disparage respondents' advertised swimming pools and otherwise discourage the purchase thereof and attempt to sell and frequently do sell different and more expensive swimming pools.

2. The advertised swimming pools are not being offered for sale at special or reduced prices and savings are not thereby afforded to purchasers from respondents' usual and customary selling price.

3. The swimming pools sold by respondents are not maintenance free.

4. The swimming pools sold by respondents are not warranted in every respect without conditions or limitations for a period of ten years or any other period of time. Such warranty or guarantee as may be provided is subject to numerous terms, conditions and limitations with respect to the duration of the warranty or guarantee. The purchaser is not informed of the nature and extent of the warranty or guarantee, the identity of the warrantor or guarantor and the manner in which the warrantor or guarantor will perform thereunder until after the installation of the swimming pool.

5. Certain swimming pools sold by respondents have not usually been sold at prices higher than those offered to potential purchasers. Respondents use the stated higher price to mislead potential purchasers into the belief that they are receiving a special or discount price. Respondents do not have a usual and customary selling price for these pools and the prices at which these pools are sold is often substantially below the stated price and varies from purchaser to purchaser depending upon the resistance of the particular purchaser.

6. After the installation of the swimming pool sold by respondents is completed, the purchaser's pool will not, in most instances, be used for demonstration or advertising purposes by respondents. As a result of allowing, or agreeing to allow their pools to be used as demonstrators or models, purchasers are not granted reduced prices or allowances.

Therefore, the statements and representations as set forth in Paragraph Four hereof, were, and are, false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, and in furtherance of a sales program to induce the purchase of their swimming pools and swimming pool accessories, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Six above, respondents or their salesmen or representatives have induced purchasers to sign contracts upon initial contact by not giving the purchaser sufficient time to carefully consider the purchase and consequences thereof.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements were and are true and into the purchase of substantial quantities of respondents' swimming pools and swimming pool accessories by reason of said erroneous and mistaken belief.

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in or affecting commerce, and as "commerce" is defined in the Federal Trade Commission Act, with corporations, firms and individuals engaged in the sale of swimming pools and other products of the same general kind and nature as sold by respondents.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint,

and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Tara Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 554 New Brunswick Ave., Fords, N.J.

Respondent James Mac Dermott is an individual and is an officer of said corporation. He formulates, directs and controls the acts and practices of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, Tara Industries, Inc., a corporation, its successors and assigns, and its officers, and James Mac Dermott, individually and as an officer of the aforesaid corporation and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, distribution or installation of swimming pools or any other product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising or offering for sale any products for the purpose of obtaining leads or prospects for the sale of different products unless the advertised products are capable of adequately performing the function for which they are offered, and respondents maintain an adequate and readily available stock of said products

2. Using any advertising, sales plan or procedure involving the use of false, deceptive or misleading statements or representations designed to obtain leads or prospects for the sale of other merchandise.

3. Representing directly or indirectly that any products or services

are offered for sale when such is not a bona fide offer to sell said products or services.

4. Disparaging any product, installation or service which is advertised or offered for sale by respondents.

5. Representing, directly or by implication, that any price for a swimming pool or other product or service sold by respondents is a special, preseason or sale price, when such price does not constitute a significant reduction from an established selling price at which such swimming pool, product or service has been sold in substantial quantities by respondents in the recent, regular course of business.

6. Representing, in any manner, that the swimming pools or any other products sold by respondents are maintenance free or require no periodic servicing or inspection.

7. Representing directly or indirectly that any of respondents' products, installations or services are warranted or guaranteed, unless the nature and extent of the warranty or guarantee, the identity of the warrantor or guarantor and the manner in which the warrantor or guarantor will perform thereunder are clearly and conspicuously disclosed in immediate conjunction therewith; and unless respondents promptly and fully perform all of their obligations and requirements, directly or impliedly represented, under the terms of each such warranty or guarantee.

8. Representing that by purchasing any merchandise, purchasers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise has been sold or offered for sale at retail in good faith for a reasonably substantial period of time in the recent, regular course of business.

9. Misrepresenting, in any manner, the amount of savings available to purchasers or prospective purchasers of any merchandise sold or offered for sale by respondents.

10. Representing, directly or indirectly, that any price is reduced from respondents' former price if records customarily maintained by respondents fail to establish that such price constitutes a significant reduction from the price at which such merchandise has been sold in substantial quantities or offered for sale in good faith for a reasonably substantial period of time, by respondents in the recent, regular course of their business.

11. Misrepresenting, directly or indirectly, that the pool of any of respondents' purchasers or prospective purchasers will be used for any type of advertising, demonstration or model or that as a result of such use, respondents' purchasers or prospective purchasers will be granted reduced prices or will receive a discount.

12. Failing to furnish the buyer with a fully completed receipt or

copy of any contract pertaining to such sales at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

13. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point boldface type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

[*enter date of transaction*]

____

(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENTS EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE: OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION.

IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO _____ [*Name of seller*] , AT _______________ [*address of seller's place of business*] _______________ , NOT LATER THAN MIDNIGHT OF _____ (*Date*).

I HEREBY CANCEL THIS TRANSACTION.

____
(Date)

____
(Buyer's signature)

14. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

15. Including in any door-to-door contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

16. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

17. Misrepresenting in any manner the buyer's right to cancel.

18. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

19. Negotiating, transferring, selling or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

20. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or abandon any shipped or delivered goods.

Provided, however, That nothing contained in this order shall relieve respondents of any additional obligations respecting contracts required by federal law or the law of the State in which the contract is made. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the State in which such different obligations are required. The Commission, upon showing, shall make such modifications as may be warranted in the premises.

It is further ordered, That respondents maintain records, to be furnished upon request of the Federal Trade Commission or its staff, which disclose the factual basis for any representations or statements made with respect to any prohibition or affirmative disclosure requirement of this order, including, but not limited to, a copy of each advertisement in which a swimming pool is offered for sale at a specified price, the volume of sales of such advertised pool at the advertised price and the name and address of each purchaser of such advertised pool.

It is further ordered, That in any advertisement for swimming pools, respondents shall disclose the material composition of the major structural components of said swimming pool including pool walls, deck, supporting members, rails and liner. Where print advertisements are utilized by respondents, said disclosures shall be set forth in a type size sufficient to clearly and conspicuously disclose the material composition of the said components to a potential purchaser. Where a pool requires periodic painting to preserve or protect wooden components thereof, respondents shall clearly and conspicuously set forth said fact in type of the same size used to list the material composition of major structural components of said swimming pools.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall forthwith distribute a copy of this order to all operating personnel, agents or representatives concerned with the promotion, sale and distribution of swimming pools or any other product and secure from such person a signed statement acknowledging receipt of said order.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

SIMEON MANAGEMENT CORPORATION, ET AL.

Docket 8996. Order, Oct. 7, 1975

Denial of request by individual respondent Darrel P. Simpson that initial decision be set aside as to him, but without prejudice to his filing a motion with supporting affidavit no later than Nov. 24, 1975.

Appearances

For the Commission: *Alfred Lindeman* and *Paul D. Hodge*.

For the respondents: *Marvin Gross, Grayson and Gross, Inc.*, Los Angeles, Calif. for Simeon Management Corporation, *pro se* for Medical Weight Loss, Inc., *Robert M. Aran* for Darrel P. Simpson, *David L. Cunningham*, Sausalito, Calif. for Bariatric Medical Clinics Management Corporation, *Leo Shaw*, San Diego, Calif. for Weight Reduction Medical Clinic and *Josef D. Cooper, Cooper and Scarpulla*, San Francisco, Calif. for C.M. Norcal, Inc., HCG Weight Clinics Foundation, Peter J. Marengo, III and Joseph Costa.

ORDER DENYING WITHOUT PREJUDICE REQUEST TO SET ASIDE INITIAL DECISION AS TO ONE RESPONDENT

On Jan. 7, 1975, the administrative law judge filed an initial decision as to three respondents, J. William Byrd, Medical Weight Loss, Inc., and Darrel P. Simpson. The decision was predicated on their failure to answer the complaint. On Mar. 7, 1975, the Commission stayed the effective date of the initial decision as to the three respondents until further order of the Commission.[1]

By letters to Charles A. Tobin dated Feb. 25, 1975, and Mar. 13, 1975, counsel for respondent Simpson asserted that Mr. Simpson had not been served with the complaint and that, at the time he was served with the first initial decision, he was totally unaware of the contents of the complaint.

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[1] The law judge filed an initial decision as to the remaining respondents on June 18, 1975. Respondents and complaint counsel have filed cross-appeals from the second initial decision and oral argument has been scheduled for Oct. 9, 1975.

Unsworn, second-hand allegations, however, do not warrant the setting aside of an initial decision. Accordingly,

It is ordered, That respondent Simpson's request that the initial decision, filed on Jan. 7, 1975, be set aside as to him, be, and it hereby is, denied without prejudice to the filing of a motion, accompanied by an affidavit by Mr. Simpson, in support of the motion, no later than Nov. 24, 1975.

IN THE MATTER OF

PORTER & DIETSCH, INC., ET AL.

Docket 9047. Order, Oct. 7, 1975

Granting of respondents' motion for issuance of corrective news release disclosing complaint was issued subject to caveat.

Appearances

For the Commission: *Dean A. Fournier, Alan H. Melnicoe* and *William H. Patton.*

For the respondents: *Albert A. Corretta, Browne, Beveridge, DeGrandi and Kline*, Wash., D.C. for Porter & Dietsch, Inc. and *pro se* for Pay N' Save Corporation.

ORDER GRANTING RESPONDENTS' MOTION FOR ISSUANCE OF CORRECTIVE NEWS RELEASE

The administrative law judge has certified an unopposed motion filed by respondents Porter & Dietsch, Inc.; William H. Fraser; Kelly Ketting Furth, Inc.; and Joseph Furth for the issuance of a corrective news release.

The news release published shortly after the complaint was issued failed to include the usual caveat that the Commission issues a complaint when it "has reason to believe" that the law has been violated and a proceeding is in the public interest, and that the issuance of a complaint simply marks the beginning of a formal proceeding in which the allegations will be ruled upon after a public hearing.

Respondents move that a corrective news release disclosing that the complaint was issued subject to the above-indicated caveat be promptly published. Accordingly,

It is ordered, That the aforesaid motion be, and it hereby is, granted, and that the Office of Public Information be directed to issue promptly a press release disclosing that the earlier release erroneously failed to include the following caveat:

> The FTC issues a complaint when it has "reason to believe" that the law has been violated and that a proceeding is in the public interest. Such action simply marks the beginning of a formal proceeding in which the allegations will be ruled upon after a public hearing.

IN THE MATTER OF

FMC CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8961. Complaint, Apr. 8, 1974-Decision, Oct. 8, 1975

Consent order requiring a Chicago, Ill. producer and distributor of pesticides, among other things to cease misrepresenting their products as being absolutely or unqualifiedly safe, non-toxic or free of hazard under conditions of normal use to human beings, warm-blooded animals, birds, fish, beneficial insects, or the environment.

Appearances

For the Commission: *Paul L. Chassy, Miriam A. Bender* and *Eugene Kaplan.*

For the respondents: *Thomas J. Whitehead, McKean, Whitehead & Wilson,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that FMC Corporation, a corporation, hereinafter referred to as respondent, has violated provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint and the order attached hereto, the following definitions of terms shall apply:

(1) "Pesticide" refers to (a) any substance or mixture of substances, including insecticides, intended for preventing, destroying, repelling or mitigating any pest, and (b) any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant.

(2) "Insecticide" refers to any substance or mixture of substances

intended for preventing, destroying repelling or mitigating any insects which may be present in any environment whatsoever.

(3) "Phosphate insecticides" refers to those insecticides belonging to the organic phosphorous chemical class.

(4) "Labeling" refers to all labels and other written, printed, or graphic matter (a) accompanying the pesticide at any time, or (b) to which reference is made on the label or in literature accompanying the pesticide where warnings, cautions, directions or limitations for the pesticide's use appear.

PAR. 2. FMC Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1105 Coleman Ave., in the city of San Jose, State of California.

PAR. 3. Respondent is now, and for some time last past has been, through its Agricultural Chemicals Division (formerly Niagara Chemical Division), engaged in the production, formulation, advertising, offering for sale, sale and distribution of pesticides designated as "Furadan," "Thiodan," "Ethion," "Sinox," "Polyram" and other pesticide products to formulators, distributors, retailers, for resale to the public, and to the public.

PAR. 4. In the course and conduct of its business as aforesaid respondent now causes, and for some time last past has caused the said products, when sold, to be transported from its place of business in one State of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its said business, and for the purposes of inducing the purchase of Furadan, Thiodan, Ethion, Sinox, Polyram, and other pesticide products, respondent has made, and is now making, alone or in cooperation with others, orally or in writing, numerous statements and representations concerning the safety and efficacy of said products, which are disseminated in advertisements in print and broadcast media, in promotional materials and by other means. Such statements and representations include, but are not limited to, the following:

Furadan:

(1) Safe to use.

(2) Furadan granules are safe to handle.

(3) Furadan * * * is safe to handle in comparison to other products.

(4) Furadan is easy to use * * * Safer for the operator, too.

(5) Furadan * * * is less hazardous than most other rootworm insecticides.

(6) Furadan presents less hazards to the user than many pesticides commonly used today.

(7) Fear no weevil * * * Use Furadan * * * And fear no more.

(8) Furadan Toxicity. Furadan 10 Granules have been found less hazardous than many other accepted pesticides in common use. Furadan is not readily absorbed through the skin, as shown by the dermal LD50 (10, 500mg/kg) rating. Care should be taken, however, to avoid rough handling which can powder material off the granules and create a slight hazard. Even so, a wide margin exists between the dose that will cause mild symptoms and that which will cause serious illness. The effects, also, are spontaneously reversible in a few hours and there is no cumulative toxicity.

Thiodan:

(1) Thiodan-safe to use.

(2) Thiodan * * * has a remarkable record of safety.

(3) Thiodan controls them all — safely.

(4) Thiodan is preferred because of its moderate toxicity - not like hazardous phosphate compounds * * *

(5) * * * low toxicity to bees and other insect predators.

(6) Growers can expect to use Thiodan without severe damage to bees * * *

(7) Easy to use * * * easy to handle.

(8) Thiodan is itself classed as "moderately toxic." When used in combination with Parathion sprays, normal safe handling precautions should be followed.

Ethion:

(1) Ethion when used in accordance with directions, is safe to the applicator.

(2) Ethion formulations are safer to use than many other pesticides.

Sinox:

(1) SINOX PE is a pre-emergence spray material which is both safe and highly effective * * *

Polyram:

(1) Polyram * * * A safe, sure fungicide for dependable, consistent control of * * * blight.

(2) Polyram * * * It's non-hazardous and requires no special clothing or safety equipment.

(3) Polyram is safe to use * * *.

PAR. 6. Through the use of statements and representations as alleged in Paragraph Five hereof, respondent has represented and is now representing, directly or by implication, that:

(1) Furadan, Thiodan, Ethion, Sinox, Polyram and other pesticide products are safe, non-toxic, hazard-free products.

(2) Thiodan is relatively more safe in all respects than all phosphate insecticide products on the market.

(3) Furadan and Ethion are relatively more safe in all respects than many or most other insecticide products on the market.

PAR. 7. In truth and in fact:

(1) Furadan, Thiodan, Ethion, Sinox, Polyram and other pesticide products are not safe, non-toxic, hazard-free products as represented by respondent.

(2) Thiodan is not relatively more safe in all respects than all phosphate insecticide products on the market.

(3) Furadan and Ethion are not relatively more safe in all respects than many or most other insecticide products on the market.

Therefore, the statements and representations as alleged in Paragraph Five hereof were, and are, deceptive.

PAR. 8. By making statements and representations, alone or in cooperation with others, orally or in writing, which appear in advertisements in print or broadcast media, in promotional material and by other means, about Furadan, Thiodan, Ethion, Sinox, Polyram and other pesticide products in a manner which is inconsistent with or disregards warnings, cautions, limitations and instructions for use found in labeling, respondent negates the import and purposes of and detracts from the effectiveness of such warnings, cautions, limitations or instructions.

Therefore, the advertisements, other promotional materials, acts and practices which contain the statements and representations referred to in Paragraph Eight above are unfair or deceptive.

PAR. 9. In the further course and conduct of its business as aforesaid, respondent has made statements and representations, alone or in cooperation with others, orally or in writing, which appear in advertisements in print and broadcast media, in promotional material or by other means, about Furadan, Thiodan, Ethion, Sinox, Polyram and other pesticide products without disclosing that such products are hazardous. Knowledge of the hazards associated with the use of such products would enable and encourage consumers to exercise the proper degree of care in using them.

Thus, respondent has failed to disclose material facts which, if known to consumers, would be likely to affect their consideration of whether or not to purchase, and how to properly use, such products. Therefore, advertisements, promotional materials, acts or practices, which fail to disclose the aforesaid material facts, are unfair or deceptive.

PAR. 10. Respondent has made statements and representations, alone or in cooperation with others, orally or in writing, which appear in advertisements in print or broadcast media, in promotional material, or by other means, which do not delineate the circumstances and conditions under which they are not universally accurate and do not define the objects of comparison when they are phrased in comparative terms. Such statements and representations have the capacity and tendency to mislead consumers regarding the safety or efficacy of the products.

Therefore, the advertisements, promotional material, acts or practices which contain such statements or representations are deceptive or unfair.

PAR. 11. In the course and conduct of its business as aforesaid and at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of insecticide products of the same general kind and nature.

PAR. 12. The use by respondent of the said deceptive or unfair advertisements, acts or practices has had, and now has, a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true and induce them into the purchase of substantial quantities of Furadan, Thiodan, Ethion, Sinox, Polyram, and other pesticide products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts or practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair or deceptive acts or practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent FMC Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State

of Delaware, with its principal office and place of business located at 200 E. Randolph Dr., Chicago, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent, FMC Corporation, a corporation, its successors and assigns and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, department or other device, in connection with the advertising, offering for sale, or sale or distribution of any pesticide product with precautionary labeling which contains any active pesticidal ingredient(s) presently marketed by respondent or currently being field tested by respondent and which is intended for use by custom applicators and commercial growers to protect animals or food, forage, field or fiber crops by virtue of the capacity of its active ingredient(s) to kill pests (sometimes referred to hereinafter as "such products"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, by print or broadcast advertising, by other promotional material, or by sales representatives' oral statements, that such products are absolutely or unqualifiedly safe, non-toxic or free of hazard for any use registered under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (hereinafter FIFRA) or any other approved use based upon evidence filed in connection with registration under FIFRA.

Provided, however, That for purposes of enforcing Paragraph I A of this order any advertisement, statement, claim or representation that such products may be employed for a crop or plant use registered under FIFRA, or any other approved use based upon evidence filed in connection with registration under FIFRA shall not be deemed a violation of this order; *Provided, further*, That this exception shall be effective only until such time as a trade regulation rule covering the advertising and promotion of such products subject to this order and containing terms at least as onerous as Paragraph I A of this order becomes final and effective.

II

With respect to representations not covered by the provisions of Section I of this order, *It is ordered*, That FMC Corporation, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, department or other device, in connection with the advertising, offering for sale, or sale or distribution of such products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, by print or broadcast advertising, by other promotional material, or by sales representatives' oral statements, that such products are absolutely safe, non-toxic or free of hazard to human beings, warm-blooded animals, birds, fish, beneficial insects, or the environment.

III

It is further ordered, That respondent, FMC Corporation, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, department or other device, in connection with the advertising, offering for sale, or sale or distribution of such products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from disseminating or causing the dissemination of:

A. Any print advertising or print promotional material which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes in such print advertising or print promotional material the following statement:

STOP! ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.

B. Any broadcast advertisement more than 30 seconds in length which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes the following statement:

ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.

C. Any broadcast advertisement of 30 seconds or less in length which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes the following statement:

ALL PESTICIDES CAN BE HARMFUL. READ THE LABEL USE AS DIRECTED.

Provided, That in television advertisements of 10 seconds or less in length for any such products which contain no direct representations concerning product safety, the requirements of the term "clearly and conspicuously" shall in all cases be met by including the above statement in the video portion of the advertisement.

Provided, however, That for purposes of enforcing Paragraph III of this order any advertisement, statement, claim or representation that such products may be employed for a crop or plant use registered under FIFRA, or any other approved use based upon evidence filed in connection with registration under FIFRA shall not be deemed sufficient to require the disclosure of any statement otherwise required under the provisions of Paragraph III; *Provided, further*, That this exception shall be limited to advertisements which promote the respondent's corporate image, which only incidentally promote the sale or distribution of such products and which are published or disseminated for publication by respondent's corporate headquarters' offices in conjunction with respondent's other nonpesticide products.

IV

Nothing in this order shall be construed to apply to scientific articles published in recognized scientific or agricultural journals or government publications, or reprints thereof, or representations (other than print advertising or other promotional material) before public or governmental forums such as public hearings, scientific meetings, or to governmental agencies, agents, or employees responsible for the regulation, testing, or dissemination of information concerning pesticide products covered by this order.

V

It is further ordered, That nothing in this order shall prohibit the dissemination of product labels (as defined by Section 2(p)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended), or reproductions thereof.

VI

It is further ordered, That should the Federal Trade Commission promulgate a trade regulation rule or industry guide governing the advertising or promotion of products subject to this order, then any pertinent less comprehensive or less restrictive provisions of such rule or guide shall automatically replace any comparable provisions set forth herein which are effective on the date that such rule or guide becomes final and effective.

VII

It is further ordered, That the respondent forthwith distribute a copy of this order to each of the operating departments of respondent's agricultural chemical division and any other operating division engaged in the manufacture, sale, advertising, promotion or distribution of products subject to this order, and to all present and future employees of such operating divisions responsible for the advertising, promotion, distribution or sale of such products.

VIII

It is further ordered, That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other changes in the corporation which may affect compliance obligations arising out of this order.

IX

It is further ordered, That respondent corporation shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the provisions of this order.

X

It is further ordered, That this order shall become effective upon service.

IN THE MATTER OF

WILSONS HOUSE OF SUEDE, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2737. Complaint, Oct. 14, 1975-Decision, Oct. 14, 1975

Consent order requiring a Beverly Hills, Calif., manufacturer and retailer of suede and leather wearing apparel, among other things to cease making deceptive pricing and savings claims.

Appearances

For the Commission: *George J. Gregores.*

For the respondents: *Glenn M. Alperstein, Gillin, Scott & Alperstein*, Hollywood, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Wilsons House of Suede, a corporation, and Jerrold A. Wilson, Brian Wilson, and Jeffery Wilson, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Wilsons House of Suede is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 9844 Wilshire Blvd., Beverly Hills, Calif.

Respondents Jerrold A. Wilson, Brian Wilson, and Jeffery Wilson are individuals and officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in manufacturing, advertising, offering for sale, sale and distribution of used and leather wearing apparel.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have caused, and now cause, their said suede and leather wearing apparel when sold, to be shipped from their place of business in the State of California to purchasers thereof located in various other States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their suede and leather wearing apparel, respondents have made numerous statements and representations in advertisements in newspapers of interstate circulation and on interstate television respecting the price of their merchandise and the savings afforded purchasers thereof.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

> UP TO 50% OFF The largest selection in the world is at Wilson's! A fine collection of coats have been marked down at up to 50% off. RIGHT NOW!* * * Now is the time to

feel the rich comfort that only suede or genuine leather can offer, by coming into Wilson's House of Suede, during our big 1/2 off Sale!

* * * * * * *

For a limited time, Wilson's is offering $50 off the regular price of any fur coat or jacket of your choice * * * save a full $50 over our low price by coming in during this limited "Special" Sale!

* * * * * * *

WILSON'S MEMORIAL DAY SALE IS ON RIGHT NOW! And this is the right time to take advantage of our tremendous selection, marked 20% to 40% down.* * * so hurry for this limited offer Sale! SPECIAL ADDED BONUS! Cut out this coupon right now and bring it in to your nearest store for a spectacular discount $25 OFF on any long coat of your choice * * * one week only!

* * * * * * *

$69.95-ONE WEEK ONLY! WILSON'S TOTAL WAREHOUSE SALE!* * * And what's more, there are hundreds more fantastic values like this in our stores during our gigantic WAREHOUSE SALE!* * * We carry the world's largest collection of men's and women's fine suede and leather fashions at lower prices, because we make all our own coats.

* * * * * * *

FACTORY SHOWROOM SAVINGS! That's what you'll find at Wilson's House of Suede and Leather! Because we cut our coats, and sell them direct to you, eliminating the middleman profits, your coat will cost less!

* * * * * * *

SALE IS NOW ON! "Last Year's Prices on This Year's Coats!" * * * This is a "special purchase," made last year by Wilson's, of the finest suedes and leathers * * * and is now available for creating the latest styles in coats and jackets.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents have represented, directly or by implication:

1. Through the use of the word "SALE," and other words of similar import and meaning not set out specifically herein, that suede and leather wearing apparel could be purchased at special or reduced prices, and purchasers were thereby afforded savings from respondents' regular selling prices.

2. That purchasers of the merchandise referred to would realize a savings of the stated amount from the actual, bona fide price at which respondents offered or sold said merchandise to the public in the recent, regular course of business on a regular basis for a reasonably substantial period of time in the trade area where the representation was made.

3. That the represented reduced prices were available only during the limited period of the sale and would be returned to respondent's presale bona fide offering price or changed to some price substantially higher than the allegedly reduced price, immediately after the completion of the sale.

4. That all styles of wearing apparel pictured in an advertisement were offered at the savings indicated in that particular advertisement or at a "Sale" price.

5. That a substantial supply of suede and leather wearing apparel was available in respondent's stores throughout a stated range of savings, such as "up to 50% off" or "marked 20% to 40% down."

6. That the facility or facilities at which respondents' merchandise was being offered for sale or sold were primarily "warehouses" or "factory showrooms."

7. That all merchandise in respondents' "warehouse" was being offered at reduced prices.

8. That purchasers of suede and leather wearing apparel would realize a savings because respondents manufactured all such apparel in their own factory, or had made a special purchase of materials.

PAR. 6. In truth and in fact:

1. Respondents' merchandise was not being offered for sale at special or reduced prices. To the contrary, the price respondents regularly advertised and their so-called advertised "sale" price were substantially identical and were used to mislead prospective customers into believing there was a saving from a bona fide regular selling or offering price.

2. The purchasers of the merchandise referred to did not realize a savings of the stated amount from the actual, bona fide price at which respondents offered or sold said merchandise to the public in the recent regular course of business on a regular basis for a reasonably substantial period of time in the trade area where the representation was made.

3. Many of the represented reduced prices were not returned to respondents' presale bona fide offering prices, nor changed to some prices substantially near said "regular prices." Thus, the period during which the "reduced" prices were available on many items was not limited to the period of the sale.

4. All styles of wearing apparel pictured in various advertisements were not subject to the savings indicated in the particular advertisement, nor to a "sale" price.

5. A substantial supply of suede and leather wearing apparel was not available in respondents' stores throughout the stated range of savings.

6. The facility or facilities at which said merchandise was being offered for sale or sold were not used primarily for the storage or warehousing of merchandise used by respondents' retail business. Nor did said facilities constitute primarily a "factory showroom" or adjunct to respondents' factory for the purpose of display to retail and wholesale purchasers. Instead, respondents sold or offered their merchandise for sale in facilities regularly used for the display and sale of said merchandise at retail.

7. All merchandise in respondents' "warehouse" was not being offered at reduced prices. Instead, only a minimal number of styles was being so offered.

8. Respondents did not manufacture all suede and leather wearing apparel in their own factory, nor had they made a special purchase of materials which resulted in a lower offering price. Thus, these factors could not enable purchasers to realize a savings.

Therefore, the statements as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms, and individuals, in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of aforesaid false, misleading, and deceptive statements, representations, and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and the respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Wilsons House of Suede is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 9844 Wilshire Blvd., Beverly Hills, Calif.

Respondents Jerrold A. Wilson, Brian Wilson and Jeffery Wilson are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Wilsons House of Suede, a corporation, its successors and assigns, and its officers, and Jerrold A. Wilson, Brian Wilson, and Jeffery Wilson, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale and distribution of suede and leather wearing apparel, or any other product or service in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting in any manner, the amount of savings available to purchasers of respondents' merchandise, or the amount by which the price of merchandise has been reduced, either from the price at which it has been usually and customarily sold by respondents in the recent regular course of business, or from the price from which it has been

usually and customarily sold at retail in the trade area where the representation is made, or from the price at which such merchandise has been offered for sale in good faith for a reasonably substantial period of time, by respondents in the recent, regular course of their business.

2. Misrepresenting, directly or by implication, that the sale of suede and leather wearing apparel or other merchandise at certain prices, terms or conditions is limited to specific days or periods of time.

3. Using the word "sale" or any other words of similar import and meaning in advertising or other promotional materials containing nonsale items without clearly and conspicuously revealing in immediate conjunction with said representations that nonsale items are contained therein and distinctively identifying said nonsale items.

4. Using the words "Up to 50% Off" or "Half-off Sale" or "marked down 20% to 40%" or any other words representing a range of price reductions, unless a reasonably substantial number of items of sale merchandise are available throughout said range.

5. Using the words "warehouse," "factory showroom," or any other words of similar import and meaning; or misrepresenting, in any manner, the nature or status of respondents' business, or the size, description or classification of any of respondents' physical facilities.

6. Using the words "Total Warehouse Sale" or "Warehouse Sale," or any other words of similar import and meaning; or misrepresenting, directly or by implication, that all or a substantial amount of respondents' warehouse stock is offered for sale.

7. Representing that purchasers of respondents' merchandise will realize a savings because respondents manufacture such merchandise in their own factory, or have made a special purchase of materials, or because of any other claimed unique or special method of doing business, event, or situation; unless respondents' business records and/or other information available to respondents establish and show the basis of such representations.

8. Representing, directly or by implication, through the use of terms such as "Sale," "Savings" or in any other manner, that any price is reduced from respondents' former price unless respondents' business records establish and show that such price is not an inconsequential reduction from the price at which such merchandise has been sold or offered for sale in good faith for a reasonably substantial period of time, by respondents in the recent, regular course of their business.

9. Failing to maintain adequate records for at least two years from the date of the publication of the advertisement (a) which disclose the facts upon which any savings claims, including former pricing claims, and similar representations of the type described in Paragraphs 1, 4, 7,

and 8 of this order are based, and (b) from which the validity of any savings claims, including former pricing claims and similar representations of the type described in Paragraphs 1, 4, 7 and 8 of this order can be determined.

It is further ordered, That the individual respondents named herein promptly notify the Commission in the event of both (1) the discontinuance of their present business or employment and (2) of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That respondent corporation, its successors and assigns, deliver a copy of this order to cease and desist to all present and future employees of respondents engaged in the preparation, creation or placing of advertising for the offering for sale, sale or distribution of suede and leather wearing apparel and other merchandise, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other substantive change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ANTELOPE SHORES, INCORPORATED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2738. Complaint, Oct. 14, 1975-Decision, Oct. 14, 1975

Consent order requiring six Denison, Tex., sellers of undeveloped real estate, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *John J. Hemrick.*
For the respondents: *Charles L. Gullett*, Denison, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof and more particularly described below and sometimes referred to hereinafter as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

1. Respondents Antelope Shores, Inc., doing business as Sherwood Shores VII and VIII of Belton; and Castle Land and Livestock Company, doing business as Castle Lake Ranch; and Greenbelt, Inc., doing business as Sherwood Shores IX; and Saint's Roost, Inc. doing business as Mesa Verde Ranch; and Texoma Lakeside Village, Inc., doing business as Mill Creek Meadows, are corporations organized, existing and doing business under and by virtue of the laws of the State of Texas with their principal office and place of business located at P.O. Box 497, 200 S. Austin St., Denison, Tex.

Respondent Sherwood Properties, Inc. of Utah doing business as Sherwood Shores V, is a corporation organized, existing and doing business under and by virtue of the laws of the States of Utah and Texas, with its principal office and place of business located at P.O. Box 497, 200 S. Austin St., Denison, Tex.

Respondent George L. DeArmond is a director of the corporate respondents, and an officer of the corporate respondents except respondent Saint's Roost, Inc. doing business as Mesa Verde Ranch. He formulates, directs and controls the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondents.

2. Respondents are now and for sometime last past have been engaged in the advertising, offering for sale and sale of undeveloped real estate to the public.

3. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend, and for some time last past have regularly extended, consumer credit, as "consumer credit" is defined in

Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

4. Subsequent to July 1, 1969, in the ordinary course of their business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, respondents have caused and are causing their customers to enter into contracts for the sale of respondents' real estate. On these contracts, hereinafter referred to as "the contract," respondents provide certain consumer credit cost information. Respondents do not provide these customers with any other consumer credit cost disclosures prior to the consummation of the "credit sale" as required by Section 226.8(a) of Regulation Z.

COUNT I

Alleging violations of the Truth in Lending Act, the charges of Paragraphs 1, 2, 3 and 4 hereof are incorporated by reference herein as if set forth verbatim.

5. By and through the use of the contract, respondents:

A. Fail to disclose the finance charge and the annual percentage rate above or adjacent to the place for the customer's signature as required by Section 226.8(a)(1) of Regulation Z.

B. Fail to disclose the number of payments scheduled to repay the obligation as required by Section 226.8(b)(3) of Regulation Z.

C. Fail to disclose the "total of payments" using that term as required by Section 226.8(b)(3) of Regulation Z.

D. Fail to use the term "cash down payment" as required by Section 226.8(c)(2) of Regulation Z.

E. Fail to use the terms as applicable "unpaid balance of cash price" or "unpaid balance" or "amount financed" as required by Sections 226.8(c)(3)(5) and (7) of Regulation Z.

F. Fail to disclose the "deferred payment price" using that term as required by Section 226.8(c)(8)(ii) of Regulation Z.

G. Fail to determine on the face of the contract whether the customer expects to use the property purchased from respondents as a principal residence so that it can be determined whether the customer is entitled to any of the rights provided in Section 226.9 of Regulation Z.

COUNT II

Alleging violations of the Truth in Lending Act, the charges of Paragraphs 1, 2, 3 and 4 hereof are incorporated by reference herein as if set forth verbatim except as to respondents Saint's Roost, Inc. doing business as Mesa Verde Ranch and Texoma Lakeside Village, Inc. doing business as Mill Creek Meadows.

6. By and through the use of the contract, respondents, except those excluded, have failed to disclose the annual percentage rate with an accuracy at least to the nearest quarter of one percent as required by Section 226.5(b)(1) of Regulation Z.

COUNT III

Alleging violations of the Truth in Lending Act, the charges of Paragraphs 1, 2, 3 and 4 hereof are incorporated by reference herein as if set forth verbatim except as to respondents Castle Land and Livestock Company doing business as Castle Lake Ranch; Saint's Roost, Inc. doing business as Mesa Verde Ranch and Texoma Lakeside Village, Inc. doing business as Mill Creek Meadows.

7. By and through the use of the contract, respondents, except those excluded, have failed to use the term "cash price" as required by Section 226.8(c)(1) of Regulation Z.

COUNT IV

Alleging violations of the Truth in Lending Act, the charges of Paragraphs 1, 2, 3 and 4 hereof are incorporated by reference herein as if set forth verbatim except as to respondents Castle Land and Livestock Company doing business as Castle Lake Ranch; Greenbelt, Inc. doing business as Sherwood Shores IX; Sherwood Properties, Inc. of Utah doing business as Sherwood Shores V and Texoma Lakeside Village, Inc. doing business as Mill Creek Meadows.

8. In the ordinary course of their business as aforesaid, respondents, except those excluded, cause to be published advertisements of their property, as "advertisement" is defined in Regulation Z. These advertisements aid, promote, or assist directly or indirectly extensions of consumer credit in connection with the sale of their property.

Typical and illustrative of said advertisements, but not all inclusive thereof are:

A. 11.22 Acre tract — Cash Price $3,310 or owner will finance with $110 down payment, 10 year payment at $38.83 per month. 8% simple interest.

B. Sherwood Shores — $995 — Will sell for $695. $70 down and $20 per month.

9. By and through the use of the advertisements set forth in Paragraph Eight hereof, respondents, except those excluded, have stated the amount of the down payment, the number of monthly installments, the period of repayment, and the simple rate of interest without also disclosing the following items in the terminology required by Section 226.8 of Regulation Z:

A. Failed to use the term "cash price" to describe the cash price of the property as required by Section 226.10(d)(2)(i) of Regulation Z.

B. Fail to use the term "cash down payment" to describe the amount of the down payment in cash as required by Section 226.10(d)(2)(ii) of Regulation Z.

C. Fail to disclose the number of installments scheduled to repay the obligation as required by Section 226.10(d)(2)(iii) of Regulation Z.

D. Fail to disclose the "annual percentage rate" using that term as required by Sections 226.10(d)(2)(iv) of Regulation Z.

E. Fail to disclose the "deferred payment price" using that term as required by Section 226.10(d)(2)(v) of Regulation Z.

10. By and through the acts and practices set forth above, respondents have failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Act, such failure to comply constitutes a violation of the Truth in Lending Act, and, pursuant to Section 108 thereof, respondents have violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents Antelope Shores, Incorporated doing business as

Sherwood Shores VII and VIII of Belton; Castle Land and Livestock Company doing business as Castle Lake Ranch; Greenbelt, Inc., doing business as Sherwood Shores IX; Saint's Roost, Inc., doing business as Mesa Verde Ranch, and Texoma Lakeside Village, Inc., doing business as Mill Creek Meadows, are corporations organized, existing and doing business under and by virtue of the laws of the State of Texas with their principal office and place of business located at P.O. Box 497, 200 S. Austin St., Denison, Tex.

Respondent Sherwood Properties, Inc., of Utah doing business as Sherwood Shores V, is a corporation organized, existing and doing business under and by virtue of the laws of the States of Utah and Texas, with its principal office and place of business located at P.O. Box 497, 200 S. Austin St., Denison, Tex.

Respondent George L. DeArmond is a director of the corporate respondents, and an officer of the corporate respondents except respondent Saint's Roost, Inc., doing business as Mesa Verde Ranch. He formulates, directs and controls the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents, Antelope Shores, Incorporated, a corporation doing business as Sherwood Shores VII and VIII of Belton; Castle Land and Livestock Company, a corporation doing business as Castle Lake Ranch; Greenbelt, Inc., a corporation doing business as Sherwood Shores IX; Saint's Roost, Inc., a corporation doing business as Mesa Verde Ranch; Sherwood Properties, Inc., of Utah, a corporation doing business as Sherwood Shores V; and Texoma Lakeside Village, Inc., a corporation doing business as Mill Creek Meadows, their successors and assigns, and their officers, and George L. DeArmond, individually and as an officer or director of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the finance charge and the annual percentage

rate above or adjacent to the place for the customer's signature as required by Section 226.8(a)(1) of Regulation Z.

2. Failing to disclose the number of payments scheduled to repay the obligation as required by Section 226.8(b)(3) of Regulation Z.

3. Failing to disclose the "total of payments" using that term as required by Section 226.8(b)(3) of Regulation Z.

4. Failing to use the term "cash downpayment" as required by Section 226.8(c)(2) of Regulation Z.

5. Failing to use the term, or terms as applicable, "unpaid balance of cash price" or "unpaid balance" or "amount financed" as required by Sections 226.8(c)(3), (5) and (7) of Regulation Z.

6. Failing to disclose the "deferred payment price" using that term as required by Section 226.8(c)(8)(ii) of Regulation Z.

7. Failing in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

8. Failing to have the following notice printed in bold face type on the face of each of the respondents' contracts:

NOTICE

IF YOU EXPECT TO USE THIS PROPERTY AS YOUR PRINCIPAL RESIDENCE YOU HAVE UNTIL MIDNIGHT OF THE THIRD BUSINESS DAY FOLLOWING THE DAY YOU SIGN THIS CONTRACT TO CANCEL THIS TRANSACTION. IT IS THEREFORE REQUIRED THAT YOU COMPLETE THE FOLLOWING:

I DO I DO NOT

EXPECT TO USE THIS PROPERTY AS THE SITE OF MY PRINCIPAL RESIDENCE

____________________ ____________________

SIGNATURE DATE

9. Failing to provide two copies of the notice of the right of rescission to each customer so entitled in the manner and form required by Section 226.9 of Regulation Z.

II

It is further ordered, That respondents Antelope Shores, Incorporated, a corporation doing business as Sherwood Shores VII and VIII of Belton; Castle Land and Livestock Company, a corporation doing business as Castle Lake Ranch; Greenbelt, Inc., a corporation doing business as Sherwood Shores IX; and Sherwood Properties, Inc., of Utah, a corporation doing business as Sherwood Shores V, their successors and assigns, and their officers, and George L. DeArmond, individually and as an officer or director of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension of consumer credit as "consumer credit" is defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

10. Failing to disclose the annual percentage rate with an accuracy of at least to the nearest quarter of one percent as required by Section 226.5(b)(1) of Regulation Z.

III

It is further ordered, That respondents Antelope Shores, Incorporated, a corporation doing business as Sherwood Shores VII and VIII of Belton; and Greenbelt, Inc., a corporation doing business as Sherwood Shores IX; and Sherwood Properties, Inc., of Utah, a corporation doing business as Sherwood Shores V, their successors and assigns, and their officers, and George L. DeArmond, individually and as an officer or director of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

11. Failing to use the term "cash price" as required by Section 226.8(c)(1) of Regulation Z.

IV

It is further ordered, That respondents Antelope Shores, Incorporated, a corporation doing business as Sherwood Shores VII and VIII of Belton; and Saint's Roost, Inc., a corporation doing business as Mesa Verde Ranch, corporations, their successors and assigns, and their officers, and George L. DeArmond, individually and as an officer or director of said respondent corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

12. Representing, directly or by implication, in any advertisement as "advertisement" is defined in Regulation Z, that no downpayment is required, or the amount of the downpayment or of any installment payment required (either in dollars or as a percentage), the dollar

amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless it also clearly and conspicuously sets forth all of the following items in terminology prescribed under Section 226.8, as required by Section 226.10(d)(2):

(a) the cash price;

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(d) the amount of the finance charge expressed as an annual percentage rate; and

(e) the deferred payment price.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents who are engaged in any aspect of the extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said copy of this order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

TYSONS CORNER REGIONAL SHOPPING CENTER, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8886. Decision, June 10, 1975-Modifying Order, Oct. 21, 1975

Order modifying an earlier order dated June 10, 1975, 85 F.T.C. 987, 40 F.R. 36560, issued against a New York City department store chain by expanding the order with the addition of Paragraph III(C) to permit respondent to negotiate to include agreements in its shopping center leases which would provide that a W&J Sloane furniture specialty store shall be the only tenant in the center primarily engaged in the sale of furniture, home furnishings, and related accessories; and by modifying Paragraph IV(B) to allow respondent to limit distribution of copies of the order to those developers of shopping centers in which respondent is a tenant operating a store containing 50,000 square feet or more.

Appearances

For the Commission: *Anthony Low Joseph*, *David I. Wilson* and *Maynard F. Thomson.*

For the respondents: *Irving Scher*, *Weil*, *Gotshal & Manges*, New York City for City Stores Company.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

By petition dated Oct. 2, 1975, City Stores Company has requested the Commission to modify its order of June 10, 1975, in two respects, described below. The Bureau of Competition has filed an answer objecting to the requested modification.

Respondent requests initially that a new subparagraph III(C) be added which would permit it to negotiate to include agreements in its shopping center leases which would provide that a W&J Sloane furniture specialty store shall be the only tenant in the center primarily engaged in the sale of furniture, home furnishings, and related accessories. (Such clauses would not prevent the competitive sale of these items by tenants such as department stores for whom such sale was not their principal activity.)

We agree with respondent's contention that the agreements it contemplates were not at issue in the litigated case, and under the circumstances the requested narrow modification is appropriate. It should be noted that this change is not intended to signify the Commission's approval of such agreements, but merely to exempt them from coverage by the order in this matter; in view of the limited scope of the adjudicative proceedings. Given appropriate evidence of anticompetitive consequences the Commission will not hesitate to challenge shopping center lease agreements which provide for exclusive rights of occupancy, (*e.g., People's Drug Stores, Inc.*, File No. 721 0090, agreement containing order to cease and desist; placed on public record for comment, Oct. 5, 1975).

City Stores also requests that the order be modified to require that copies of the order be provided only to developers of shopping centers in which City Stores operates stores larger than 50,000 square feet. Respondent points out that it operates more than 100 stores of size below 50,000 square feet. We agree it is doubtful that the practices condemned by the order are likely to exist as to these stores, and notification of the centers in which they exist would, therefore, seem of slight possible value and might indeed produce confusion as well as modest but unnecessary expense. For the foregoing reasons we will make the second requested modification. This change will not, of course, obviate respondent's obligation to ensure that practices prohibited by the order are not committed in any shopping center in which it is a tenant. Therefore,

It is ordered, That the proceedings be reopened and that the order to cease and desist issued June 10, 1975, be modified by the addition of the following Paragraph III(C):

It is further ordered, That this order shall not prohibit respondent from negotiating to include, including, carrying out, or enforcing an agreement or provision in any agreement which provides that a W&J Sloane furniture specialty store operated by respondent in a shopping center shall be the only tenant in the shopping center primarily engaged in the sale of furniture, home furnishings, and related accessories.

It is further ordered, That Paragraph IV(B) of the order to cease and desist issued June 10, 1975, be modified to read:

Within thirty (30) days after this order becomes final, notify each developer of shopping centers in which respondent is a tenant operating a store containing 50,000 square feet or more of floor space of this order by providing each such developer with a copy thereof by registered certified mail.

IN THE MATTER OF

STEVENS BEDDING WAREHOUSE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2739. Complaint, Oct. 21, 1975-Decision, Oct. 21, 1975

Consent order requiring fourteen separately incorporated retail stores affiliated with as well as a Chicago, Ill., distributor of home furnishing products, among other things to cease misrepresenting savings available to customers; misrepresenting special or limited offers; misrepresenting merchandise as free; and failing to maintain adequate records.

Appearances

For the Commission: *Anne L. Draznin.*

For the respondents: *Merril Freed, D'Ancona, Pflaum, Wyatt & Rikind,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Stevens Bedding Warehouse, Inc., Stevens Northern Bedding, Inc., Stevens Devon Bedding, Inc., Stevens Brookfield Bedding, Inc., Stevens Morton Grove Bedding, Inc., Stevens Harlem Bedding, Inc., Stevens Western Bedding, Inc., Stevens Wabash Bedding, Inc., Stevens Madison Bedding, Inc., Stevens Calumet City Bedding, Inc., Stevens Park Forest Bedding, Inc., Stevens Waukegan Bedding, Inc., Stevens Wheeling Bedding, Inc., Stevens Marquette Bedding, Inc., and Stevens Bolingbrook Bedding, Inc., corporations, and Norton Baran, as an officer and stockholder of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Stevens Bedding Warehouse, Inc., Stevens Northern Bedding, Inc., Stevens Devon Bedding, Inc., Stevens Brookfield Bedding, Inc., Stevens Morton Grove Bedding, Inc., Stevens Harlem Bedding, Inc., Stevens Western Bedding, Inc., Stevens Wabash Bedding, Inc., Stevens Madison Bedding, Inc., Stevens Calumet City Bedding, Inc., Stevens Park Forest Bedding, Inc., Stevens Waukegan Bedding, Inc., Stevens Wheeling Bedding, Inc., Stevens Marquette Bedding, Inc., Stevens Bolingbrook Bedding, Inc., are corporations

organized, existing and doing business under and by virtue of the laws of the State of Illinois, with their principal office and place of business located at 4435 S. Oakley Ave., in the City of Chicago, State of Illinois. Respondent Norton Baran is an officer and stockholder of said corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of home furnishing products, including, but not limited to bedding, sleeper sofas, and related case and upholstered furniture, to the public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have disseminated and now disseminate, and have caused and now cause the dissemination of advertisements by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements for said products by use of the United States mails, advertisements in newspapers of interstate circulation, advertisements in television and radio broadcasts of interstate circulation, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. Typical and illustrative of the foregoing, but not all inclusive thereof, are the following:

SUBSTANTIAL SAVINGS

* * * * * * *

TOTAL SELLOUT SAVE 28%-48% INCREDIBLE DISCOUNT PRICES

* * * * * * *

LAST 2 DAYS. END OF THE MONTH SALE. ANNUAL PRICE SHATTERING SALE YOU HAVE BEEN WAITING FOR. DRASTIC REDUCTIONS. TREMENDOUS REDUCTIONS.

* * * * * * *

NEVER BEFORE A SALE OF THIS TYPE ON NAME BRAND SLEEP PRODUCTS

* * * * * * *

MANUFACTURERS CLOSE OUT SALE OF THE YEAR. 4 DAYS ONLY.
THESE PRICES CANNOT BE REPEATED AFTER REMAINING
STOCKS ARE GONE

* * * * * * *

SUPER DISCOUNT WEEKEND SPECIAL. 3 DAYS ONLY

* * * * * * *

BRAND NAMES AT DISCOUNT PRICES AND YOU GET A BONUS

* * * * * * *

FREE 6 PIECE BEDDING PACKAGE WITH PURCHASE OF
ADVERTISED $158 KING OR $98 QUEEN SIZE BEDDING

* * * * * * *

PAR. 5. By and through the use of the above quoted statements and representations and others of similar import and meaning, but not expressly set out herein, with respect to and for the purpose of inducing the purchase of their merchandise, respondents and their salesmen, agents and representatives have represented and are now representing directly or by implication, that:

1. Respondents' products are being offered for sale at special or reduced prices, and that savings are thereby afforded to purchasers from respondents' regular selling price.
2. Respondents' advertised offer is made for a limited time only.
3. Purchasers of respondents' merchandise would realize at least a stated minimum amount of savings from respondents' regular selling prices.
4. Purchasers of respondents' products would receive free gifts or bonuses with the purchase of respondents' advertised products.

PAR. 6. In truth and in fact:

1. Respondents' products are not being offered for sale at special or reduced prices, and savings are not thereby afforded purchasers because of reductions from respondents' regular selling prices. The prices advertised by respondents are the usual and customary purchase prices of the products.
2. Respondents' advertised offers are not made for a limited time only. Said merchandise is advertised regularly at the represented prices and on the terms and conditions therein stated.
3. Purchasers of respondents' merchandise do not realize stated minimum amounts of savings over the price at which said merchandise has been sold at retail by the respondents in their recent, regular course of business. The stated percentage of savings constitutes an implied comparison between the manufacturers' suggested retail prices

for such merchandise and respondents' usual and customary selling prices.

4. Purchasers of respondents' products do not receive free gifts or bonuses with their purchases of advertised home furnishings and bedding products.

Therefore, the statements, representations and practices as set forth in Paragraphs Four and Five hereof were, and are, false, misleading and deceptive.

PAR. 7. The use by respondents of the false, misleading and deceptive statements, representations, acts and practices and their failure to disclose material facts as aforesaid, has had, and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and to induce a substantial number thereof to purchase said home furnishings and bedding products offered by respondents by reason of said erroneous and mistaken beliefs.

PAR. 8. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce with corporations, firms and individuals in the sale and distribution of home furnishings, bedding products and service of the same general kind and nature as those sold by respondents.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint,

and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents Stevens Bedding Warehouse, Inc., Stevens Northern Bedding, Inc., Stevens Devon Bedding, Inc., Stevens Brookfield Bedding, Inc., Stevens Morton Grove Bedding, Inc., Stevens Harlem Bedding, Inc., Stevens Western Bedding, Inc., Stevens Wabash Bedding, Inc., Stevens Madison Bedding, Inc., Stevens Calumet City Bedding, Inc., Stevens Park Forest Bedding, Inc., Stevens Waukegan Bedding, Inc., Stevens Wheeling Bedding, Inc., Stevens Marquette Bedding, Inc., and Stevens Bolingbrook Bedding, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois with their executive offices and warehouse located at 4435 S. Oakley Ave., Chicago, Ill.

Respondent, Norton Baran, is an officer and stockholder of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations, and his address is the same as that of said corporations.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Stevens Bedding Warehouse, Inc., Stevens Northern Bedding, Inc., Stevens Devon Bedding, Inc., Stevens Brookfield Bedding, Inc., Stevens Morton Grove Bedding, Inc., Stevens Harlem Bedding, Inc., Stevens Western Bedding, Inc., Stevens Wabash Bedding, Inc., Stevens Madison Bedding, Inc., Stevens Calumet City Bedding, Inc., Stevens Park Forest Bedding, Inc., Stevens Waukegan Bedding, Inc., Stevens Wheeling Bedding, Inc., Stevens Marquette Bedding, Inc., Stevens Bolingbrook Bedding, Inc., their successors and assigns, and officers, and Norton Baran, as an officer and stockholder of said corporations and as an officer and stockholder of any other corporation which would stand in the same or a substantially similar relationship in operating, structure and business relationship to the named corporate respondents and to him as the respondents do to each other at the date of service of this order and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with advertising, offering for sale, sale or distribution of home furnishings and bedding products or any other products or merchandise advertised, sold or offered for sale or distribution in conjunction therewith in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Using the words "BUY NOW AND SAVE," "DRASTIC REDUCTIONS," "SUPER DISCOUNT WEEKEND SPECIAL," or any other words of similar import not specifically set forth herein, which represent, directly or indirectly, orally or in writing, that any savings are afforded the public in the purchase of merchandise from respondents at respondents' advertised price unless the price of such merchandise being sold or offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

2. Representing, directly or indirectly, orally or in writing, that stated minimum amounts of savings are afforded the public in the purchase of merchandise from the respondents at respondents' advertised price, unless, in fact, the price at which merchandise is offered constitutes, at least, the stated minimum amount of reduction from the price at which said merchandise has been usually and customarily sold at retail by the respondents in the recent, regular course of business.

3. Using the words "LAST 2 DAYS," "4 DAYS ONLY," "WEEKEND SPECIAL" or any other words of similar import not specifically set forth herein, which represent that the products advertised are available to the public at the terms, conditions, and prices advertised for a limited time only, when in fact, said products have been offered for sale or sold by respondents at terms, conditions, and prices similar to those stated in the advertisements at times other than those set forth therein in the recent, regular course of respondents' business.

4. Representing, directly or indirectly, orally or in writing, that any merchandise or service advertised, sold, offered for sale or distributed by respondents is furnished "free" or at no cost to the purchaser, when, in fact, the cost of such "free" merchandise or service is directly or indirectly included in the selling price of respondent's products that are

advertised, sold, offered for sale or distributed to the purchaser in conjunction with said "free" merchandise or service.

5. Representing, directly or indirectly, orally or in writing, that any merchandise or service is being offered as a "gift," "without charge," "bonus," or other words or terms which tend to convey the impression to the public that the merchandise or service is free, when the use of the term "free" in relation thereto is prohibited by the provisions of this order.

6. Failing to maintain and produce for inspection or copying for a period of three (3) years adequate records:

(a) Which disclose the facts upon which any savings claims, including former pricing claims and comparative value claims, and similar representations of the type described in Paragraphs 1, 2 and 3 of this order are based, and

(b) From which the validity of any savings claims, including former pricing claims and comparative value claims, and similar representations of the type described in Paragraphs 4 and 5 of this order can be determined.

7. Failing to deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the sale or offering for sale of any product and engaged in any aspect of the preparation, creation or placing of advertising and failing to secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondent corporations shall forthwith deliver a copy of this order to each of their operating divisions.

It is further ordered, That during the period from the date of service of this order to the expiration of 10 years from such date:

(a) respondents promptly notify the Commission within five (5) business days of the dissolution of a named corporate respondent which does not result in the emergence of a successor corporation or of the creation by incorporation, of a new retail outlet which would stand in the same or a substantially similar relationship in operation, structure and business relationship to the named corporate and individual respondents as the respondents do to each other at the date of service of this order, and

(b) respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, with the exception of those changes enumerated in (a) above, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporate respondents which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

STEREO EQUIPMENT SALES, INC. T/A BALTIMORE STEREO WHOLESALERS, ETC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2740. Complaint, Oct. 21, 1975-Decision, Oct. 21, 1975

Consent order requiring a Timonium, Md., mail-order seller of stereo equipment and components, and related merchandise, among other things to cease soliciting prepaid orders if respondent cannot ship ordered merchandise within a stated time period; failing to make refunds; failing to maintain records; failing to disclose the shipping weight of merchandise; and misrepresenting any of their divisions as wholesalers.

Appearances

For the Commission: *Alan L. Cohen* and *Thomas J. Keary.*

For the respondents: *H. George Schweitzer*, *Heffelfinger, Schweitzer & Rabil*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Stereo Equipment Sales, Inc., a corporation, doing business as Baltimore Stereo Wholesalers, Stereo Wholesalers and Stereo Discounters, and Benjamine Shumate, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Stereo Equipment Sales, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 7A Aylesbury Rd., Timonium, Md. Such corporation does business as Baltimore Stereo Wholesalers, Stereo Wholesalers and Stereo Discounters.

Respondent Benjamine Shumate is an individual and an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of stereo equipment and components and other related merchandise to the public by mail order and through retail outlets.

PAR. 3. In the course and conduct of their business, respondents are causing, and for some time last past have caused, said merchandise, when sold, to be shipped from their place of business located in the State of Maryland to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in or affecting commerce, with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 5. In the course and conduct of their mail order business, as aforesaid, respondents offer merchandise for sale by means of advertisements, brochures, flyers, catalogs, letters, and oral representations by telephone. In connection with their aforesaid business and for the purpose of inducing the purchase of their said merchandise, respondents have made, and are now making, certain statements and representations with respect to delivery and the promptness with which orders will be filled.

Typical and illustrative of said statements and representations, but not all inclusive thereof, is the following:

> UPON RECEIPT OF YOUR ORDER AT STEREO WHOLESALERS IT IS ASSIGNED AN ORDER NUMBER AND PROCESSED THROUGH OUR MAIL ORDER DEPARTMENT WHERE PRICING IS VERIFIED AND THE AVAILABILITY OF THE EQUIPMENT IS CHECKED. YOU ARE NOTIFIED AT THAT TIME AS TO THE SHIPPING STATUS OF YOUR ORDER. THE ORDER THEN GOES TO THE SHIPPING DEPT. WHERE IT IS NORMALLY SHIPPED WITHIN THREE WORKING DAYS.
>
> IF YOUR REQUEST SHOULD NOT BE IN STOCK, NO SUBSTITUTIONS WILL BE MADE WITHOUT YOUR APPROVAL. WE WILL WRITE TO SEE IF YOU WISH A SUBSTITUTION OR A REFUND.

PAR. 6. By and through the use of the statements and representations quoted in Paragraph Five hereof, and others of similar import and meaning but not expressly set forth herein, and by the offering of merchandise for sale, respondents have represented, and are now representing, directly or by implication, that:

1. merchandise ordered and prepaid will be delivered within a reasonable period of time after receipt of a purchaser's order; and
2. if the merchandise ordered by a purchaser is not in stock, the purchaser will be so notified and will be sent a notice asking whether the purchaser wants a substitution or a refund.

PAR. 7. In truth and in fact:

1. Respondents, in many instances, have not and are not now shipping merchandise within a reasonable period of time after receipt of a purchaser's prepaid order. Respondents, in many instances, ship merchandise many weeks after receipt of a purchaser's order.
2. When ordered merchandise is not in stock, respondents, in many instances, have not notified purchasers and offered such purchasers substitutions or refunds.

Therefore, the statements and representations set forth in Paragraphs Five and Six, hereof, were and are unfair, false, misleading, and deceptive.

PAR. 8. In the further course and conduct of their mail order business and for the purpose of inducing the purchase of their said merchandise, respondents have distributed advertisements, brochures, flyers, catalogs, letters or other material soliciting orders which provide the purchaser with order blanks. The purchaser, if he wishes to completely prepay his order, is required to calculate the postage or shipping charges based on the weight of the merchandise offered, using the postage and shipping rate charts provided. However, the advertisements, brochures, flyers, catalogs, letters and other material soliciting orders do not indicate the weight of the merchandise offered.

Consequently, in many instances, purchasers have paid respondents more for postage or shipping than the actual postage or shipping charges incurred by respondents in mailing or shipping the merchandise, and said purchasers have not received from respondents a refund for their overpayments. Therefore, the failure of respondents to disclose the weights of their merchandise, and their failure to make refunds of postage or shipping overpayments, was and is unfair, misleading and deceptive.

PAR. 9. By and through the use of the trade name "Baltimore Stereo Wholesalers" and "Stereo Wholesalers" separately and in conjunction with statements appearing in their advertisements, brochures, flyers, catalogs, letters, or other material soliciting orders, respondents have represented and do represent, directly or by implication, that they are wholesalers and that their prices are wholesale prices and that in each instance the savings afforded to their purchasers is that amount which is realized by purchasers who buy at actual wholesale prices.

PAR. 10. In truth and in fact, respondents are not wholesalers with respect to many of the articles offered for sale and sold by them, nor do they offer to sell, or sell, many of their articles of merchandise at wholesale prices but, to the contrary, the prices of many of such articles are in excess of the prices usually and customarily paid by retailers. Consequently, in many instances, the savings afforded is less than that amount which is realized by purchasers who buy at actual wholesale prices.

Therefore, the statements and representations set forth in Paragraph Nine, hereof, were and are false, misleading and deceptive.

PAR. 11. The use by respondents of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondents' products, and overpayment of postage or shipping charges, by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Stereo Equipment Sales, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 7A Aylesbury Rd., Timonium, Md. Such corporation does business as Baltimore Stereo Wholesalers, Stereo Wholesalers and Stereo Discounters.

Respondent Benjamine Shumate is an individual and an officer of said corporation. He formulates, directs and controls the policies acts and practices of said corporation and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

A

For purposes of this order, the following definitions shall apply:

(1) "Shipment" shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(2) "Receipt of payment" shall be deemed to be, (1) at the time respondents receive the order with payment enclosed either in cash or by check or (2) at the time respondents charge a purchaser's account for a credit order.

(3) "Prompt refund" shall mean a return of the full amount remitted by the purchaser or the crediting of the purchaser's account for the full indebtedness incurred for the unshipped merchandise within seven (7) working days of the date on which the purchaser's right to refund vests under the provisions of this order. Refunds shall be deemed made when one of the following is mailed to the purchaser by first class mail:

(a) cash, money order or check; or

(b) if respondents are the creditor, a copy of the credit memorandum which removes the charge from the purchaser's account; or

(c) the actual charge or sales document which would create an obligation by the purchaser to a third party creditor; or

(d) a copy of the appropriate credit memorandum to the third party creditor which will remove the charge from the purchaser's account.

B

It is ordered, That respondents Stereo Equipment Sales, Inc., a corporation, doing business as Baltimore Stereo Wholesalers, Stereo Wholesalers and Stereo Discounters, or under any name or names, and its officers, and Benjamine Shumate, individually and as an officer of said corporation, and respondents' representatives, agents, employees, successors and assigns directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of stereo equipment and components and other merchandise, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Soliciting orders for the sale of merchandise to be ordered by the purchaser through the mail on a prepaid basis, unless such merchandise is shipped within that time clearly and conspicuously stated in such solicitation or, if no time is stated, within thirty (30) days after receipt of payment and a properly completed order from the purchaser.

2. Failing to make, without prior demand, a prompt refund to the purchaser of all moneys received for merchandise solicited on a prepaid basis and ordered through the mails when the merchandise is not shipped:

(a) Within that time clearly and conspicuously stated in the solicitation to which the purchaser responded as the time in which shipment will be made, or

(b) If no time is stated, within thirty (30) days of receipt of the purchaser's payment by respondents.

Provided, however, That the inhibitions of Paragraph B(1) shall not apply if the provisions of Paragraph B(2) are complied with; *and, Provided, further*, That Paragraph B(1) and Paragraph B(2) shall not apply under the following circumstances: where respondents, due to circumstances beyond their control, are unable to make shipment as required in Paragraph B(1) and respondents send to the purchaser a notice of delayed shipment providing the purchaser with the opportunity to express his choice whether to cancel his order and receive a refund or be shipped the merchandise by a specified later date. The notice shall be sent by first class mail and accompanied by a self-addressed, postage paid device upon which the purchaser may indicate his choice, and mailed in advance of the expiration of the thirty (30) day period, or that time stated in the solicitation. The notice shall expressly advise the purchaser of the estimated date of shipment for his order. If, prior to shipment, respondents receive a response from the purchaser requesting a refund, such refund shall be promptly made.

If no response is received from the purchaser and respondents do not ship the merchandise within the estimated date of shipment given in the above notice, and for each subsequent time respondents do not ship merchandise by the estimated date of shipment to which a purchaser has agreed, respondents must send to the purchaser an additional notice of delayed shipment providing the purchaser with the opportunity to express his choice whether to cancel his order and receive a refund or be shipped the merchandise by a specified later date. This additional notice shall be sent by first class mail and accompanied by a self-addressed, postage paid device upon which the purchaser may indicate his choice, and mailed in advance of the estimated date of shipment given in the previous notice. This additional notice shall expressly advise the purchaser of the estimated date of shipment for his order. If, prior to shipment, respondents receive a response from the purchaser requesting a refund, such refund shall be promptly made.

Provided, further, however, That Paragraphs B(1) and B(2) shall not apply to any advertisement which:

(1) does not contain an order blank or other similar means to order merchandise from respondents;

(2) does not make any representation concerning the speed or promptness with which respondents ship merchandise to its customers; and

(3) does not offer specific items for sale at specified prices.

3. Failing to:

(a) Maintain a record of each complaint alleging failure to ship merchandise solicited and ordered on a prepaid basis, or of failure to make refund within the applicable period of time, as specified in Paragraphs B(1) and B(2) of this order, and the disposition of each such complaint. Such record shall be kept for a period of at least eighteen (18) months following the disposition of such complaint;

(b) Maintain records showing the employment of systems and procedures designed to comply with Paragraphs B(1) and B(2) of this order.

4. Failing to disclose, in any brochures, flyers, catalogs, letters, oral representations or other solicitations of orders which provide the purchaser with the means to order merchandise from respondents, the shipping weight of any of the items of merchandise offered.

5. Failing to promptly refund any postage or shipping payments made by a purchaser which are in excess of the postage or shipping charges incurred by respondents in mailing or shipping the merchandise to the purchaser; *Provided, however,* That respondents may charge a flat percentage of the order price for postage or shipping and handling if that fact is clearly and conspicuously disclosed, orally or in writing, to prospective purchasers before they order merchandise from respondents.

6. Representing, directly or by implication, in any advertisements, brochures, flyers, catalogs, letters or any other material soliciting orders, or in any of respondents' places of business open to the public, or otherwise representing, directly or by implication, that respondents or any of their divisions are wholesalers, or that they or their divisions sell articles of merchandise at wholesale prices, unless respondents, or the division referred to, in fact:

(a) make a substantial number of their sales to retailers in the ordinary course of business, and

(b) sell items which they offer at wholesale at prices which do not exceed the prices usually and customarily paid by retailers for such merchandise to any source of supply, when purchased in the quantity offered for sale by respondents.

Provided, further, however, That respondents shall be permitted to phase out the use of the word "Wholesalers" in their trade name:

(a) in all advertisements, brochures, flyers, catalogs or any other material soliciting orders within six (6) months from the date this order is finally accepted;

(b) in all stationery, invoices and other business forms (and in-store promotional material) as the current supply is exhausted, but no later than six (6) months from the date this order is finally accepted; and

(c) in all store signs within eight (8) months from the date this order is finally accepted.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future employees or other persons engaged in the preparation and placing of respondents' advertisements, brochures, flyers, catalogs, letters or other material soliciting orders, and the offering for sale, or sale, of respondents' products, and secure from each such employee or other person a signed statement acknowledging receipt of said order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report; in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

WARDS COMPANY, INC. T/A DIXIE HI-FIDELITY WHOLESALERS, ETC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2741. Complaint, Oct. 21, 1975-Decision, Oct. 21, 1975

Consent order requiring a Richmond, Va., mail-order seller of stereo equipment and components, and related merchandise, among other things to cease soliciting prepaid orders if respondent cannot ship ordered merchandise within a specified time period; failing to make refunds; failing to maintain records; failing to disclose handling and insurance costs; and misrepresenting any of its operating divisions as wholesalers.

Appearances

For the Commission: *Alan L. Cohen* and *Thomas J. Keary.*

For the respondents: *Robert A. Skitol* and *Robert L. Wald, Wald, Harkrader & Ross*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Wards Company, Inc., a corporation, doing business as Dixie Hi-Fidelity Wholesalers and Dixie Hi-Fi, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Wards Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at 5021 Brook Rd., Richmond, Va. Such corporation does business as Dixie Hi-Fidelity Wholesalers and Dixie Hi-Fi.

Par. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of stereo equipment and components and other related merchandise to the public by mail order and through retail outlets.

PAR. 3. In the course and conduct of its business, respondent is causing, and for some time last past has caused, said merchandise, when sold, to be shipped from its place of business located in the Commonwealth of Virginia to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and is now, in substantial competition, in or affecting commerce, with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as those sold by respondent.

PAR. 5. In the course and conduct of its mail order business, as aforesaid, respondent offers merchandise for sale by means of advertisements, brochures, flyers, catalogs, letters, and oral representations by telephone. In connection with its aforesaid business and for the purpose of inducing the purchase of its said merchandise, respondent has made, and is now making, certain statements and representations with respect to delivery and the promptness with which orders will be filled.

Typical and illustrative of said statements and representations, but not all inclusive thereof, is the following:

> DIXIE, one of the largest stereo wholesalers, fills all your orders promptly.
>
> We stock every item in this catalog and your order will be shipped promptly and insured.

PAR. 6. By and through the use of the statements and representations quoted in Paragraph Five hereof, and others of similar import and meaning but not expressly set forth herein, and by the offering of merchandise for sale, respondent has represented, and is now representing, directly or by implication, that merchandise ordered and prepaid will be delivered within a reasonable period of time after receipt of a purchaser's order.

PAR. 7. In truth and in fact, respondent, in many instances, has not and is not now shipping merchandise within a reasonable period of time after receipt of a purchaser's prepaid order. Respondent, in many instances, ships merchandise many weeks after receipt of a purchaser's order.

Therefore, the statements and representations set forth in Paragraphs Five and Six, hereof, were and are unfair, false, misleading, and deceptive.

PAR. 8. In the further course and conduct of its mail order business and for the purpose of inducing the purchase of its said merchandise, respondent has distributed advertisements, brochures, flyers, catalogs, letters or other material soliciting orders which provide the purchaser with order blanks. The purchaser, if he wishes to completely prepay his order, is required to calculate the postage or shipping charges based on the weight of the merchandise offered. However, the advertisements, brochures, flyers, catalogs, letters and other material soliciting orders do not provide the customer with postage or shipping rate charts.

Consequently, in many instances, purchasers have paid respondent more for postage or shipping than the actual postage or shipping charges incurred by respondent in mailing or shipping the merchandise, and said purchasers have not received from respondent a refund for their overpayments. Therefore, the failure of respondent to make refunds of postage or shipping overpayments, was and is unfair, misleading and deceptive.

PAR. 9. In the further course and conduct of its mail order business and for the purpose of inducing the purchase of its said merchandise, respondent has distributed advertisements, brochures, flyers, catalogs, letters or other material soliciting orders which provide the purchaser with order blanks. These materials do not disclose that handling or insurance costs will be charged to purchasers ordering from respondent, although such costs are regularly charged to the purchaser. Therefore, the failure of respondent to disclose the handling and insurance costs was, and is unfair, misleading and deceptive.

PAR. 10. By and through the use of the trade name Dixie Hi-Fidelity Wholesalers, and in conjunction with statements appearing in its advertisements, brochures, flyers, catalogs, letters, or other material soliciting orders, respondent has represented and does represent, directly or by implication, that it is a wholesaler and that its prices are wholesale prices and that in each instance the savings afforded to its purchasers is that amount which is realized by purchasers who buy at actual wholesale prices.

PAR. 11. In truth and in fact, respondent is not a wholesaler with respect to many of the articles offered for sale and sold by it, nor does it offer to sell, or sell, many of its articles of merchandise at wholesale prices but, to the contrary, the prices of many of such articles are in excess of the prices usually and customarily paid by retailers. Consequently, in many instances, the savings afforded is less than that amount which is realized by purchasers who buy at actual wholesale prices.

Therefore, the statements and representations set forth in Paragraph Ten, hereof, were and are false, misleading and deceptive.

PAR. 12. The use by respondent of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices, and its failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondent's products, and overpayment of postage or shipping charges, by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Wards Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at 5021 Brook Rd., Richmond, Va. Such corporation does business as Dixie Hi-Fidelity Wholesalers and Dixie Hi-Fi.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

A

For purposes of this order, the following definitions shall apply:

(1) "Shipment" shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(2) "Receipt of payment" shall be deemed to be, (1) at the time respondent receives the order with payment enclosed either in cash or by check or (2) at the time respondent charges a purchaser's account for a credit order.

(3) "Prompt refund" shall mean a return of the full amount remitted by the purchaser or the crediting of the purchaser's account for the full indebtedness incurred for the unshipped merchandise within seven (7) working days of the date on which the purchaser's right to refund vests under the provisions of this order. Refunds shall be deemed made when one of the following is mailed to the purchaser by first class mail:

(a) cash, money order or check; or

(b) if respondent is the creditor, a copy of the credit memorandum which removes the charge from the purchaser's account; or

(c) the actual charge or sales document which would create an obligation by the purchaser to a third party creditor; or

(d) copy of the appropriate credit memorandum to the third party creditor which will remove the charge from the purchaser's account.

B

It is ordered, That respondent Wards Company, Inc., a corporation, doing business as Dixie Hi-Fidelity Wholesalers and Dixie Hi-Fi, or under any name or names, and its officers, and respondent's representatives, agents, employees, successors and assigns directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of stereo equipment and components and other merchandise, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Soliciting orders for the sale of merchandise to be ordered by the purchaser through the mail on a prepaid basis, unless such merchandise is shipped within that time clearly and conspicuously stated in such solicitation or, if no time is stated, within thirty (30) days after receipt of payment and a properly completed order from the purchaser.

2. Failing to make, without prior demand, a prompt refund to the purchaser of all moneys received for merchandise solicited on a prepaid basis and ordered through the mails when the merchandise is not shipped:

(a) Within that time clearly and conspicuously stated in the solicitation to which the purchaser responded as the time in which shipment will be made, or

(b) If no time is stated, within thirty (30) days of receipt of the purchaser's payment by respondent.

Provided, however, That the inhibitions of Paragraph B(1) shall not apply if the provisions of Paragraph B(2) are complied with; *and, Provided further*, That Paragraph B(1) and Paragraph B(2) shall not apply under the following circumstances: where respondent, due to circumstances beyond its control, is unable to make shipment as required in Paragraph B(1) and respondent sends to the purchaser a notice of delayed shipment providing the purchaser with the opportunity to express his choice whether to cancel his order and receive a refund or be shipped the merchandise by a specified later date. The notice shall be sent by first class mail and accompanied by a self-addressed, postage paid device upon which the purchaser may indicate his choice, and mailed in advance of the expiration of the thirty (30) day period, or that time stated in the solicitation. The notice shall expressly advise the purchaser of the estimated date of shipment for his order. If, prior to shipment, respondent receives a response from the purchaser requesting a refund, such refund shall be promptly made.

If no response is received from the purchaser and respondent does not ship the merchandise within the estimated date of shipment given in the above notice, and for each subsequent time respondent does not ship merchandise by the estimated date of shipment to which a purchaser has agreed, respondent must send to the purchaser an additional notice of delayed shipment providing the purchaser with the opportunity to express his choice whether to cancel his order and receive a refund or be shipped the merchandise by a specified later date. This additional notice shall be sent by first class mail and accompanied by a self-addressed, postage paid device upon which the purchaser may indicate his choice, and mailed in advance of the estimated date of shipment given in the previous notice. This additional notice shall expressly advise the purchaser of the estimated date of shipment for his order. If, prior to shipment, the respondent receives a response from the purchaser requesting a refund, such refund shall be promptly made.

Provided further, however, That Paragraphs B(1) and B(2) shall not apply to any advertisement which:

(1) does not contain an order blank or other similar means to order merchandise from respondent;

(2) does not make any representation concerning the speed or promptness with which respondent ships merchandise to its customers; and

(3) does not offer specific items for sale at specified prices.

Provided further, however, That should the Federal Trade Commission promulgate a trade regulation rule or industry guide concerning Undelivered Mail Order Merchandise and Services, containing provisions comparable to, but less comprehensive or less restrictive than, the provisions of this order, nothing herein shall preclude respondent from exercising its right to petition for appropriate modification of this order under Section 3.72 or any other pertinent provision of the Commission's Rules of Practice or of law.

3. Failing to:

(a) Maintain a record of each complaint alleging failure to ship merchandise solicited and ordered on a prepaid basis, or of failure to make refund within the applicable period of time, as specified in Paragraphs B(1) and B(2) of this order, and the disposition of each such complaint. Such record shall be kept for a period of at least eighteen (18), months following the disposition of such complaint;

(b) Maintain records showing the employment of systems and procedures designed to comply with Paragraphs B(1) and B(2) of this order.

4. Failing to promptly refund any postage or shipping payments made by a purchaser which are in excess of the postage or shipping charges incurred by respondent in mailing or shipping the merchandise to the purchaser; *Provided, however,* That respondent may charge a flat percentage of the order price for postage or shipping and handling if that fact is clearly and conspicuously disclosed, orally or in writing, to

prospective purchasers before they order merchandise from respondent.

5. Failing to clearly and conspicuously disclose, orally or in writing, to prospective purchasers before they order merchandise from respondent, the actual handling and insurance costs which will be charged to the purchaser.

6. Representing, directly or by implication, in any advertisements, brochures, flyers, catalogs, letters or any other material soliciting orders, or in any of respondent's places of business open to the public, or otherwise representing, directly or by implication, that respondent or any of its divisions is a wholesaler, or that it or its division sells articles of merchandise at wholesale prices, unless respondent, or the division referred to, in fact:

(a) makes a substantial number of its sales to retailers in the ordinary course of business, and

(b) sells items which it offers at wholesale at prices which do not exceed the prices usually and customarily paid by retailers for such merchandise to any source of supply, when purchased in the quantity offered for sale by respondent.

Provided, further, however, That respondent shall be permitted to phase out the use of the word "Wholesalers" in its trade name:

(a) in all advertisements, brochures, flyers, catalogs or any other material soliciting orders within six (6) months from the date this order is finally accepted;

(b) in all stationery, invoices and other business forms (and in-store promotional material) as the current supply is exhausted, but no later than six (6) months from the date this order is finally accepted; and

(c) in all store signs within eight (8) months from the date this order is finally accepted.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future employees or other persons engaged in the preparation and placing of respondent's advertisements, brochures, flyers, catalogs, letters or other material soliciting orders, and the offering for sale, or sale, of respondent's products, and secure from each such employee or other person a signed statement acknowledging receipt of said order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

CONSOLIDATED INTERNATIONAL TOOL & OIL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2742. Complaint, Oct. 21, 1975-Decision, Oct. 21, 1975

Consent order requiring a Rockford, Ill., seller of distributorships for automotive products, tools, electrical products, recording tapes, and other products, among other things to cease making unsubstantiated earnings claims, false claims concerning the quality and quantity of locations and products they will provide distributors, and connections or arrangements with nationally advertised corporations. Further, respondents must notify prospective customers that their contracts are not final and binding until a distributor is satisfied with his account locations and has been supplied with sufficient products for his displays.

Appearances

For the Commission: *James F. Drzewiecki.*

For the respondents: *Patrick H. Sreenan*, Rockford, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Consolidated International Tool & Oil, Inc., a corporation, Globe Marketing & Services, Inc., a corporation, and Joseph La Franka, individually and as an officer of said corporations, and also doing business as Consolidated Distributing Co., hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Consolidated International Tool & Oil, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business formerly located at 4304 Charles St., Rockford, Ill.

Respondent Globe Marketing & Services, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business formerly located at 4304 Charles St., Rockford, Ill.

Respondent Joseph La Franka is an individual and officer of respondent corporations and also does business as Consolidated Distributing Co. He formulates, directs and controls the acts and practices of said business entities including the acts and practices hereinafter set forth. His address is 1211 Florist Dr., Rockford, Ill.

PAR. 2. Respondents are now, and for some time have been engaged in the advertising, offering for sale, sale and distribution of distributorships for automotive products, tools, electrical products, recording tapes and various other products to distributors. These products are purchased by distributors for resale to the public.

PAR. 3. In the course and conduct of their business, respondents for some time have caused, their said products to be shipped from their place of business in the State of Illinois to distributors located in various other States of the United States, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. Respondents insert advertisements in newspapers, soliciting persons to become distributors for respondent corporations. Typical and illustrative but not all inclusive of the statements and representations made in newspapers and various promotional materials are the following:

Excellent opportunity for additional Part-Time Income of $6,000 to $8,000 or, a Full-Time Income of $15,000 or more.

EARNINGS UP TO:
$800 per month part-time
$2,000 per month full-time

NO SELLING

100% MONEY BACK GUARANTEE

WE OFFER: Pre-established accounts Complete training Full Company Support Defined territory Continued Support and Assistance Guaranteed Investment

Secured investment: $6,500

This is an excellent opportunity for persons who qualify.

* * * * * * *

IMPORTANT TO INSTALL IMMEDIATELY Install all of your displays immediately after your locations have been secured. Don't put it off. Do it IMMEDIATELY!
INITIAL DISPLAY LOADING Be certain all displays are fully loaded for immediate use by the consumer.

PAR. 5. By and through the use of the aforesaid statements and others of similar import not specifically set forth herein, respondents represent directly or by implication that:

1. A person can expect to earn between $500 and $800 or more per month by devoting part time to his distributorship, and that he can expect to earn between $1250 and $2000 or more per month by devoting full time to his distributorship.
2. There is no selling required of a distributor.
3. Respondents guarantee to return the entire investment to a distributor if he is not satisfied with the distributorship.
4. All account locations assigned to a distributor have been established by respondents prior to signing of a contract by distributor.
5. Respondents offer complete training to distributor.
6. Respondents offer distributor continuing support and assistance in making his distributorship a success.
7. Distributor is assigned a defined and exclusive territory in which all of his accounts will be established and in which no other distributor for respondent may operate.
8. Respondents guarantee distributor's investment against loss.
9. Respondents are selective with regard to persons qualified to become distributors.
10. Respondents will provide distributor with products for his displays on a timely basis.

PAR. 6. In truth and in fact:

1. A person cannot expect to earn between $500 and $800 or more per month by devoting part time to his distributorship, nor can he expect to earn between $1250 and $2000 or more per month by devoting full time to his distributorship. Such earnings claims are greatly in excess of the profit that will accrue in a great majority of cases no matter how much time is devoted to the distributorship.
2. Selling is required of a distributor if profitable locations are to be obtained.
3. Respondents have never returned the entire investment to a distributor who is not satisfied with the distributorship.
4. Account locations assigned to a distributor have not been established by respondents prior to signing of a contract by distributor. In a majority of cases respondents have not established account locations until after the distributor has signed a contract.
5. Respondents do not offer distributor complete training. The only

training given is in the form of general suggestions in a "Distributor Operating Manual."

6. Respondents have failed in some instances to support and assist distributor in making his distributorship a success.

7. Though respondents may purport to assign a distributor a defined and exclusive territory, frequently his assigned accounts are outside this territory; territorial boundaries overlap and distributors are not assigned exclusive territories.

8. Respondents in no way guarantee a distributor's investment against loss.

9. Respondents are not selective with regard to persons qualified to become distributors. The only requirement for becoming a distributor is the price of the initial investment.

10. Respondents do not provide distributor with products for his displays on a timely basis.

Therefore, the statements and representations as set forth in Paragraphs Four and Five were, and are, false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business as aforesaid, and in furtherance of their purpose of inducing the purchase of their distributorships, respondents direct various newspapers to print advertisements containing corporate logos of STP Corporation, the BernzOmatic Corporation, General Electric Company and Superscope, Inc. The use of these logos in newspaper advertising and on other printed matter disseminated by respondents represents, directly or by implication, that respondents are closely affiliated with the said corporations.

In fact, respondents are not closely affiliated, nor are they affiliated in any way, with the said corporations. Rather, the relationship between respondents and the said corporations is basically that of buyer and seller.

Therefore, the acts and practices set forth above were, and are, false, misleading and deceptive.

PAR. 8. In the further course and conduct of their business as aforesaid, respondents cause persons who respond to advertisements to contact respondents' sales representatives. For the purpose of inducing the sale of distributorships offered by respondents, said sales representatives make to prospective distributors many statements and representations, directly or by implication, regarding opportunities available to distributors and assistance given to distributors by respondents. Among and typical, but not all inclusive, of such statements and representations are the following:

1. A distributor will earn between $12,000 and $30,000 or more per year.

2. A distributor can expect an average sale of a certain specified amount of merchandise per day.

3. A distributor can recover his initial investment within one year.

4. Accounts will be set up by respondents in profitable sales producing locations.

5. All accounts will be within the certain radius of distributor's home stipulated in distributor's contract.

6. Accounts will be in an exclusive territory where no other distributor for respondent may operate.

7. Respondents will set up 20 separate physical account locations for distributor.

8. Accounts will be set up shortly after distributor signs his contract.

9. A distributor will be able to sell STP products for less than the price charged by retail stores in his area.

10. Respondents would at some undetermined future time become the sole STP dealer in the distributor's area.

11. A distributor would have exclusive dealership for STP products in his territory.

12. A distributor will receive original parts tune-up kits from respondents.

13. A distributor will be supplied with a great variety of products exhibited to him by respondents.

14. A distributor will have 90 days to pay for all products ordered from respondents.

15. Respondents will pay freight costs for shipment of products to distributor.

PAR. 9. In truth and in fact:

1. Few, if any, distributors have earned more than $12,000 per year.

2. A distributor cannot expect an average sale of a certain specified amount of merchandise per day.

3. Few, if any, of respondents' distributors have recovered their initial investment within one year.

4. Accounts are not set up by respondents in profitable sales producing locations. They are usually set up in marginal places of business.

5. Accounts are often located outside the certain radius of distributor's home stipulated in distributor's contract.

6. Accounts are often not in an exclusive territory where no other distributor for respondent may operate. Territories often overlap with more than one distributor sharing a territory or even a single location.

7. Respondents do not set up 20 separate physical account locations for distributor. Often respondents count each display rack in one physical location as a single account.

8. Accounts are not set up shortly after distributor signs his contract. Often there are protracted delays by respondents in setting up accounts.

9. A distributor is seldom able to sell STP products for less than the price charged by retail stores in his area.

10. Respondents never were, nor ever had the opportunity to become, sole STP dealers in any area. Thus there was no possibility that all STP products sold in any area would be sold through respondents' distributors.

11. A distributor never had, nor is he likely to ever have, exclusive dealership for STP products in his territory.

12. A distributor does not receive original parts tune-up kits from respondents.

13. A distributor is not supplied with the great variety of products exhibited to him by respondents.

14. A distributor does not have 90 days to pay for all products ordered from respondents. He must pay cash when ordering.

15. Respondents do not pay freight costs for shipment of products to distributor. Distributor must pay these costs himself.

Therefore, the statements and representations as set forth in Paragraph Eight were, and are, false, misleading and deceptive.

PAR. 10. In the further course and conduct of their business as aforesaid, and in furtherance of their purpose of inducing the purchase of their distributorships, respondents' sales representatives give prospective distributors the names and addresses of alleged "successful distributors" for respondents. Respondents' sales representatives tell prospective distributors to contact these "successful distributors." For the purpose of inducing the sale of distributorships offered by respondents, such "successful distributors" make to prospective distributors many statements and representations, directly or by implication, regarding opportunities available to purchasers of distributorships. Among and typical, but not all inclusive, of such statements and representations are that:

1. They are distributors for respondents.

2. They are extremely successful, earning $25,000 or more per year as distributors for respondents.

PAR. 11. In truth and in fact:

1. They are not, and never have been, distributors for respondents.

2. They are not extremely successful, and do not earn $25,000 or more per year as distributors for respondents.

Therefore, the statements and representations as set forth in Paragraph Ten were, and are, false, misleading and deceptive.

PAR. 12. By directing prospective distributors to such "successful distributors," respondents are furthering and abetting the deception of the public in the manner and as to the things hereinbefore alleged.

PAR. 13. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals engaged in the sale and distribution of similar distributorships.

PAR. 14. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and to induce a substantial number thereof to purchase said distributorships offered by respondents by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Consolidated International Tool & Oil, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business formerly located at 4304 Charles St., Rockford, Ill.

Respondent Globe Marketing & Services, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business formerly located at 4304 Charles St., Rockford, Ill.

Respondent Joseph La Franka is an individual and an officer of said corporations, and also does business as Consolidated Distributing Co. He formulates, directs and controls the policies, acts and practices of said business entities and his address is 1211 Florist Dr., Rockford, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Consolidated International Tool & Oil, Inc., a corporation, Globe Marketing & Services, Inc., a corporation, their successors and assigns, and officers and Joseph La Franka, individually and as an officer of said corporations and doing business as Consolidated Distributing Co., and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of distributorships for automotive products, tools, electrical products, recording tapes and any other products to distributors for resale to the public, or in connection with any other product or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, orally or in writing, that:

a. Distributors of respondents' products can or will derive any stated amount of sales, income, gross or net profits, unless:

1. Such sales, income or profits are reasonably likely to be achieved by the person to whom the representation is made;

2. The basis and assumptions for such representation are set forth in detail;

3. Such representation and the underlying data have been prepared in accordance with generally accepted accounting principles;

4. In immediate conjunction therewith, the following statement is clearly and conspicuously disclosed: "THERE IS NO ASSURANCE THAT INCOME AND PROFIT PROJECTIONS WILL BE ATTAINED BY ANY SPECIFIC DISTRIBUTOR. THEY ARE MERELY ESTIMATES." and,

5. The amounts represented are not in excess of sales, income or profits actually achieved by existing distributors; and where distributors have not been in operation long enough to indicate what sales, income or profits may result, making any representation of such to a prospective distributor.

6. Respondents maintain adequate records (a) which disclose the facts upon which any claims of the type discussed in Paragraph a. of this order are based; and (b) from which the validity of any claim of the type discussed in Paragraph a. of this order can be determined.

b. Persons investing in respondents' distributorships are assured of profitable income from the distributorships.

c. Persons investing in respondents' distributorships can expect an average sale of a certain specified amount of merchandise per day, or any other period of time, unless in fact the average number of sales represented is that of a substantial number of distributors.

d. Selling is not required of distributors in order to profitably operate a distributorship.

e. A distributor's entire investment, or any portion thereof, will be returned if he is not satisfied with the distributorship.

f. Account locations assigned to a distributor have been established prior to signing of a contract by distributor.

g. Persons investing in respondents' distributorships will receive complete training enabling them to become self-sufficient distributors, unless complete details of the training are explained to a prospective distributor prior to his signing of a contract.

h. Respondents will provide a distributor full and continuing support and assistance in making his distributorship a success.

i. Persons investing in respondents' distributorships will be granted an exclusive territory in which to sell products purchased from respondents, and in which no other distributor for respondents may operate.

j. All accounts established for a distributor will be within a certain radius of distributor's home.

k. A distributor's investment in respondents' distributorship is guaranteed in any way against loss.

l. Any criteria other than the ability to provide the price of initial investment are used in the selection of respondents' distributors.

m. Respondents will provide distributors with products for their displays on a timely basis.

n. Respondents are in any way affiliated with any firm whose products they merely resell; or misrepresenting in any way their status with or relation to any other business organization or product.

o. Persons investing in respondents' distributorships will receive the return of their investment within any specified period of time.

p. Respondents will obtain profitable sales producing account locations for their distributors; or misrepresenting in any way the type of business establishment or premises in which account locations will be established.

q. Any certain number of accounts will be established by respondents, unless in fact this number corresponds with the actual number of physical account locations finally established by respondents.

r. Respondents will set up accounts for distributor shortly after distributor signs his contract.

s. A distributor will be able to sell any product sold to him by respondents for less than the price charged by others selling the same product at the same distributive level in the distributor's trade area.

t. Respondents are, or will become, sole dealers, franchisees or distributors of any product in any area.

u. A distributor will be the exclusive dealer or distributor in his area for any product sold by respondents.

v. A distributor will receive from respondents any products other than those which respondents in fact will make available to distributor.

w. Terms of payment for products supplied to distributors by respondents are anything other than cash.

x. Respondents will pay freight costs for shipment of products to distributors.

y. Any person is a distributor, employee, representative or agent of respondents unless in fact that person actually holds the position he is represented to hold.

It is further ordered, That respondents make the following disclosures to all prospective purchasers of their distributorships:

1. State in writing in all contracts and purchase agreements:

a. That the contract or purchase agreement is not final and binding until respondents have completely performed their obligations thereunder by establishing account locations satisfactory to the purchaser, and by providing the purchaser with sufficient inventory to fill his initial displays.

b. That full refund of a prospective purchaser's investment will be made at any time during the period described in Paragraph 1(a) above, upon written request from the prospective purchaser.

It is further ordered, That respondents furnish each prospective purchaser of respondents' distributorships with a copy of the completed contract or purchase agreement proposed to be used at least fifteen (15) business days prior to the date the agreement is to be consummated.

It is further ordered, That respondents:

a. Distribute a copy of this order to each of their operating divisions.

b. Deliver a copy of this order to all prospective purchasers of respondents' products, services or distributorships at least fifteen (15) days prior to the signing of a contract or purchase agreement, and secure from each such prospective purchaser a signed statement acknowledging receipt of said order.

c. Deliver a copy of this order to all present and future salesmen or other persons engaged in the sale of respondents' products, services or distributorships, and require that each of these said persons sign a statement clearly stating his intention to be bound by and to conform to the requirements of this order; retain said statement during the period said person is employed or engaged; and make said statements available to the Commission's staff for inspection and copying upon request.

d. Institute a program of continuing surveillance adequate to reveal whether each person described in subparagraph (c) of this paragraph is conforming to the requirements of this order.

e. Discontinue dealing with or terminate the use or engagement of any person who refuses to sign a statement as described in subparagraph (c) of this paragraph, or who continues on his own any act or practice prohibited by this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of successor corporations, creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

SAVOY DRUG & CHEMICAL COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2743. Complaint, Oct. 21, 1975–Decision, Oct. 21, 1975

Consent order requiring a Chicago, Ill., seller and distributor of Let's Lift It, a skin preparation, among other things to cease making false or unsubstantiated performance and effectiveness claims for any product; and misrepresenting tests or test results.

Appearances

For the Commission: *Mark A. Heller* and *Jean F. Greene*.

For the respondent: *Halbert O. Crews, Greenberg, Keele, Lunn & Aronberg*, Chicago, Ill. and *William R. Pendergast, McMurray & Pendergast*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Savoy Drug and Chemical Co., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Savoy Drug and Chemical Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business at 427 W. Randolph St., Chicago, Ill.

PAR. 2. Respondent is now, and for some time past has been, engaged in the advertising, offering for sale, sale and distribution of a skin preparation known as Let's Lift It.

PAR. 3. In the course and conduct of its aforesaid business, respondent now causes, and for some time last past has caused its said skin preparation, when sold, to be shipped from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintains and at all times mentioned herein, has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, the respondent has disseminated, and is now disseminating, and has caused and is now causing the dissemination of false advertisements concerning its said product by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, and respondent has also disseminated and is now disseminating, and has caused and is now causing the dissemination of false advertising concerning its said product by various means for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of the said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its aforesaid business, respondent has made numerous statements and representations in magazines and elsewhere with respect to the ability of its product to produce unblemished skin. Typical and illustrative of the statements and representations contained in said advertising and promotional material, but not all-inclusive thereof, are the following:

> 15 Minute Skin Cleaning Miracle Drys Acne Pimples and Lifts Out Blackheads On Nose, Face, Chin and Neck.

* * * * * * *

> Makes Skin Smoother, Clearer, Lighter and Younger Looking . . . Even Without Make-up * * * Works Wonders on Your Skin or Your Money Back.

* * * * * * *

> A Cosmetic Chemist's Experiments With Extracts From Natural Herbs and Plants May be the Best News Yet for the Horrid Acne Pimples and the Ugly Blackheads that makes Faces Look Blemished.

* * * * * * *

> We call it a miracle and it works in only 15 minutes. Even without make-up your skin keeps that naturally healthy looking glow of youth for days and with regular use as necessary your lovelier complexion can be almost perpetual.

* * * * * * *

> Let's Lift It, as this amazing new herbal skin beautifying discovery is called, it's not a cover-up * * * not a cream * * * not a lotion * * * and it works its wonders the natural herb way without make-up of any kind. You just smooth it on and let it set very quickly. Your skin actually feels a fast pick up as the unusual deep down action exercises the skin,

firms tissue, makes sagging muscles tingle. Then in 15 minutes you actually see it rinse away blackheads, dry acne pimples and clarify sallow, muddy, sluggish looking skin.

* * * * * * *

Dark circles, shadows and muddy spots lighten visibly. Enlarged pores are refined and look smaller. Excess skin oiliness around the nose no longer shines. Even without make-up skin seems to acquire the clean, smooth texture * * * the bright clearer tone * * * the glow of youth appearance that's every woman's dream.

* * * * * * *

You have nothing to lose but the pimples, blackheads and wrinkles you don't want anyway.

PAR. 6. By and through the use of said statements and representations, respondent has represented, directly or by implication, that:

1. Let's Lift It will clear all blackheads, acne pimples and wrinkles from the skin of each individual who uses it;
2. Let's Lift It substantially lightens dark circles, shadows, and muddy spots on the skin of each individual who uses it;
3. Let's Lift It permanently refines and reduces enlarged pores in the skin of every individual who uses it;
4. Let's Lift It permanently tightens sagging skin under the eyes, and at the mouth and jawline on every individual who uses it;
5. Tests or experiments which prove the representations numbered 1 through 4 above have been conducted.

PAR. 7. In truth and in fact:

1. Let's Lift It will not clear all blackheads, acne pimples, and wrinkles from the skin of each individual who uses it;
2. Let's Lift It will not substantially lighten dark circles, shadows, and muddy spots on the skin of each individual who uses it;
3. Let's Lift It will not permanently refine and reduce enlarged pores in the skin of every individual who uses it;
4. Let's Lift It will not permanently tighten sagging skin under the eyes, and at the mouth and jawline on every individual who uses it;
5. Tests or experiments which prove the representations numbered 1 through 4 above have not been conducted.

PAR. 8. In the course and conduct of its business, and at all times mentioned herein, respondent has been in substantial competition in commerce with corporations, firms, and individuals in the sale of skin preparations.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of respondent's skin preparation by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enter the following order:

1. Respondent Savoy Drug & Chemical Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business at 427 W. Randolph St., Chicago, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Savoy Drug & Chemical Company, a corporation, and its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of skin preparations or any other product in, or affecting, commerce as "commerce" is defined in the Federal Trade Commission Act, to forthwith cease and desist from:

A. Representing directly or by implication that any such product:

1. Treats or alleviates the conditions that produce blemishes or wrinkles, or produces skin that is free of acne, pimples, or blackheads, or will cause skin blemishes or wrinkles to be lifted away, removed, or eliminated;

2. Removes or eliminates dark circles, shadows, or muddy spots;

3. Refines or reduces large pores, or tightens sagging skin;

4. Has any therapeutic quality, characteristic, or capacity, or will have any result, or will perform in any given manner, or is effective for any purpose, unless each such quality, characteristic, capacity, result, manner of performance, or effectiveness has been fully substantiated.

B. Disseminating or causing the dissemination of any advertising by United States mails or by any means in, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, which misrepresents, directly or by implication:

1. The performance, efficacy, capacity, or usefulness, or any characteristic, property, quality, or the result of use of any such product;

2. The extent to which any such product has been tested, or the results of its use demonstrated.

C. Disseminating or causing the dissemination of any advertising by any means, for the purpose of inducing or which is likely to induce, directly or by implication, the purchase of any such product in, or having an effect upon, commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations, acts, or practices prohibited in Paragraphs A or B above.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall within sixty (60) days after the effective date of the order served upon it, file with the Commission a report, in writing, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

EMANUELE VITALE, ET AL. T/A EXPORT-IMPORT WOOLENS CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2744. Complaint, Oct. 21, 1975-Decision, Oct. 21, 1975

Consent order requiring a New York City importer and distributor of wool products, among other things to cease falsely and deceptively labeling wool products as to wool content.

Appearances

For the Commission: *Jerry R. McDonald.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Emanuele Vitale and Samuel Vitale, individually and as co-partners trading and doing business as Export-Import Woolens Co., hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Emanuele Vitale and Samuel Vitale are individuals and are co-partners trading and doing business as Export-Import Woolens Co., with their office and principal place of business located at 1290 Avenue of the Americas, New York, N.Y.

Respondents are engaged in the importation, distribution and sale of wool products including but not limited to wool fabrics.

PAR. 2. Respondents, now and for some time last past, have imported for introduction into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, and sold in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were fabrics which were stamped, tagged, labeled, or otherwise identified by respondents as containing "65% polyester and 35% wool," whereas, in truth and in fact, said wool products contained substantially different amounts of fibers than as represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool fabrics, which failed to have labels on or affixed thereto showing the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more; and (5) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the rules and regulations promulgated thereunder in the following respect:

Samples, swatches or specimens of wool products used to promote or effect sales of such wool products in commerce, were not labeled or marked to show the information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in violation of Rule 22 of the aforesaid rules and regulations.

PAR. 6. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents Emanuele Vitale and Samuel Vitale are individuals and are co-partners trading and doing business as Export-Import Woolens Co., with their principal office and place of business located at 1290 Avenue of the Americas, New York, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Emanuele Vitale and Samuel Vitale, individually and as co-partners trading and doing business as Export-Import Woolens Co. or under any name or names, their successors and assigns, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the importation for introduction or the introduction into commerce or the offering for sale, sale, transportation, distribution, delivery for shipment, or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.
2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.
3. Failing to securely affix labels to samples, swatches or specimens of wool fiber products, used to promote or effect the sale of such wool fiber products, showing in words and figures plainly legible all the information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address, the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

E. S. INTERNATIONAL CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2745. Complaint, Oct. 21, 1975-Decision, Oct. 21, 1975

Consent order requiring a New York City importer and distributor of fabrics including wool and wool blend products, among other things to cease falsely and deceptively labeling and invoicing wool products as to wool content and to notify those that purchased these fabrics that they were misbranded.

Appearances

For the Commission: ***Jerry R. McDonald*** and ***Joel R. Eidelsberg.***

For the respondents: ***David Paget, Winer, Neuburger & Sive,*** New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that E. S. International Corp., a corporation, and Saleh Ezra Sassoon, also known as Charles Sassoon, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent E. S. International Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 485 Fifth Ave., New York, N.Y.

Individual respondent Saleh Ezra Sassoon, also known as Charles Sassoon, is an officer of E. S. International Corp. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

Respondents are engaged in the importation and sale of fabrics including but not limited to wool products.

PAR. 2. Respondents, now and for some time past, have imported for introduction into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, and sold in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain wool fabrics stamped, tagged, labeled, or otherwise identified by respondents as 50 percent wool, 50 percent polyester; 50 percent wool, 45 percent polyester, 5 percent airon; and 50 percent wool, 50 percent man-made fibers whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely wool fabrics, with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

PAR. 6. Respondents are now and for some time past have been engaged in the importation, offering for sale, sale, and distribution of certain products, namely fabrics. In the course and conduct of their business as aforesaid, respondents now cause and for some time last past, have caused their said products, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Respondents in the course and conduct of their business have made statements on invoices to their customers misrepresenting the fiber content of certain of their products.

Among such misrepresentations, but not limited thereto, were statements setting forth the fiber content thereof as 50 percent wool, 50 percent polyester; 50 percent wool, 45 percent polyester, 5 percent airon; and 50 percent wool, 50 percent man-made fibers whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 8. The acts and practices set out in Paragraph Seven have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content thereof.

PAR. 9. The aforesaid acts and practices of the respondents as herein alleged in Paragraph Seven were, and are, all to the prejudice and injury of the public, and constituted, and now constitute, unfair and deceptive acts or practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent E.S. International Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 485 Fifth Ave., New York, N.Y.

Respondent Saleh Ezra Sassoon, also known as Charles Sassoon, is an officer of said corporation. He formulates, directs and controls the acts, practices and policies of said corporation and his address is the same as that of said corporation.

Respondents are engaged in the importation and sale of fabrics including but not limited to wool products.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents E.S. International Corp., a corporation, its successors and assigns, and its officers, and Saleh Ezra Sassoon, also known as Charles Sassoon, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the introduction, or importing for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents E.S. International Corp., a corporation, its successors and assigns, and its officers, and Saleh Ezra Sassoon, also known as Charles Sassoon, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the importing, advertising, offering for sale, sale or distribution of fabrics in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the amount of constituent fibers contained in such products on invoices or shipping memoranda applicable thereto, or in any other manner.

It is further ordered, That respondents mail a copy of this order by registered mail to each of their customers that purchased the wool products which gave rise to this complaint.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and his affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

MITSUI & CO. (U.S.A.), INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2746. Complaint, Oct. 21, 1975-Decision, Oct. 21, 1975

Consent order requiring a New York City importer and seller of fabrics including but not limited to wool products, among other things to cease falsely or deceptively misbranding or mislabeling its wool products and to notify those who purchased the misbranded wool products of the fact that they were misbranded.

Appearances

For the Commission: *Judith K. Braun.*

For the respondent: *Joseph Barbash, Debevoise, Plimpton, Lyons & Gates,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mitsui & Co. (U.S.A.), Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mitsui & Co. (U.S.A.), Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 200 Park Ave., New York, N.Y.

Respondent is engaged in the importation and sale of fabrics including but not limited to wool products.

PAR. 2. Respondent, now and for some time past, has imported for introduction into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, and sold in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondent within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain wool fabrics stamped, tagged, labeled, or otherwise identified by respondent as "70% polyester, 30% reprocessed wool," whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondent in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely wool fabrics, with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of respondent as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mitsui & Co. (U.S.A.), Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 200 Park Ave., New York, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Mitsui & Co. (U.S.A.), Inc., a corporation, its successors and assigns, and its officers, and respondent's representatives, agents, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the introduction, or importing for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, does forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondent deliver a copy of this order by registered mail to each of its customers that purchased "THEO" fabrics from it during the period from Jan. 1, 1973 to the effective date of this order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent shall notify the Commission at least 30 days prior to any proposed change in its corporate status which may affect compliance obligations arising out of the order such as dissolution, assignment or sale resulting in the emergence of successor corporations and that this order shall be binding on any such successor.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

YAMAHA INTERNATIONAL CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2747. Complaint, Oct. 23, 1975-Decision, Oct. 23, 1975

Consent order requiring a Buena Park, Calif., motorcycle manufacturer and its San Francisco, Calif., advertising agency, among other things to cease making unsubstantiated claims of motorcycle safety. Further, respondent is required to transmit to participants in its "Learn-to-Ride" program a letter reflecting the fact that contrary to popular opinion, riding a motorcycle weighing only several hundred pounds is not as safe as operating an automobile weighing one to two tons, regardless of the training a cyclist has had.

Appearances

For the Commission: *Dean A. Fournier.*

For the respondents: *Lawrence P.J. Bonaguidi* and *William D. Greene, Burns, Van Kirk, Green & Kafer,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Yamaha International Corporation, a corporation, and Botsford Ketchum Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Yamaha International Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 6600 Orangethorpe Ave., Buena Park, Calif.

PAR. 2. Respondent Botsford Ketchum Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 55 Union St., San Francisco, Calif.

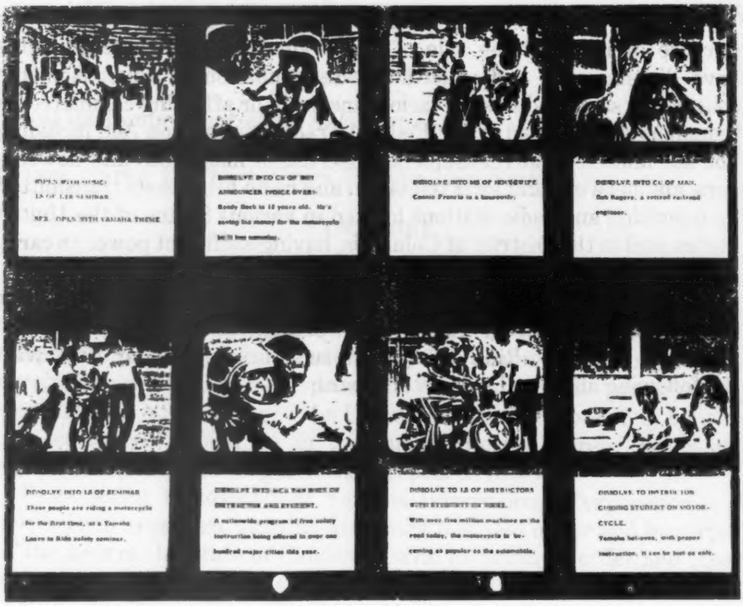
PAR. 3. Respondent Yamaha International Corporation is now, and for some time last past has been, engaged in the sale and distribution of Yamaha motorcycles, snowmobiles, and other products.

PAR. 4. Respondent Botsford Ketchum Inc. is now and for some time last past has been the advertising agency of Yamaha International Corporation, and now and for some time last past has prepared and placed for publication and caused the dissemination of advertising material, including but not limited to the advertising referred to herein, to promote the sale of Yamaha products.

PAR. 5. In the course and conduct of its business as aforesaid, respondent Yamaha International Corporation causes its said motorcycles, snowmobiles, and other products, when sold, to be transported from its place of business in California to purchasers located in various other States of the United States and in the District of Columbia. Said respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. In the course and conduct of their said businesses, and for the purpose of inducing the sale of said Yamaha products, respondents have disseminated and caused the dissemination of advertisements concerning said products by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in magazines and newspapers, and network and local television and radio broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across State lines.

PAR. 7. Among the advertisements disseminated as hereinabove set forth was a television commercial, presented in connection with Yamaha's Learn-To-Ride safety seminars during the year 1973, with the following audio and video storyboard:



(OPENS WITH MUSIC)
LS OF L.T.R. SEMINAR

SFX: OPENS WITH YAMAHA THEME

DISSOLVE INTO CU OF BOY
ANNOUNCER (VOICE OVER):
Randy Bach is 12 years old. He's saving his money for the motorcycle he'll buy someday.

DISSOLVE INTO MS OF HOUSEWIFE.
Connie Francis is a housewife.

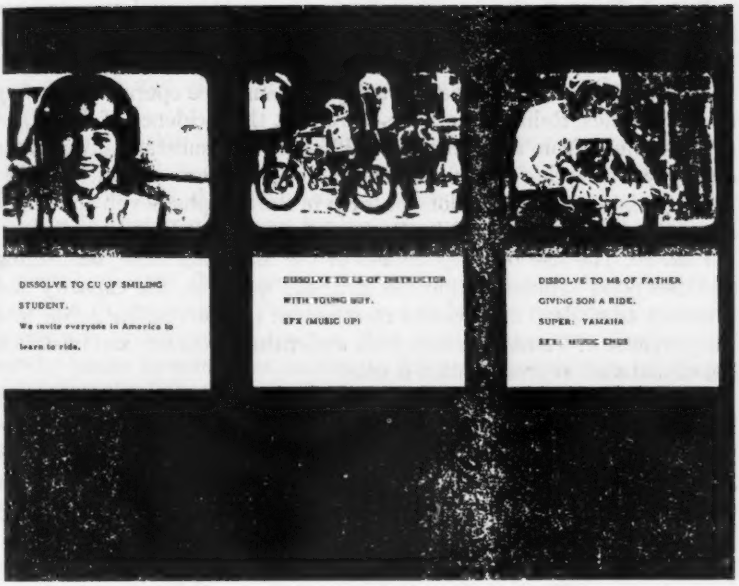
DISSOLVE INTO CU OF MAN.
Bob Rogers, a retired railroad engineer.

DISSOLVE INTO LS OF SEMINAR
These people are riding a motorcycle for the first time, at a Yamaha Learn to Ride safety seminar.

DISSOLVE INTO MCU TWO SHOT OF INSTRUCTOR AND STUDENT.
A nationwide program of free safety instruction being offered in over one hundred major cities this year.

DISSOLVE TO LS OF INSTRUCTORS WITH STUDENTS ON BIKES.
With over five million machines on the road today, the motorcycle is becoming as popular as the automobile.

DISSOLVE TO INSTRUCTOR GUIDING STUDENT ON MOTORCYCLE.
Yamaha believes, with proper instruction, it can be just as safe.



DISSOLVE TO CU OF SMILING STUDENT.

We invite everyone in America to learn to ride.

DISSOLVE TO LS OF INSTRUCTOR WITH YOUNG BOY.

SFX (MUSIC UP)

DISSOLVE TO MS OF FATHER GIVING SON A RIDE.

SUPER: YAMAHA

SFX: MUSIC ENDS

PAR. 8. Through the use of said television commercial, respondents have represented, directly or by implication, that, with proper instruction, motorcycles can be operated as safely as automobiles.

PAR. 9. In truth and in fact, motorcycles cannot be operated as safely as automobiles. Reliable statistics show that the incidence of death and serious injury from accidents is significantly and substantially greater among motorcycle operators than among drivers of automobiles. Therefore, the representation set forth in Paragraphs Seven and Eight hereof was, and is, false, misleading and deceptive.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive representation has had, and now has, the capacity and tendency to mislead and deceive members of the purchasing public into the purchase of Yamaha motorcycles under the erroneous and mistaken belief that such representation is true.

PAR. 11. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Yamaha International Corporation has been, and is now, in substantial competition, in or affecting commerce, with corporations, firms, and individuals in the sale of products of the same general kind and nature as those sold by said respondent.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Botsford Ketchum Inc. has been, and is now, in substantial competition, in or affecting commerce, with other advertising agencies.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, and having duly considered comments filed pursuant to Section 2.34 of its rules, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent Yamaha International Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 6600 Orangethorpe Ave., Buena Park, Calif.

Respondent Botsford Ketchum Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 55 Union St., San Francisco, Calif.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Yamaha International Corporation, a corporation, and Botsford Ketchum Inc., a corporation, and their officers, agents, representatives, employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of motorized vehicles or other products as specified below, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing orally, visually, in writing, or in any other manner, directly or by implication, that any motorized vehicle other than an automobile can be operated as safely as an automobile, unless respondents have a reasonable basis for such representation at the time it is made, including documentation of competent and reliable scientific tests or other objective data of statistical validity.

B. Making any claims or statements orally, visually, in writing, or in any other manner, directly or by implication, as to the safety of any transportation device or vehicle, unless respondents have a reasonable basis for such claim or statement at the time it is made, which may consist of documentation of competent and reliable scientific tests or other objective data of statistical validity.

Provided, however, That mere visual depiction of a product, device or vehicle in operation, without more, shall not be deemed a representation, claim or statement as to safety within the meaning of the above Paragraphs A and B.

It is further ordered, That respondent Yamaha International Corporation shall, not later than sixty (60) days after service upon it of this order, send a letter in the form annexed hereto as Letter "A" to each person known to have participated in any way in a Yamaha Learn-To-Ride seminar during the year 1973. Mailing by first class mail to the last known address of each such person shall comply with this requirement.

It is further ordered, That respondents maintain complete business records relative to the manner and form of their compliance with this order. Respondents shall retain each such record for at least three years, and shall retain substantiation and other documentation at least two years beyond the last dissemination of any representation, claim, or statement contingent thereon under the provisions of this order. Upon reasonable notice, respondents shall make any and all such records available for inspection and photocopying by authorized representatives of the Federal Trade Commission at respondents' place of business or other properly designated location.

It is further ordered, That respondents forthwith distribute a copy of this order to each of their operating divisions, and to all personnel now or hereafter engaged in any aspect of the preparation, creation or placing of advertising of transportation devices or vehicles.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in a corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, or any other change in said corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondents shall, within 60 days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

LETTER A

YAMAHA INTERNATIONAL CORPORATION

Dear Learn-To-Ride Participant:

A recent survey financed by our corporation revealed that a considerable number of the persons who attended our Learn-To-Ride program believe that, with proper instruction, they can be just as safe riding a motorcycle as in an automobile.

As one of the leading vendors of motorcycles in the United States, and because of our concern for the safety of all motorcycle owners and riders, we feel it is important to correct this erroneous and potentially hazardous belief. Although the motorcycle's maneuverability helps in avoiding accidents, and training can certainly help make you a safer rider, all presently available statistics show a substantially higher likelihood of accidental death or serious injury for the motorcyclist than for the automobile driver.

In other words: No matter how thorough your training, in the event you become involved in an accident you will be less safe from injury while riding a two-wheel vehicle weighing several hundred pounds than when riding in an enclosed four-wheel vehicle of one to two tons.

We believe that by making this fact clear to all who participated in our Learn-To-Ride program, we can contribute to their future safety as motorcycle operators.

IN THE MATTER OF

TEAC CORPORATION OF AMERICA

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2752. Complaint, Oct. 24, 1975–Decision, Oct. 24, 1975

Consent order requiring a Montebello, Calif., supplier of high fidelity audio components, among other things to cease fixing resale prices of its products; fair trading its products for five years; suggesting resale prices for two years; withholding earned advertising allowances from, or refusing to sell to, price-cutting dealers; requiring dealers to report price-cutters; and imposing customer restrictions upon dealers.

Appearances

For the Commission: *Laura P. Worsinger* and *Elliot Feinberg.*

For the respondent: *David B. Schulman, Prince, Schoenberg, Fisher, Newman & Schulman*, Chicago, Ill.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party identified in the caption hereof, and more particularly described and referred to hereinafter as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, (15 U.S.C. § 45), and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent TEAC Corporation of America is a corporation organized under the laws of the State of California, with its principal office located at 7733 Telegraph Rd., Montebello, Calif.

PAR. 2. Respondent has been, and is now, engaged in the manufacture, importation, distribution and sale of high fidelity audio components and related products. Respondent distributes and sells these products to retail dealers. In fiscal year 1974, the gross sales of the respondent were in excess of $25 million.

PAR. 3. Respondent distributes and sells its products to retail dealers (hereinafter referred to as dealers) located in all fifty States and the District of Columbia, through salespersons and sales representatives who act under the direction and control and carry out the policies of respondent.

PAR. 4. In the course and conduct of its business as aforesaid, respondent causes and has caused, high fidelity audio components and other products to be shipped from the State in which they are manufactured or warehoused to purchasers in other States. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, respondent has been and is in substantial competition in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, with persons or firms engaged in the manufacture, importation, distribution or sale of high fidelity audio components and related products.

PAR. 6. In the course and conduct of its business as aforesaid, respondent, in combination, agreement, or understanding with some of its authorized dealers, or with the cooperation or acquiescence of other of its dealers has engaged in a course of action to unlawfully fix, establish, stabilize or maintain suggested retail prices at which certain of its products are resold. In furtherance of said course of action, respondent has engaged in, and is now engaging in, the following acts and practices, among others:

(a) establishing agreements, understandings, or arrangements with its dealers, as a condition precedent to the granting or retention of a dealership, that such dealers will maintain certain resale or retail prices;

(b) informing its dealers, by direct and indirect means, that respondent expects and requires such dealers to maintain and enforce certain resale or retail prices, or such dealerships will be terminated or shipments will be delayed;

(c) requiring its dealers to agree not to sell or otherwise supply or furnish its products to other dealers;

(d) soliciting and obtaining from its dealers, cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices;

(e) directing, soliciting or encouraging salespersons, sales representatives, and other employees or agents of respondent to secure and report information identifying any dealer who (1) advertises, offers to sell or sells respondent's products at prices below the retail prices suggested or established by respondent; or (2) sells respondent's products to other dealers in high fidelity audio components;

(f) threatening to terminate and terminating certain dealers who fail or refuse to observe and maintain respondent's suggested retail prices, or who advertise respondent's products at retail prices below the prices established by respondent or who supply respondent's products to other dealers; and

(g) regularly furnishing dealers with price lists and supplements thereto containing established or suggested retail prices for respondent's products.

PAR. 7. In the course and conduct of its business as aforesaid, respondent has entered into combinations, agreements, understandings or arrangements which have the purpose or effect of prohibiting dealers from selling respondent's products to certain potential customers.

PAR. 8. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondent, as hereinabove alleged, are unfair methods of competition and unfair acts or practices because they have the tendency to, or the actual effect of:

(a) fixing, maintaining or stabilizing the prices at which respondent's products will be resold;

(b) suppressing or eliminating competition among dealers selling respondent's products;

(c) inflating the prices paid by consumers for respondent's products;

(d) depriving dealers of their freedom to select their customers and otherwise to function as free and independent businessmen; and

(e) depriving consumers of the benefits of competition.

PAR. 9. The aforesaid acts, practices and methods of competition, constitute unfair methods of competition and unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jursidictional findings, and enters the following order:

1. Respondent TEAC Corporation of America, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 7733 Telegraph Rd., Montebello, Calif.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent TEAC Corporation of America, a corporation, its successors and assigns, and respondent's employees, agents, representatives, including sales representatives, or other independent contractors, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, importation, distribution, offering for sale and sale of high fidelity audio components and other products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Establishing, continuing or enforcing any contracts, agreements, understandings or arrangements with distributors or retail dealers of respondent's products (hereinafter distributors and retail dealers are referred to in this order as "dealers") which have the purpose or effect of fixing, establishing, maintaining, or enforcing the prices at which respondent's products are to be resold.

2. Fixing, establishing, controlling, or maintaining the prices at which dealers may advertise, promote, offer for sale or sell respondent's products.

3. Publishing, disseminating, circulating or providing by any other means, any suggested resale prices; *Provided, however,* That subsequent to two (2) years after the date on which this order becomes final, respondent may suggest resale prices if it is clearly and conspicuously stated on each page of any pricelist, book, tag, advertising or promotional material or other document that the price is suggested.

4. Requiring any dealer to enter into written or oral agreements or understandings that such dealer will adhere to established or suggested prices for respondent's products as a condition to receiving or retaining its dealership.

5. Refusing to sell or threatening to refuse to sell to any dealer who desires to engage in the sale of respondent's products for the reason that such dealer will not enter into an understanding or agreement with respondent to advertise or sell said products at respondent's established or suggested resale price.

6. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any TEAC dealer because said dealer advertises respondent's products at retail prices other than that which respondent deems appropriate or has approved.

7. Disseminating or circulating any warranty registration form or any other document which requires or requests that the price paid by the ultimate consumer for respondent's products be stated and reported to respondent.

8. Securing or attempting to secure any promises or assurances from dealers or prospective dealers regarding the prices at which such dealers will advertise or sell respondent's products or requesting or requiring any dealer or prospective dealer to obtain approval from respondent for prices offered by said dealers in advertisements for respondent's products.

9. Requiring, soliciting or encouraging any dealer, person or firm either directly or indirectly to report the identity of any dealer, person

or firm who does not adhere to any resale price for any of respondent's products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

10. Terminating, threatening, intimidating, coercing, delaying shipments, or taking any other action to prevent the sale of respondent's products by a dealer because said dealer has advertised or sold, is advertising or selling, or is suspected of advertising or selling such products at other than prices that respondent may deem to be appropriate or has approved.

11. Establishing, continuing or enforcing, by refusal to sell, termination or threat thereof, delay in shipment or threat thereof, or in any other manner, any contract, agreement, understanding, or arrangement or method of doing business which has the purpose or effect of restricting or limiting in any manner the customers or classes of customers to whom dealers may sell respondent's products.

12. Convening or participating in any meeting for the purpose of undertaking or engaging in any of the acts or practices prohibited by this order.

In connection with the foregoing provisions under Part I of this order; *It is further provided*, That after the expiration of five (5) years from the date this order becomes final, nothing contained in this order shall prohibit respondent from lawfully exercising such rights, if any, as it may have to establish and distribute resale prices for its products under fair trade laws then in effect.

II

It is further ordered, That respondent shall:

1. Forthwith upon this order becoming final, mail or deliver, and obtain signed receipts therefor, copies of this order to every present dealer, to every dealer terminated by respondent since Jan. 1, 1972 and to every person or company that within three (3) years becomes a new dealer.

2. Forthwith distribute a copy of this order to each of its operating divisions and subsidiaries and to all officers, sales personnel, sales agents, sales representatives and advertising agencies and secure from each such entity or person a signed statement acknowledging receipt of said order.

3. Within thirty (30) days from the date on which this order becomes final, mail or deliver, and obtain a signed receipt therefor, written notice to all of respondent's sales personnel, sales agents, sales representatives, and advertising agencies informing such persons that their violation of any provision of this order may result in the termination of said employment or business relationship. Respondent

shall obtain prior approval from the New York Regional Office of the Federal Trade Commission of said written notification.

4. Forthwith terminate the employment or business relationship with any person or firm willfully violating any provision of this order and take appropriate disciplinary and corrective action, which may include termination, for nonwillful violations.

5. Within sixty (60) days from the date on which this order becomes final, mail or deliver, and obtain a signed receipt therefor, a written offer of reinstatement, upon the same terms and conditions available to respondent's other dealers, to any distributor or dealer located in an area where resale prices were not or could not be lawfully controlled who was terminated by respondent from Jan. 1, 1972 to the effective date of this order, unless respondent can establish that the applicant does not or did not at the time of termination have good credit or that the dealer does not have reasonably adequate facilities for selling respondent's products at retail, and forthwith reinstate any such distributor or dealer who within thirty (30) days thereafter requests, in writing, reinstatement.

III

It is further ordered, That respondent:

1. Notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

2. For a period of three (3) years from the date this order becomes final, establish and maintain a file of all records referring or relating to respondent's refusal during such period to sell its products to any dealer, which file shall contain a record of a communication to each such dealer explaining respondent's refusal to sell, and which file will be made available for Commission inspection on reasonable notice; and, annually, for a period of three (3) years from the date hereof, submit a report to the Commission's New York Regional Office listing the names and addresses of all dealers with whom respondent has refused to deal during the preceding year, a description of the reason for the refusal and the date of the refusal.

IV

It is further ordered, That in the event the Commission issues any order which is less restrictive than the provisions of Paragraphs I, II, or III of this order, in any proceeding involving alleged resale price maintenance of a manufacturer or supplier of audio components subject to investigation by the Commission pursuant to File No. 741 0042, then the Commission shall, upon the application of TEAC Corporation of America reconsider this order and may reopen this proceeding in order to make whatever revisions, if any, are necessary to bring the foregoing paragraphs into conformity with the less stringent restrictions imposed upon respondent's competitors.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

SHERWOOD ELECTRONIC LABORATORIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2753. Complaint, Oct. 24, 1975-Decision, Oct. 24, 1975

Consent order requiring a Chicago, Ill., supplier of high fidelity audio components, among other things to cease fixing resale prices of its products; fair trading its products for five years; suggesting resale prices for two years; withholding earned advertising allowances from, or refusing to sell to, price-cutting dealers; requiring dealers to report price-cutters; and imposing customer restrictions upon dealers.

Appearances

For the Commission: *Laura P. Worsinger* and *Elliot Feinberg*.

For the respondent: *Donald Mackay, Sidley & Austin*, Chicago, Ill.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party identified in the caption hereof, and more particularly described and referred to hereinafter as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, (15 U.S.C. §45), and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Sherwood Electronic Laboratories, Inc. is a corporation organized under the laws of the State of Illinois, with its principal office located at 4300 N. California Ave., Chicago, Ill.

PAR. 2. Respondent has been, and is now, engaged in the manufacture, importation, distribution and sale of high fidelity audio components and related products. Respondent distributes and sells these products to retail dealers. In fiscal year 1973, the gross sales of the respondent were in excess of $12 million.

PAR. 3. Respondent distributes and sells its products to distributors and to retail dealers (hereinafter distributors and retail dealers are referred to as dealers) located in all fifty States and in the District of Columbia and Puerto Rico, through salespersons and sales representatives who act under the direction and control and carry out the policies of respondent.

PAR. 4. In the course and conduct of its business as aforesaid, respondent causes and has caused, high fidelity audio components and other products to be shipped from the State in which they are manufactured or warehoused to purchasers in other States. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, respondent has been and is in substantial competition in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, with persons or firms engaged in the manufacture, importation, distribution or sale of high fidelity audio components and related products.

PAR. 6. In the course and conduct of its business as aforesaid, respondent, in combination, agreement, or understanding with some of its authorized dealers, or with the cooperation or acquiescence of other of its dealers has engaged in a course of action to unlawfully fix, establish, stabilize or maintain suggested retail prices at which certain of its products are resold. In furtherance of said course of action, respondent has engaged in, and is now engaging in, the following acts and practices, among others:

(a) establishing agreements, understandings, or arrangements with its dealers, as a condition precedent to the granting or retention of a dealership, that such dealers will maintain certain resale or retail prices;

(b) informing its dealers, by direct and indirect means, that respondent expects and requires such dealers to maintain and enforce certain resale or retail prices, or such dealerships will be terminated or shipments will be delayed;

(c) requiring its dealers to agree not to sell or otherwise supply or furnish its products to other dealers;

(d) soliciting and obtaining from its dealers, cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices;

(e) directing, soliciting or encouraging salespersons, sales representatives, and other employees or agents of respondent to secure and report information identifying any dealer who (1) advertises, offers to sell or sells respondent's products at prices below the retail prices suggested or established by respondent; or (2) sells respondent's products to other dealers in high fidelity audio components;

(f) threatening to terminate and terminating certain dealers who fail or refuse to observe and maintain respondent's suggested retail prices, or who advertise respondent's products at retail prices below the prices established by respondent or who supply respondent's products to other dealers; and

(g) regularly furnishing dealers with price lists and supplements thereto containing established or suggested retail prices for respondent's products.

PAR. 7. In the course and conduct of its business as aforesaid, respondent has entered into combinations, agreements, understandings or arrangements which have the purpose or effect of prohibiting dealers from selling respondent's products to certain potential customers.

PAR. 8. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondent, as hereinabove alleged, are unfair methods of competition and unfair acts or practices because they have the tendency to, or the actual effect of:

(a) fixing, maintaining or stabilizing the prices at which respondent's products will be resold;

(b) suppressing or eliminating competition among dealers selling respondent's products;

(c) inflating the prices paid by consumers for respondent's products;

(d) depriving dealers of their freedom to select their customers and otherwise to function as free and independent businessmen; and

(e) depriving consumers of the benefits of competition.

PAR. 9. The aforesaid acts, practices and methods of competition, constitute unfair methods of competition and unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sherwood Electronic Laboratories, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 4300 N. California Ave., Chicago, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Sherwood Electronic Laboratories, Inc., a corporation, its successors and assigns, and respondent's employees, agents, representatives, including sales representatives or other independent contractors, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, importation, distribution, offering for sale and sale of high fidelity audio components and other products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Establishing, continuing or enforcing any contracts, agreements,

understandings or arrangements with distributors or retail dealers of respondent's products (hereinafter distributors and retail dealers are referred to in this order as "dealers") which have the purpose or effect of fixing, establishing, maintaining, or enforcing the prices at which respondent's products are to be resold.

2. Fixing, establishing, controlling or maintaining the prices at which dealers may advertise, promote, offer for sale or sell respondent's products.

3. Publishing, disseminating, circulating or providing by any other means, any suggested resale prices; *Provided, however,* That subsequent to two (2) years after the date on which this order becomes final, respondent may suggest resale prices if it is clearly and conspicuously stated on each page of any pricelist, book, tag, advertising or promotional material or other document that the price is suggested.

4. Requiring any dealer to enter into written or oral agreements or understandings that such dealer will adhere to established or suggested prices for respondent's products as a condition to receiving or retaining its dealership.

5. Refusing to sell or threatening to refuse to sell to any dealer who desires to engage in the sale of respondent's products for the reason that such dealer will not enter into an understanding or agreement with respondent to advertise or sell said products at respondent's established or suggested resale price.

6. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer because said dealer advertises respondent's products at retail prices other than that which respondent deems appropriate or has approved.

7. Disseminating or circulating any warranty registration form or any other document which requires or requests that the retail price paid by the ultimate consumer for respondent's products be stated and reported to respondent.

8. Securing or attempting to secure any promises or assurances from dealers or prospective dealers regarding the prices at which such dealers will advertise or sell respondent's products or requesting or requiring any dealer or prospective dealer to obtain approval from respondent for prices offered by said dealers in advertisements for respondent's products.

9. Requiring, soliciting or encouraging any dealer, person or firm either directly or indirectly to report the identity of any dealer, person or firm who does not adhere to any resale or retail price for any of respondent's products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

10. Terminating, threatening, intimidating, coercing, delaying ship-

ments, or taking any other action to prevent the sale of respondent's products by a dealer because said dealer has advertised or sold, is advertising or selling, or is suspected of advertising or selling such products at other than prices that respondent may deem to be appropriate or has approved.

11. Establishing, continuing or enforcing, by refusal to sell, termination or threat thereof, delay in shipment or threat thereof, or in any other manner, any contract, agreement, understanding, or arrangement or method of doing business which has the purpose or effect of restricting or limiting in any manner the customers or classes of customers to whom dealers may sell respondent's products.

12. Convening or participating in any meeting for the purpose of undertaking or engaging in any of the acts or practices prohibited by this order.

In connection with the foregoing provisions under Part I of this order; *It is further provided,* That after the expiration of five (5) years from the date this order becomes final, nothing contained in this order shall prohibit respondent from lawfully exercising such rights, if any, as it may have to distribute and establish resale prices for its products under fair trade laws then in effect.

II

It is further ordered, That respondent shall:

1. Forthwith upon this order becoming final, mail or deliver, and obtain signed receipts therefor, copies of this order to every present dealer, to every dealer terminated by respondent since Jan. 1, 1972 and to every person or firm that within three (3) years from the effective date hereof becomes a new dealer.

2. Forthwith distribute a copy of this order to each of its operating divisions and subsidiaries and to all officers, sales personnel, sales agents, sales representatives and advertising agencies and secure from each such entity or person a signed statement acknowledging receipt of said order.

3. Within thirty (30) days from the date on which this order becomes final, mail or deliver, and obtain a signed receipt therefor, written notice to all of respondent's sales personnel, sales agents and sales representatives and advertising agencies informing such persons that their violation of any provision of this order may result in the termination of said employment or business relationship. Respondent shall obtain prior approval from the New York Regional Office of the Federal Trade Commission of said written notification.

4. Forthwith terminate the employment or business relationship with any person or firm willfully violating any provision of this order

and take appropriate disciplinary and corrective action, which may include termination, for nonwillful violation.

5. Within sixty (60) days from the date on which this order becomes final, mail or deliver, and obtain a signed receipt therefor, a written offer of reinstatement upon the same terms and conditions available to respondent's other dealers, to any distributor or dealer located in an area where resale prices were not or could not be lawfully controlled who was terminated by respondent from Jan. 1, 1972 to the effective date of this order unless respondent can establish that the dealer terminated does not or did not at the time of termination have good credit or that the dealer does not have reasonably adequate facilities for selling respondent's products, and forthwith reinstate any such distributor or dealer who within thirty (30) days thereafter requests, in writing, reinstatement.

III

It is further ordered, That respondent:

1. Notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

2. For a period of three (3) years from the date this order becomes final, establish and maintain a file of all records referring or relating to respondent's refusal during such period to sell its products to any dealer, which file shall contain a record of a communication to each such dealer explaining respondent's refusal to sell, and which file will be made available for Commission inspection on reasonable notice; and, annually, for a period of three (3) years from the date hereof, submit a report to the Commission's New York Regional Office listing the names and addresses of all dealers with whom respondent has refused to deal during the preceding year, a description of the reason for the refusal and the date of the refusal.

IV

It is further ordered, That in the event the Commission issues any order which is less restrictive than the provisions of Paragraphs I, II, or III of this order, in any proceeding involving alleged resale price maintenance of a manufacturer or supplier of audio components subject to investigation by the Commission pursuant to File No. 741 0042, then the Commission shall, upon the application of Sherwood Electronic

Laboratories, Inc., reconsider this order and may reopen this proceeding in order to make whatever revisions, if any, are necessary to bring the foregoing paragraphs into conformity with the less stringent restrictions imposed upon respondent's competitors.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

SANSUI ELECTRONICS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2754. Complaint, Oct. 24, 1975-Decision, Oct. 24, 1975

Consent order requiring a Woodside, N.Y., supplier of high fidelity audio components, among other things to cease fixing resale prices of its products; fair trading its products for five years; suggesting resale prices for two years; withholding earned advertising allowances from, or refusing to sell to, price-cutting dealers; requiring dealers to report price-cutters; and imposing customer restrictions upon dealers.

Appearances

For the Commission: *Laura P. Worsinger* and *Elliot Feinberg.*

For the respondent: *Harold E. Horowitz*, New York City, and *John D. Swartz, Pollak, Swartz, Stark & Armon,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party identified in the caption hereof, and more particularly described and referred to hereinafter as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, (15 U.S.C. §45), and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Sansui Electronics Corporation is a corporation organized under the laws of the State of New York, with its principal office located at 55-11 Queens Blvd., Woodside, N.Y.

PAR. 2. Respondent has been, and is now, engaged in the manufacture, importation, distribution and sale of high fidelity audio components and related products. Respondent distributes and sells these products to retail dealers. In fiscal year 1974, the gross sales of the respondent were in excess of $25 million.

PAR. 3. Respondent distributes and sells its products to retail dealers (hereinafter referred to as dealers) located in all fifty States and in the District of Columbia, through salespersons and sales representatives who act under the direction and control and carry out the policies of respondent.

PAR. 4. In the course and conduct of its business as aforesaid, respondent causes and has caused, high fidelity audio components and other products to be shipped from the State in which they are manufactured or warehoused to purchasers in other States. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, respondent has been and is in substantial competition in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, with persons or firms engaged in the manufacture, importation, distribution or sale of high fidelity audio components and related products.

PAR. 6. In the course and conduct of its business as aforesaid, respondent, in combination, agreement, or understanding with some of its authorized dealers, or with the cooperation or acquiescence of other of its dealers has engaged in a course of action to unlawfully fix, establish, stabilize or maintain suggested retail prices at which certain of its products are resold. In furtherance of said course of action, respondent has engaged in, and is now engaging in, the following acts and practices, among others:

(a) Establishing agreements, understandings, or arrangements with its dealers, as a condition precedent to the granting or retention of a dealership, that such dealers will maintain certain resale or retail prices;

(b) Informing its dealers, by direct and indirect means, that respondent expects and requires such dealers to maintain and enforce certain resale or retail prices, or such dealerships will be terminated or shipments will be delayed.

(c) Requiring its dealers to agree not to sell or otherwise supply or furnish its products to other dealers.

(d) Soliciting and obtaining from its dealers, cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices.

(e) Directing, soliciting or encouraging salespersons, sales representatives, and other employees or agents of respondent to secure and report information identifying any dealers who (1) advertises, offers to sell or sells respondent's products at prices below the retail prices suggested or established by respondent; or (2) sells respondent's products to other dealers in high fidelity audio components;

(f) Threatening to terminate and terminating certain dealers who fail or refuse to observe and maintain respondent's suggested retail prices, or who advertise respondent's products at retail prices below the prices established by respondent or who supply respondent's products to other dealers; and

(g) Regularly furnishing dealers with price lists and supplements thereto containing established or suggested retail prices for respondent's products.

PAR. 7. In the course and conduct of its business as aforesaid, respondent has entered into combinations, agreements, understandings or arrangements which have the purpose or effect of prohibiting dealers from selling respondent's products to certain potential customers.

PAR. 8. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondent, as hereinabove alleged, are unfair methods of competition and unfair acts or practices because they have the tendency to, or the actual effect of:

(a) fixing, maintaining or stabilizing the prices at which respondent's products will be resold;

(b) suppressing or eliminating competition among dealers selling respondent's products;

(c) inflating the prices paid by consumers for respondent's products;

(d) depriving dealers of their freedom to select their customers and otherwise to function as free and independent businessmen; and

(e) depriving consumers of the benefits of competition.

PAR. 9. The aforesaid acts, practices and methods of competition, constitute unfair methods of competition and unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sansui Electronics Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 55-11 Queens Blvd., Woodside, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Sansui Electronics Corporation, a corporation, its successors and assigns, and respondent's agents, representatives, including sales representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, importation, distribution, offering for sale and sale of high fidelity audio components and other products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Establishing, continuing or enforcing any contracts, agreements, understandings or arrangements with distributors or retail dealers of respondent's products (hereinafter distributors and retail dealers are referred to in this order as "dealers") which have the purpose or effect

of fixing, establishing, maintaining, stabilizing or enforcing the prices at which respondent's products are to be resold.

2. Fixing, establishing, controlling, maintaining or stabilizing the prices at which dealers may advertise, promote, offer for sale or sell respondent's products.

3. Publishing, disseminating, circulating or providing by any other means, any suggested resale prices; *Provided, however,* That subsequent to two (2) years after the date on which this order becomes final, respondent may suggest resale prices if it is clearly and conspicuously stated on each page of any pricelist, book, tag, advertising or promotional material or other document that the price is suggested.

4. Requiring any dealer to enter into written or oral agreements or understandings that such dealer will adhere to established or suggested prices for respondent's products as a condition to receiving or retaining its dealership.

5. Refusing to sell or threatening to refuse to sell to any dealer who desires to engage in the sale of respondent's products for the reason that such dealer will not enter into an understanding or agreement with respondent to advertise or sell said products at respondent's established or suggested resale price.

6. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer because said dealer advertises respondent's products at retail prices other than that which respondent deems appropriate or has approved.

7. Disseminating or circulating any warranty registration form or any other document which requires or requests that the price paid by the ultimate consumer for respondent's products be stated and reported to respondent.

8. Securing or attempting to secure any promises or assurances from dealers or prospective dealers regarding the prices at which such dealers will advertise or sell respondent's products or requesting or requiring any dealer or prospective dealer to obtain approval from respondent for prices offered by said dealers in advertisements for respondent's products.

9. Requiring, soliciting or encouraging any dealer, person or firm either directly or indirectly to report the identity of any dealer, person or firm who does not adhere to any resale price for any of respondent's products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

10. Terminating, threatening, intimidating, coercing, delaying shipments, or taking any other action to prevent the sale of respondent's products by a dealer because said dealer has advertised or sold, is advertising or selling, or is suspected of advertising or selling such

products at other than prices that respondent may deem to be appropriate or has approved.

11. Establishing, continuing or enforcing, by refusal to sell, termination or threat thereof, delay in shipment or threat thereof, or in any other manner, any contract, agreement, understanding, or arrangement or method of doing business which has the purpose or effect of restricting or limiting in any manner the customers or classes of customers to whom dealers may sell respondent's products.

12. Convening or participating in any meeting for the purpose of undertaking or engaging in any of the acts or practices prohibited by this order.

In connection with the foregoing provisions under Part I of this order; *It is further provided*, That after the expiration of five (5) years from the date this order becomes final, nothing contained in this order shall prohibit respondent from lawfully exercising such rights, if any, as it may have to establish and distribute resale prices for its products under fair trade laws then in effect.

II

It is further ordered, That respondent shall:

1. Forthwith upon this order becoming final, mail or deliver, and obtain signed receipts therefor, copies of this order to every present dealer, to every dealer terminated by respondent since Jan. 1, 1972 and to every new dealer for a period of three (3) years.

2. Forthwith distribute a copy of this order to each of its operating divisions and subsidiaries and to all officers, sales personnel, sales agents, sales representatives and advertising agencies and secure from each such entity or person a signed statement acknowledging receipt of said order.

3. Within thirty (30) days from the date on which this order becomes final, mail or deliver, and obtain a signed receipt therefor, written notice to all of respondent's sales personnel, sales agents, sales representatives and advertising agencies informing such persons that their violation of any provision of this order may result in the termination of said employment or business relationship. Respondent shall obtain prior approval from the New York Regional Office of the Federal Trade Commission of said written notification.

4. Forthwith terminate the employment or business relationship with any person or firm willfully violating any provision of this order and take appropriate disciplinary and corrective action, which may include termination, for nonwillful violations.

5. Within sixty (60) days from the date on which this order becomes final, mail or deliver, and obtain a signed receipt therefor, a written

offer of reinstatement, upon the same terms and conditions available to respondent's other dealers, to any distributor or dealer located in an area where resale prices were not or could not be lawfully controlled, who was terminated by respondent from Jan. 1, 1972 to the effective date of this order, unless respondent can establish that the applicant does not or did not at the time of termination have good credit or that the dealer does not have reasonably adequate facilities for selling respondent's products at retail, and forthwith reinstate any such distributor or dealer who within thirty (30) days thereafter requests, in writing, reinstatement.

III

It is further ordered, That respondent:

1. Notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

2. For a period of three (3) years from the date this order becomes final, establish and maintain a file of all records referring or relating to respondent's refusal during such period to sell its products to any dealer, which file shall contain a record of a communication to each such dealer explaining respondent's refusal to sell, and which file will be made available for Commission inspection on reasonable notice; and, annually, for a period of three (3) years from the date hereof, submit a report to the Commission's New York Regional Office listing the names and addresses of all dealers with whom respondent has refused to deal during the preceding year, a description of the reason for the refusal and the date of the refusal.

IV

It is further ordered, That in the event the Commission issues any order which is less restrictive than the provisions of Paragraphs I, II, or III of this order, in any proceeding involving alleged resale price maintenance of a manufacturer or supplier of audio components subject to investigation by the Commission pursuant to File No. 741 0042, then the Commission shall, upon the application of Sansui Electronics Corporation reconsider this order and may reopen this proceeding in order to make whatever revisions, if any, are necessary to bring the foregoing paragraphs into conformity with the less stringent restrictions imposed upon respondent's competitors.

IN THE MATTER OF

U.S. PIONEER ELECTRONICS CORP.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2755. Complaint, Oct. 24, 1975-Decision, Oct. 24, 1975

Consent order requiring a Moonachie, N.J., supplier of high fidelity audio components, among other things to cease fixing resale prices of its products and limiting customers with whom its dealers may deal; fair trading its products for five years; suggesting resale prices for two years; withholding earned advertising allowances from, or refusing to sell to, price-cutting dealers; requiring dealers to report price-cutters; and imposing customer restrictions upon dealers.

Appearances

For the Commission: *Laura P. Worsinger* and *Elliot Feinberg.*

For the respondent: *William A. Fenwick* and *Edwin N. Lowe, Davis, Stafford, Kellman & Fenwick,* Palo Alto, Calif.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party identified in the caption hereof, and more particularly described and referred to hereinafter as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, (15 U.S.C. §45), and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent U.S. Pioneer Electronics Corp. is a corporation organized under the laws of the State of New York, with its principal office located at 75 Oxford Dr., Moonachie, N.J.

PAR. 2. Respondent has been, and is now, engaged in the manufacture, importation, distribution and sale of high fidelity audio components and related products. Respondent distributes and sells these products to retail dealers. In fiscal year 1974, the gross sales of the respondent were in excess of $80 million.

PAR. 3. Respondent distributes and sells its products to retail dealers (hereinafter referred to as dealers) in the continental United States through salespersons and sales representatives who act under the direction and control and carry out the policies of respondent.

PAR. 4. In the course and conduct of its business as aforesaid, respondent causes and has caused, high fidelity audio components and other products to be shipped from the State in which they are manufactured or warehoused to purchasers in other States. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, respondent has been and is in substantial competition in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, with persons or firms engaged in the manufacture, importation, distribution or sale of high fidelity audio components and related products.

PAR. 6. In the course and conduct of its business as aforesaid, respondent, in combination, agreement, or understanding with some of its authorized dealers, or with the cooperation or acquiescence of other of its dealers has engaged in a course of action to unlawfully fix, establish, stabilize or maintain the suggested retail prices at which certain of its products are resold. In furtherance of said course of action, respondent has engaged in, and is now engaging in, the following acts and practices, among others:

(a) Establishing agreements, understandings, or arrangements with its dealers, as a condition precedent to the granting or retention of a dealership, that such dealers will maintain certain resale or retail prices;

(b) Informing its dealers, by direct and indirect means, that respondent expects and requires such dealers to maintain and enforce certain resale or retail prices, or such dealerships will be terminated or shipments will be delayed.

(c) Requiring its dealers to agree not to sell or otherwise supply or furnish its products to other dealers.

(d) Soliciting and obtaining from its dealers, cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices.

(e) Directing, soliciting or encouraging salespersons, sales representatives, and other employees or agents of respondent to secure and report information identifying any dealer who (1) advertises, offers to sell or sells respondent's products at prices below the retail prices suggested or established by respondent; or (2) sells respondent's products to other dealers in high fidelity audio components;

(f) Threatening to terminate and terminating certain dealers who fail or refuse to observe and maintain respondent's suggested retail prices, or who advertise respondent's products at retail prices below the prices established by respondent or who supply respondent's products to other dealers; and

(g) Regularly furnishing dealers with price lists and supplements thereto containing established or suggested retail prices for respondent's products.

PAR. 7. In the course and conduct of its business as aforesaid, respondent has entered into combinations, agreements, understandings or arrangements which have the purpose or effect of prohibiting dealers from selling respondent's products to certain potential customers.

PAR. 8. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondent, as hereinabove alleged, are unfair methods of competition and unfair acts or practices because they have the tendency to, or the actual effect of:

(a) fixing, maintaining or stabilizing the prices at which respondent's products will be resold;

(b) suppressing or eliminating competition among dealers selling respondent's products;

(c) inflating the prices paid by consumers for respondent's products;

(d) depriving dealers of their freedom to select their customers and otherwise to function as free and independent businessmen; and

(e) depriving consumers of the benefits of competition.

PAR. 9. The aforesaid acts, practices and methods of competition, constitute unfair methods of competition and unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent U.S. Pioneer Electronics Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 75 Oxford Dr., Moonachie, N.J.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent U.S. Pioneer Electronics Corp., a corporation, its successors and assigns, and respondent's employees, agents, representatives, including sales representatives or other independent contractors, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, importation, distribution, offering for sale and sale of high fidelity audio components and other products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Establishing, continuing or enforcing any contracts, agreements, understandings or arrangements with distributors or retail dealers of respondent's products (hereinafter distributors and retail dealers are referred to in this order as "dealers") which have the purpose or effect of fixing, establishing, maintaining, or enforcing the prices at which respondent's products are to be resold.

2. Fixing, establishing, controlling or maintaining the prices at which dealers may advertise, promote, offer for sale or sell respondent's products.

3. Publishing, disseminating, circulating or providing by any other means, any suggested resale prices; *Provided, however*, That subsequent to two (2) years after the date on which this order becomes final, respondent may suggest resale prices if it is clearly and conspicuously

stated on each page of any pricelist, book, tag, advertising or promotional material or other document that the price is suggested.

4. Requiring any dealer to enter into written or oral agreements or understandings that such dealer will adhere to established or suggested prices for respondent's products as a condition to receiving or retaining its dealership.

5. Refusing to sell or threatening to refuse to sell to any dealer who desires to engage in the sale of respondent's products for the reason that such dealer will not enter into an understanding or agreement with respondent to advertise or sell said products at respondent's established or suggested resale price.

6. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer because said dealer advertises respondent's products at retail prices other than that which respondent deems appropriate or has approved.

7. Disseminating or circulating any warranty registration form or any other document which requires or requests that the retail price paid by the ultimate consumer for respondent's products be stated and reported to respondent.

8. Securing or attempting to secure any promises or assurances from dealers or prospective dealers regarding the prices at which such dealers will advertise or sell respondent's products or requesting or requiring any dealer or prospective dealer to obtain approval from respondent for prices offered by said dealers in advertisements for respondent's products.

9. Requiring, soliciting or encouraging any dealer, person or firm either directly or indirectly to report the identity of any dealer, person or firm who does not adhere to any resale or retail price for any of respondent's products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

10. Terminating, threatening, intimidating, coercing, delaying shipments, or taking any other action to prevent the sale of respondent's products by a dealer because said dealer has advertised or sold, is advertising or selling, or is suspected of advertising or selling such products at other than prices that respondent may deem to be appropriate or has approved.

11. Establishing, continuing or enforcing, by refusal to sell, termination or threat thereof, delay in shipment or threat thereof, or in any other manner, any contract, agreement, understanding, or arrangement or method of doing business which has the purpose or effect of restricting or limiting in any manner the customers or classes of customers to whom dealers may sell respondent's products.

12. Convening or participating in any meeting for the purpose of

undertaking or engaging in any of the acts or practices prohibited by this order.

In connection with the foregoing provisions under Part I of this order, *It is further provided*, That after the expiration of five (5) years from the date this order becomes final, nothing contained in this order shall prohibit respondent from lawfully exercising such rights, if any, as it may have to distribute and establish resale prices for its products under fair trade laws then in effect.

II

It is further ordered, That respondent shall:

1. Forthwith upon this order becoming final, mail or deliver, and obtain signed receipts therefor, copies of this order to every present dealer, to every dealer terminated by respondent since Jan. 1, 1972 and to every person or firm that within three (3) years from the effective date hereof becomes a new dealer.

2. Forthwith distribute a copy of this order to each of its operating divisions and subsidiaries and to all officers, sales personnel, sales agents, sales representatives and advertising agencies and secure from each such entity or person a signed statement acknowledging receipt of said order.

3. Within thirty (30) days from the date on which this order becomes final, mail or deliver, and obtain a signed receipt therefor, written notice to all of respondent's sales personnel, sales agents and sales representatives and advertising agencies informing such persons that their violation of any provision of this order may result in the termination of said employment or business relationship. Respondent shall obtain prior approval from the New York Regional Office of the Federal Trade Commission of said written notification.

4. Forthwith terminate the employment or business relationship with any person or firm willfully violating any provision of this order and take appropriate disciplinary and corrective action, which may include termination, for nonwillful violation.

5. Within sixty (60) days from the date on which this order becomes final, mail or deliver, and obtain a signed receipt therefor, a written offer of reinstatement upon the same terms and conditions available to respondent's other dealers, to any distributor or dealer located in an area where resale prices were not or could not be lawfully controlled who was terminated by respondent from Jan. 1, 1972 to the effective date of this order unless respondent can establish that the dealer terminated does not or did not at the time of termination have good credit or that the dealer does not have reasonably adequate facilities for selling respondent's products, and forthwith reinstate any such

distributor or dealer who within thirty (30) days thereafter requests, in writing, reinstatement.

III

It is further ordered that respondent:

1. Notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

2. For a period of three (3) years from the date this order becomes final, establish and maintain a file of all records referring or relating to respondent's refusal during such period to sell its products to any dealer, which file shall contain a record of a communication to each such dealer explaining respondent's refusal to sell, and which file will be made available for Commission inspection on reasonable notice; and, annually, for a period of three (3) years from the date hereof, submit a report to the Commission's New York Regional Office listing the names and addresses of all dealers with whom respondent has refused to deal during the preceding year, a description of the reason for the refusal and the date of the refusal.

IV

It is further ordered, That in the event the Commission issues any order which is less restrictive than the provisions of Paragraphs I, II, or III of this order, in any proceeding involving alleged resale price maintenance of a manufacturer or supplier of audio components subject to investigation by the Commission pursuant to File No. 741 0042, then the Commission shall, upon the application of U.S. Pioneer Electronics Corp. reconsider this order and may reopen this proceeding in order to make whatever revisions, if any, are necessary to bring the foregoing paragraphs into conformity with the less stringent restrictions imposed upon respondent's competitors.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

HASBRO INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2748. Complaint, Oct. 28, 1975–Decision, Oct. 28, 1975

Consent order requiring a Pawtucket, R.I., seller and distributor of toy, gift and hobby products, among other things to cease deceptively packaging its merchandise.

Appearances

For the Commission: *Pamela H. Feinstein* and *Larry B. Feinstein.*

For the respondent: *David Greene, Aberman, Greene and Locker,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hasbro Industries, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hasbro Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its principal office and place of business located at 1027 Newport Ave., Pawtucket, R.I.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of hobby products, toy craft products and activity toys to jobbers and retailers to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, said products, when sold, to be shipped from its place of business in the State of Rhode Island to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among the products which are offered for sale and sold by the respondent are a number of hobby products, toy craft products and activity toys. Through the use of certain methods of packaging, respondent has represented, and has placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain of the above products, as depicted or otherwise described on the exteriors of packages, corresponded in their lengths and widths, or their lengths, widths and thicknesses, with the boxes in which they were contained, and that others of such products were offered in quantities reasonably related to the size of the containers in which they were presented for sale.

PAR. 5. Typical and illustrative of said products as described in Paragraph Four, but not all inclusive thereof, are the following:

Spangle Beads
Indian Princess Bead Craft
Popeye Paint and Crayon Set
Embroidery
Round Knit
Foil Art
Crocheting

PAR. 6. In truth and in fact, such products often have not corresponded with their container or package dimensions and are often not offered in quantities reasonably related to the sizes of the containers or packages in which they are presented for sale. Purchasers of such a product are thereby given the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

Therefore the methods of packaging referred to in Paragraph Four hereof were and are unfair and false, misleading and deceptive.

PAR. 7. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as the products sold by the respondent.

PAR. 8. The use by respondent of the aforesaid unfair, false, misleading and deceptive methods of packaging has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the quantum or amount of the product being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondent's product by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its rules, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hasbro Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 1027 Newport Ave., Pawtucket, R.I.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Hasbro Industries, Inc., a corporation, and its officers, and respondent's agents, representatives, employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of hobby products, toy craft products and activity toys, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Packaging said products in oversized boxes or other containers so as to create the appearance or impression that the width or thickness or other dimensions or quantity of products contained in a box or container is appreciably greater than is the fact; but nothing in this order shall be construed as forbidding respondent to use oversized containers if respondent justifies the use of such containers as necessary for the efficient packaging of the products contained therein and establish that respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers;

2. Providing wholesalers, retailers or other distributors of said products with any means or instrumentality with which to deceive the purchasing public in the manner described in Paragraph (1) above.

It is further ordered, That respondent or its successors or assigns notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporate respondent which may affect compliance obligations arising out of this order.

It is further ordered, That respondent distribute a copy of this order to all operating divisions and subsidiaries of said corporation.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

HAIR REPLACEMENT RESEARCH CENTER, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2749. Complaint, Oct. 28, 1975-Decision, Oct. 28, 1975

Consent order requiring a Bloomfield, N.J., seller of hairpieces, implant hair replacement services and related products to bald persons, among other things to cease making false and misleading claims with respect to their hair implant process, and failing to disclose that their implant process involves surgical implantation of synthetic sutures which can cause pain, infection, scarring, and other disorders. Further, respondents are required to advise prospective customers to consult with a physician prior to contracting to undergo the process, and to provide customers a three-day cooling off period during which they may cancel their contract with full refund of their deposit.

Appearances

For the Commission: *Lester Grey.*
For the respondents: *Henry J. DiSabato,* Harrison, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hair Replacement Research Center, Inc., a corporation, trading also as Hair Replacement Research Consultants and Salvatore Saporito, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hair Replacement Research Center, Inc., trading also as Hair Replacement Research Consultants, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 72 Burroughs Place, Bloomfield, N.J.

Respondent Salvatore Saporito is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents operate the Hair Replacement Research Center salon and promote on their own behalf, among others, the implant hair replacement system hereinafter sometimes referred to as the "System." The system involves a surgical procedure whereby synthetic sutures (prolene) or similar synthetic thread are stitched into the scalps of respondents' customers. Hairpieces are then attached to the suture loops. Respondents sell, install and maintain the system, except that the surgical procedure itself is performed by a medical doctor.

PAR. 3. In the course and conduct of their business, respondents promote the system by advertising in newspapers of general circulation which are distributed across State lines, and by mailing promotional literature to prospective customers who respond to such advertising. As a result of such newspaper advertising, and literature mailing, respondent has maintained a substantial course of trade in commerce, as "commerce" is used in Sections 5 and 12 of the Federal Trade Commission Act, and as a result of such newspaper advertising and mailing of promotional literature, have disseminated and caused to be disseminated false advertisements by United States mails, within the meaning of Section 12 (a)(1) of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of the hair implant replacement system, respondents, directly have made numerous statements and representations in advertisements inserted in newspapers of general circulation and in other promotional literature. Typical of the statements and representations contained in said advertisements and promotional literature, but not all inclusive, are the following:

> Without ever having to resort to toupees, hairpieces, * * *.
>
> It's called implanting hair where none exists, making it a part of you.
>
> * * * Thus enabling you to style it * * * Like your own hair again.
>
> This revolutionary technique will assure the client complete success and happiness. Permanent hair in just 2 hours.
>
> This exciting method of "implant" permits the client to swim under water, change hair styles and most important be able to once again scratch his or her own scalp as they did when they had their own hair.
>
> The new implantation method requires no between visits for tightenings. You can really shampoo, swim, dive, ski, etc. * * * Like your own hair again. It can't come off * * *.

PAR. 5. Through the use of the above advertisements, and others of similar import and meaning but not expressly set out herein, and by oral statements and representations made by employees and agents of the respondents, respondents have represented, directly or by implication, that:

1. The implant system does not involve wearing a hairpiece, or toupee.

2. The hairpiece applied becomes part of the anatomy like natural hair, and has characteristics of natural hair, including the following:

(a) The same appearance as natural hair upon normal observation and upon extreme close-up examination.

(b) It may be cared for like natural hair, particularly in that actions such as washing, combing, brushing and mussing may be performed on it in the same manner as might a person with natural hair.

(c) The wearer may engage in physical activities with as much disregard for his hairpiece as might a person with natural hair.

3. After the system has been applied, the wearer can care for it himself, and will not have to seek professional or skilled assistance in

maintaining the system, and that the customer will not incur charges over and above the charge for installing the system.

PAR. 6. In truth and in fact:

1. The system does involve the wearing of a hairpiece or toupee.

2. The hairpiece applied does not become part of the anatomy like natural hair. The system involves the suturing of synthetic threads into the scalp of the recipient by a surgical procedure and which may be rejected by the body. The hairpiece differs from natural hair in many respects, including the following:

(a) It does not have the same appearance as natural hair in a substantial number of instances. It is often discernible as a hairpiece or toupee upon normal observation, and upon extreme close-up examination.

(b) It cannot be cared for like regular hair but requires special care and handling. Strong pulling on the hair, such as may be expected to occur in washing, combing, brushing, and mussing, can cause pain because of the pressure exerted on the sutures in the scalp, may cause bleeding, and may cause the sutures to pull out. As a consequence, washing the hair and scalp is difficult. Because washing is difficult, foreign particles and dead skin tissue tend to accumulate beneath the implant hair application and become a significant source of irritation. The hair styles into which the hairpiece may be combed or brushed without professional treatments are limited.

(c) The wearer may not engage in physical activities with as much disregard for his hairpiece as might a person with natural hair. The wearer must at all times be careful that the hair does not pull or get pulled, or become tangled, or strained. Discomfort and pain may be caused by common actions, such as rolling the head on a pillow during sleep.

3. The wearer cannot in most instances care for the hairpiece himself; he must seek professional or skilled assistance on many occasions. Medical problems associated with the surgery or the continuing presence of synthetic thread in the scalp may require subsequent visits to a medical doctor. A substantial additional charge for such service could be incurred. Respondents' applied hair is subject to bleaching in sunlight and other discoloration normally associated with hairpieces, and where the hairpiece has been color-dyed, loss of dye through washing and normal wear; thus replacement hairpieces are required at intervals in order to maintain a color match with any natural hair the wearer may have.

The statements and representations set forth in Paragraphs Four and Five were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, respondents, have represented in advertisements the asserted advantages of the system, as hereinbefore described. In many cases, respondents have represented their system to be painless and have not disclosed in such advertisements that a surgical procedure is a required step in the system. In no case have respondents' advertisements disclosed:

(a) that clients may experience discomfort and pain as a result of the surgical procedure, from the synthetic sutures themselves, and from pulling normally incident to wearing the hairpiece;

(b) that clients will be subject to the risk of irritation, infections, and skin diseases as a result of the surgical procedure and as a result of the synthetic sutures remaining in the scalp;

(c) that permanent scarring to the scalp may result from the required surgical procedures, and as a result of the synthetic sutures remaining in the scalp.

The consequences described in this paragraph have in fact occurred, and to a reasonable medical certainty can be expected to occur, and respondents knew, and had reason to know, that they could be expected to occur. Furthermore, the surgical procedure has not been used in conjunction with respondents' system for a sufficient experimental period to determine the extent of seriousness of the above side effects, and whether there are any other side effects, including but not limited to rejection of the synthetic sutures through the human body's natural rejection process.

Therefore, the advertisements referred to in Paragraph Seven are false and misleading and the acts and practices referred to in said Paragraph are unfair and deceptive.

PAR. 8. For the purpose of inducing the purchase of the system, respondents entice members of the purchasing public to their salon with advertisements of "* * * Like your own hair again, It can't come off" as a solution to baldness and like advertisements to attract members of the purchasing public concerned about their hair loss, and with offers of free information without any obligations. In most cases respondents do not disclose details of their system unless and until a prospect visits their salon. When members of the purchasing public have visited the salon, they have been subjected to emotional sales pressure, for the purpose of persuading them to sign a contract for the application of the implant system, and to make a substantial down payment, without being afforded a reasonable opportunity to consider and comprehend the scope and extent of the contractual obligations involved, the seriousness of the surgical procedure and the possibilities of discomfort, pain, disease, or disfigurement related to the continued presence of the synthetic suture in the scalp. Persons are insistently urged to sign such contracts and make such downpayments, through the use of persistent and emotionally forceful sales presentations employing the following tactics, among others:

1. Representing that the psychological benefit of having hair replaced is so significant as to be of immediate necessity and that, subconsciously, bald men are desperate for prompt relief.

2. Inducing prospects to sign contracts and/or make downpayments before they have consulted a medical doctor and freely and openly discussed with such doctor the medical risks and consequences of the surgical procedure, and of the synthetic suture being embedded in their scalp. Such consultations typically occur immediately before the commencement of surgery, by which time the client is likely to feel pressured to go through with the application.

Therefore, the advertisements referred to in Paragraph Eight were and are false and misleading, and the acts and practices set forth in such paragraph were and are false and deceptive.

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms, and individuals, in the sale of cosmetics, devices and treatments for the concealment of baldness.

PAR. 10. The use by respondents of the above unfair and deceptive representations and practices has had, and now has, the capacity and tendency to mislead consumers, and to unfairly influence consumers to hurriedly and precipitately sign contracts for the application of the implant hair replacement system, and to make partial or full payment therefor, without affording them reasonable opportunity to consider and comprehend the scope and extent of the contractual obligations involved, or the seriousness of the surgical procedure, and the possibilities of discomfort, pain, disease or disfigurement related thereto, and related to the continual presence of the synthetic suture in the scalp, or to compare prices, techniques, and devices available from competing corporations, firms, and individuals selling baldness concealment cosmetics, devices, and treatments to the purchasing public.

PAR. 11. The respondents' acts and practices alleged herein are to the prejudice and injury of the purchasing public, and to respondents' competitors, and constitute unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, and false advertisements disseminated by United States mails, and in commerce, in violation of Section 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hair Replacement Research Center, Inc., trading also as Hair Replacement Research Consultants, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 72 Burroughs Place, Bloomfield, N.J.

Respondent Salvatore Saporito is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Hair Replacement Research Center, Inc., a corporation, trading also as Hair Replacement Research Consultants, and or under any other name or names, its successors and assigns and its officers, and Salvatore Saporito, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device or through franchisees or licensees, in connection with the advertising, offering for sale, sale, or distribution of the implant replacement system or other hair replacement product or process involving surgery (hereinafter sometimes referred to as the "System"), in commerce, as "commerce" is defined in the Federal Trade Commission Act, or by the United States mails within the meaning of Section 12(a)(1) of the Federal Trade Commission Act do forthwith cease and desist from representing, directly or by implication:

1. That the system does not involve wearing a device or cosmetic which is like a hairpiece or toupee;

2. That after the system has been applied, the hair applied becomes part of the anatomy like natural hair, and has the following characteristics of natural hair.

a. the same appearance in all applications as natural hair, upon normal observation, and upon extreme close-up examination;

b. it may be cared for like natural hair where care involves possible pulling on the hair;

c. the wearer may engage in physical activity and movement with the same disregard for his hair as he would if he had natural hair.

3. That after the system has been applied, the wearer can care for it himself, and will not have to seek professional or skilled assistance in maintaining the system, and that the customer will not incur maintenance costs over and above the cost of applying the system.

It is further ordered, That respondents, in advertising, offering for sale, selling or distributing the system, disclose clearly and conspicuously that:

1. The system involves a surgical procedure resulting in the implantation of synthetic sutures in the scalp, to which hair is affixed.

2. By virtue of the surgical procedure involving implantation of synthetic sutures in the scalp, and by virtue of the synthetic suture remaining in the scalp, there is a risk of discomfort, pain, infection, scarring, and other skin disorders.

3. Continuing special care of the system is necessary to minimize the probabilities and risks referred to in subparagraph two of this paragraph, and such care may involve additional costs for medications and assistance.

4. The purchaser is advised to consult with his personal physician about the system before deciding whether to purchase it.

Respondents shall set forth the above disclosures separately and conspicuously from the balance of each advertisement or presentation used in connection with the advertising, offering for sale, sale, or distribution of the system, and shall devote no less than 15 percent of each advertisement or presentation to such disclosures. *Provided*, *however*, That in advertisements which consist of less than ten column inches in newspapers and periodicals, and in radio and television advertisements with a running time of one minute or less, respondents may substitute the following statement, in lieu of the above requirements: Warning: This application involves surgery whereby synthetic sutures are placed in the scalp. Discomfort, pain, and medical problems may occur. Continuing care is necessary. Consult your own physician.

No less than 15 percent of such advertisements shall be devoted to this disclosure, such disclosure shall be set forth clearly and conspicuously from the balance of each of such advertisements, and if such disclosure is in a newspaper or periodical, it shall be in at least eleven point type.

It is further ordered, That respondents, in connection with the sale of the System, provide prospective purchasers with a separate disclosure sheet containing the information required in the immediately preceding paragraph of this order, subparagraphs one (1) through four (4) thereof, and that respondents require that, prior to executing any contract to purchase said system, such prospective purchasers, sign and date the disclosure sheet after the sentence, "I have read the foregoing disclosures and understand what they mean," and that Hair Replacement Research Center, Inc. provide a copy of said disclosure sheet to the customers and retain such signed disclosure sheet for at least three years.

It is further ordered, That, in connection with the sale of the system, no contract for application of the system shall become binding on the purchaser prior to midnight of the third day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed, and that:

1. Respondents shall clearly and conspicuously disclose, orally prior to the time of sale, and in writing on any contract, promissory note or other instrument executed by the purchaser in connection with the sale of the system, that the purchaser may rescind or cancel any obligation incurred by mailing or delivering a notice of cancellation to the office responsible for the sale prior to midnight of the third day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed.

2. Respondents shall provide a separate and clearly understandable form which the purchaser may use as a notice of cancellation.

3. Respondents shall not negotiate any contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to midnight of the fifth day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed.

It is further ordered, That respondents, in connection with the advertising, offering for sale, sale, or distribution of the system, serve a copy of this order upon each present and every future licensee or franchisee, and upon each physician participating in application of respondents' system, and obtain written acknowledgment of the receipt thereof; and that respondents obtain from each present and future licensee or franchisee an agreement in writing, (1) to abide by the terms of this order, and (2) to cancellation of their license or franchise for failure to do so; and that respondents cancel the license or franchise of any licensee or franchisee that fails to abide by the terms of this order. Respondents shall retain such acknowledgments and agreements for so long as such persons or firms continue to participate in the application or sale of respondents' system.

It is further ordered, That respondents, in connection with the advertising, offering for sale, sale, or distribution of the system, forthwith distribute a copy of this order to each of their operating divisions or departments.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, licensees, or franchisees, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That in the event that the corporate respondent merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation or to any other person, said respondent shall require such successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; *Provided*, That if said respondent wishes to present to the Commission any reasons why said order should not apply in its present form to said successor or transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

It is further ordered That the individual respondent Salvatore Saporito promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further understood that nothing contained in this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies.

Nothing in this order shall be construed to imply that any past or future conduct of respondents is subject to and complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

TAYLOR & KIMBROUGH REALTY COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2750. Complaint, Oct. 28, 1975-Decision, Oct. 28, 1975

Consent order requiring a Memphis, Tenn., realty company, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Truett M. Honeycutt.*
For the respondents: *William Bartholomew,* Memphis, Tenn.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Taylor & Kimbrough Realty Company, a corporation, and Lloyd R. Taylor, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Taylor & Kimbrough Realty Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 3255 White Brook Plaza, Bldg. C, Suite 100, Memphis, Tenn.

Respondent Lloyd R. Taylor is President of the corporate respondent. He formulates, directs and controls the policies, acts and practices of said corporation. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged as brokers and agents selling real estate to the public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents have caused, and are now causing advertisements, as "advertisement" is defined in Section 226.2(b) of Regulation Z, to be placed in various media for the purpose of aiding, promoting, or assisting, directly or indirectly, extensions or arrangements of consumer credit in conjunction with the sale of residential real estate, as "consumer credit" is defined in Section 226.2(k) of Regulation Z.

PAR. 4. Subsequent to July 1, 1969, respondents have caused advertisements referred to in Paragraph Three to be published. Certain of said advertisements:

1. Stated the rate of finance charge without expressing that rate as an "annual percentage rate," using that term, in violation of Section 226.10(d)(1) of Regulation Z.

2. Stated the amount of the downpayment (either in dollars or as a percentage), and the number of installments, without also stating, as required by Section 226.10(d)(2) of Regulation Z, in terminology prescribed under Section 226.8 of Regulation Z, all of the following:

a. the amount of the loan;

b. the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

c. the amount of the finance charge expressed as an annual percentage rate.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act, and pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Taylor & Kimbrough Realty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at 3255 Whitebrook Plaza, Bldg. C, Suite 100, Memphis, Tenn.

2. Respondent Lloyd R. Taylor is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Taylor & Kimbrough Realty Company, a corporation, its successors and assigns, and its officers, and Lloyd R. Taylor, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit, or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Stating the rate of a finance charge unless such rate is expressed

as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 of Regulation Z, as prescribed by Section 226.10(d)(1) of Regulation Z.

2. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any installment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

a. the amount of the loan;

b. the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

c. the amount of the finance charge expressed as an annual percentage rate.

3. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said copy of this order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

BAZA'R, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2751. Complaint, Oct. 28, 1975-Decision, Oct. 28, 1975

Consent order requiring a Portland, Oreg., supermarket chain, among other things to cease not having advertised items readily available for sale at or below the advertised price. Further, respondent is required to use shelf signs to indicate the location of items advertised below regular shelf price; to mark customarily price-marked items with the advertised prices; to post at store entrances and check-out counters notices (1) containing a copy of the ad, (2) listing any advertised items unavailable, and (3) announcing that rainchecks will be issued for them; and to maintain a program of continuing surveillance to insure that their stores comply with the order.

Appearances

For the Commission: *W. Lee Buck.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Baza'r, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

Alleging violation of Sections 5 and 12 of the Federal Trade Commission Act.

PARAGRAPH 1. Respondent Baza'r, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 1845 S.E. Third Ave., Portland, Oreg.

PAR. 2. Respondent is engaged in the operation of a chain of retail food stores. Respondent operates retail food stores and food departments in Oregon, Washington and other States in the United States. Its volume of business is substantial. In the operation of its retail food stores, respondent offers and presents for sale to its customers, and sells to its customers, an extensive line of products, including food, as that term is defined in the Federal Trade Commission Act, groceries and other merchandise, all of which are sometimes referred to hereafter as "items." Many of said items are purchased from numerous suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from manufacturing and processing plants or from other sources of supply to its warehouses, distribution centers, or retail food stores located in various States other than the State of origination, distribution or storage of said items. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid items by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase from respondent of the said items in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations concerning the price or terms at which said items would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's food stores at which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated and now being disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented and is now representing directly or by implication that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be or are:

A. Readily available for sale to customers;

B. Readily available for sale at or below the advertised prices; and

C. Sold to consumers at or below the advertised price.

PAR. 6. In truth and in fact, in a number of respondent's retail food stores located in the Portland, Oreg. metropolitan area in which the aforesaid advertisements were disseminated, in stores covered by such advertisements, during the effective periods of the advertised offers, a substantial number of items listed or depicted in the said advertisements were or are:

A. Not readily available for sale;

B. Not readily available for sale at or below the advertised prices; or

C. Sold to customers at a price higher than the advertised price.

Therefore, the statements and representations as referred to herein, were and are false, misleading and deceptive, and each of such advertisements was and is misleading in material respects and constituted, and now constitutes a "false advertisement," as that term is defined in the Federal Trade Commission Act.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have in each of its stores covered by such advertisements, throughout the effective periods of the advertised offers, in quantities sufficient to meet reasonably anticipated demands, the advertised items:

A. Readily available for sale to customers; or

B. Readily available for sale at or below the advertised prices;

respondent has been and now is engaged in unfair acts and practices.

PAR. 8. By disseminating or causing the dissemination of advertisements which offer or present for sale items at specific prices, as aforesaid, and during the effective periods of such advertised offers at certain stores covered by said advertisements, by selling said items or other merchandise to customers at prices higher than the advertised prices, respondent has been and now is engaged in unfair acts and practices.

PAR. 9. In the course and conduct of its business, and at all times referred to herein, respondent has been and now is in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 10. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid "false advertisements," has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items.

PAR. 11. The acts and practices as aforesaid, and the dissemination by respondent of the false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Federal Trade Commission trade regulation rule concerning retail food store advertising and marketing practices (16 CFR 424), the allegations of Paragraphs One, Two, Three, Four and Nine, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 12. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended 15 U.S.C. §41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and Rules of Practice, 16 CFR §1.11, *et seq.*, conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule was published in the Federal Register on Nov. 14, 1969 (34 F.R. 18252). Thereafter on May 31, 1971 the Commission duly promulgated a trade regulation rule concerning retail food store advertising and marketing practices effective July 12, 1971, 16 C.F.R. §424.1 (1973).

PAR. 13. Respondent is a member of the retail food store industry, and its acts and practices in connection with the sale and offering for sale of food and grocery products or other merchandise are subject to the jurisdiction of Sections 5 and 12 of the Federal Trade Commission Act and are within the intent and meaning of, and are subject to, the provisions of the aforesaid trade regulation rule.

PAR. 14. In connection with its aforesaid advertisements, respondent, in a substantial number of instances, has failed to comply with the aforesaid trade regulation rule by offering food and grocery products or other merchandise for sale at a stated price by means of advertisements disseminated in areas served by certain of its stores which were covered by the advertisement but which did not have such products in stock and readily available for sale to customers during the effective period of the advertisement.

PAR. 15. In connection with its advertisements disseminated as aforesaid, respondent, in a substantial number of instances, has failed to comply with the aforesaid trade regulation rule by failing to make certain of the advertised items conspicuously and readily available for sale at or below the advertised prices.

PAR. 16. Respondent's aforesaid violations of the trade regulation rule concerning retail food store advertising and marketing practices constitute violations of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Baza'r, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 1845 S.E. Third Ave., Portland, Oreg.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Baza'r, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereafter sometimes referred to as items, offered or sold in its retail stores, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing the dissemination of any advertisement by any means which offers any items for sale at a stated price, unless throughout the effective period of the advertised offer at each retail store covered by the advertisement:

1. Each advertised item is readily available for sale to customers in the public area of the store, or if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed which states that the item is in stock and may be obtained upon request, and said item is furnished on request;

2. There is a sign or other conspicuous marking at the place where an item advertised below regular shelf price is displayed for sale clearly disclosing that the item is "as advertised" or "on sale" or words of similar import as appropriate, and disclosing on such sign or marking, the advertised price;

3. Each advertised item, which is usually and customarily individually marked with a price, is individually, clearly, and conspicuously marked with the advertised price;

4. Each advertised item is sold to customers at or below the advertised price;

Provided, That it shall not be deemed a violation of the above subparagraphs A.1., A.2., A.3., or A.4., if respondent is complying with a specific exemption, limitation or restriction with respect to store, item or price which is clearly and conspicuously disclosed in all advertisements.

Provided, further, It shall constitute a defense to a charge of unavailability under subparagraph I.A.1. if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records and affidavits as will show that (a) the advertised items were delivered to its stores in quantities sufficient to meet reasonably anticipated demand, or (b) the advertised items were ordered but not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such nondelivery acted immediately to contact the media to correct the advertisement or proposed advertisement to reflect the limited availability or unavailability of each advertised item, and (c) respondent immediately offered to customers on inquiry a "rain check" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price.

In determining compliance with section I of this order, the Commission will consider the circumstances surrounding failure to make advertised items conspicuously and readily available for sale at or below the advertised prices due to circumstances beyond respondent's control.

II

It is further ordered, That respondent Baza'r, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or drugs, as those terms are defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated, by United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of any such product, any advertisement which contains any of the offers prohibited by section I of this order;

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the offers prohibited by Section I of this order.

III

It is further ordered, That throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise, notices which contain the following:

A. A copy of the advertisement.

B. A statement that:

> All items advertised are readily available for sale at or below advertised price except the following items:
>
> Rain checks will be gladly issued for these items, that will enable you to purchase these items at or below the advertised price in the near future. If you have any questions, the store director will be glad to assist you.

IV

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each advertisement which represents that items are available for sale at a stated price at any of its stores: "Each of these advertised items is required to be readily available for sale at or below the advertised price in each ____ (*store name*) ____ store, except as specifically noted in this ad."

V

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store directors who, directly or indirectly, have any supervisory responsibilities as to individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

C. Respondent shall, for a period of three (3) years subsequent to the date of this order:

1. Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;

2. Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

3. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

D. Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order in the preceding year.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

PACIFIC GAMBLE ROBINSON CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2756. Complaint, Oct. 29, 1975-Decision, Oct. 29, 1975

Consent order requiring a Seattle, Wash., grocery store chain, among other things to cease not having advertised items readily available for sale at or below the advertised price. Further, respondent is required to use shelf signs to indicate the location of items advertised below regular shelf price; to mark customarily price-marked items with the advertised prices; to post at store entrances and check-out counters notices (1) containing a copy of the ad, (2) listing any advertised items unavailable, and (3) announcing that rainchecks will be issued for them; and to maintain a program of continuing surveillance to insure that their stores comply with the order.

Appearances

For the Commission: *W. Lee Buck*.

For the respondent: *John E. Ryan, Jr., Ryan, Bush, Swanson & Hendel*, Seattle, Wash.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Pacific Gamble

Robinson Co., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

Alleging violation of Sections 5 and 12 of the Federal Trade Commission Act.

PARAGRAPH 1. Respondent Pacific Gamble Robinson Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 4103 Second Ave. S., Seattle, Wash.

PAR. 2. Respondent is engaged in the wholesale and retail grocery business, buying and selling a wide variety of food and grocery products. Respondent operates retail food stores in Oregon, Washington, and other States in the United States. Its volume of business is substantial. In the operation of its retail food stores, respondent offers and presents for sale to its customers, and sells to its customers, an extensive line of products, including food, as that term is defined in the Federal Trade Commission Act, groceries and other merchandise, all of which are sometimes referred to hereafter as "items." Many of said items are purchased from numerous suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from manufacturing and processing plants or from other sources of supply to its warehouses, distribution centers, or retail food stores located in various States other than the State of origination, distribution or storage of said items. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid items by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase from respondent of the said items in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations concerning the price or terms at which said items would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's food stores at which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated and now being disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented and is now representing directly or by implication that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be or are:

A. Readily available for sale to customers;

B. Readily available for sale at or below the advertised prices; and

C. Sold to consumers at or below the advertised price.

PAR. 6. In truth and in fact, in a number of respondent's retail food stores located in the Seattle, Wash., and Portland, Oreg., metropolitan areas in which the aforesaid advertisements were disseminated, in stores covered by such advertisements, during the effective periods of the advertised offers, a substantial number of items listed or depicted in the said advertisements were or are:

A. Not readily available for sale;

B. Not readily available for sale at or below the advertised prices; or

C. Sold to customers at a price higher than the advertised price.

Therefore, the statements and representations as referred to herein, were and are false, misleading and deceptive, and each of such advertisements was and is misleading in material respects and constituted, and now constitutes a "false advertisement," as that term is defined in the Federal Trade Commission Act.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have in each of its stores covered by such advertisements, throughout the effective periods of the advertised offers, in quantities sufficient to meet reasonably anticipated demands, the advertised items:

A. Readily available for sale to customers; or

B. Readily available for sale at or below the advertised prices;

respondent has been and now is engaged in unfair acts and practices.

PAR. 8. By disseminating or causing the dissemination of advertisements which offer or present for sale items at specific prices, as aforesaid, and during the effective periods of such advertised offers at certain stores covered by said advertisements, by selling said items or other merchandise to customers at prices higher than the advertised prices, respondent has been and now is engaged in unfair acts and practices.

PAR. 9. In the course and conduct of its business, and at all times referred to herein, respondent has been and now is in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 10. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid "false advertisements," has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items.

PAR. 11. The acts and practices as aforesaid, and the dissemination by respondent of the false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Federal Trade Commission trade regulation rule concerning retail food store advertising and marketing practices (16 CFR 424), the allegations of Paragraphs One, Two, Three, Four and Nine, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 12. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended 15 U.S.C. §41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and

Rules of Practice, 16 CFR §1.11, *et seq.*, conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule was published in the Federal Register on Nov. 14, 1969 (34 F.R. 18252). Thereafter on May 31, 1971 the Commission duly promulgated a trade regulation rule concerning retail food store advertising and marketing practices effective July 12, 1971, 16 C.F.R. §424.1 (1973).

Par. 13. Respondent is a member of the retail food store industry, and its acts and practices in connection with the sale and offering for sale of food and grocery products or other merchandise are subject to the jurisdiction of Sections 5 and 12 of the Federal Trade Commission Act and are within the intent and meaning of, and are subject to, the provisions of the aforesaid trade regulation rule.

Par. 14. In connection with its aforesaid advertisements, respondent, in a substantial number of instances, has failed to comply with the aforesaid trade regulation rule by offering food and grocery products or other merchandise for sale at a stated price by means of advertisements disseminated in areas served by certain of its stores which were covered by the advertisement but which did not have such products in stock and readily available for sale to customers during the effective period of the advertisement.

Par. 15. In connection with its advertisements disseminated as aforesaid, respondent, in a substantial number of instances, has failed to comply with the aforesaid trade regulation rule by failing to make certain of the advertised items conspicuously and readily available for sale at or below the advertised prices.

Par. 16. Respondent's aforesaid violations of the trade regulation rule concerning retail food store advertising and marketing practices constitute violations of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Pacific Gamble Robinson Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 4103 Second Ave. S., Seattle, Wash.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Pacific Gamble Robinson Co., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereafter sometimes referred to as items, offered or sold in its retail stores, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing the dissemination of any advertisement by any means which offers any items for sale at a stated price, unless throughout the effective period of the advertised offer at each retail store covered by the advertisement:

1. Each advertised item is readily available for sale to customers in the public area of the store, or if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed which states that the item is in stock and may be obtained upon request, and said item is furnished on request;

2. There is a sign or other conspicuous marking at the place where an item advertised below regular shelf price is displayed for sale clearly disclosing that the item is "as advertised" or "on sale" or words of similar import as appropriate, and disclosing on such sign or marking, the advertised price;

3. Each advertised item, which is usually and customarily individually marked with a price, is individually, clearly, and conspicuously marked with the advertised price;

4. Each advertised item is sold to customers at or below the advertised price;

Provided, That it shall not be deemed a violation of the above subparagraphs A.1., A.2., A.3., or A.4., if respondent is complying with a specific exemption, limitation or restriction with respect to store, item or price which is clearly and conspicuously disclosed in all advertisements.

Provided, further, It shall constitute a defense to a charge of unavailability under subparagraph I.A.1. if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records and affidavits as will show that (a) the advertised items were delivered to its stores in quantities sufficient to meet reasonably anticipated demand, or (b) the advertised items were ordered but not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such nondelivery acted immediately to contact the media to correct the advertisement or proposed advertisement to reflect the limited availability or unavailability of each advertised item, and (c) respondent immediately offered to customers on inquiry a "rain check" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price.

In determining compliance with Section I of this order, the Commission will consider the circumstances surrounding failure to make advertised items conspicuously and readily available for sale at or below the advertised prices due to circumstances beyond respondent's control.

II

It is further ordered, That respondent Pacific Gamble Robinson Co., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or drugs, as those terms are defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated, by United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of any such product, any advertisement which contains any of the offers prohibited by Section I of this order;

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the offers prohibited by Section I of this order.

III

It is further ordered, That throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise, notices which contain the following:

A. A copy of the advertisement.

B. A statement that:

> All items advertised are readily available for sale at or below advertised price except the following items:
>
> Rain checks will be gladly issued for these items, that will enable you to purchase these items at or below the advertised price in the near future. If you have any questions, the store director will be glad to assist you.

IV

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each printed advertisement which represents that items are available for sale at a stated price at any of its stores: "Each of these advertised items is required to be readily available for sale at or below the advertised price in each Tradewell store, except as specifically noted in this ad."

V

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store directors who, directly or indirectly, have any supervisory responsibilities as to individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

C. Respondent shall, for a period of three (3) years subsequent to the date of this order:

1. Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;
2. Grant any duly authorized representative of the Federal Trade Commission access to all such business records;
3. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

D. Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order in the preceding year.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

D'ARCY-MacMANUS & MASIUS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2757. Complaint, Oct. 31, 1975-Decision, Oct. 31, 1975

Consent order requiring a New York City advertising agency, among other things to cease making deceptive fuel economy claims for automobiles.

Appearances

For the Commission: *H. Robert Field* and *Richard A. Bloomfield.*
For the respondent: *Lewis E. Striebeck, Jr.*, St. Louis, Mo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that D'Arcy-MacManus & Masius, Inc. a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

For the purposes of this complaint the following definition shall apply:

1. "EPA test" shall mean the test of air pollution control, containing fuel economy data, conducted by the Environmental Protection Agency, the results of which were published in the Federal Register of Monday, Nov. 5, 1973.

2. "In Commerce" shall mean commerce as commerce is defined in the Federal Trade Commission Act.

3. "Advertisements" shall mean advertisements actually disseminated to the public as well as proposed advertisements or promotional material.

4. "Data cars" shall mean the actual automobiles tested by the Environmental Protection Agency in the EPA test.

PARAGRAPH 1. Respondent D'Arcy-MacManus & Masius, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 437 Madison Ave., New York, N.Y.

PAR. 2. Respondent is now, and for some time last past has been engaged in the advertising and promotion of certain motor vehicles, including but not limited to that model of automobile designated by the Cadillac Division of the General Motors Corporation as the Cadillac Eldorado.

PAR. 3. In the course and conduct of its aforesaid business, respondent causes the advertising and promotional materials it prepares to be transported from its places of business located in various States of the United States to various media and clients located in various other States of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained, a substantial course of trade in said advertising and promotional materials in commerce. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, has caused the dissemination of, or has prepared for dissemination advertisements for the aforementioned Cadillac Eldorado, said dissemination having been by means of magazines and newspapers and by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcast across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said Cadillac Eldorado automobiles.

PAR. 5. In the course and conduct of its said business, respondent has prepared to be furnished to Cadillac Eldorado dealers located in various States certain advertisements with the knowledge and expectation that these advertisements and/or advertisements based thereon and substantially similar thereto would be disseminated directly or indirectly by at least some of the said dealers to the general public.

PAR. 6. Among the advertisements so disseminated, prepared, or furnished to dealers as aforesaid in Paragraphs Four and Five above is the advertisement attached as Exhibit A.

PAR. 7. At least some of said dealers did in fact disseminate in commerce an advertisement, substantially identical to the advertisement attached as Exhibit A.

PAR. 8. Exhibit B is an example of the advertisement disseminated by one of said dealers, and is substantially similar to Exhibit A.

PAR. 9. Said Exhibit A and B and other substantially similar thereto contain one or more false, deceptive and misleading representations and fail to disclose facts which are material in light of the representations contained therein. Therefore, the representations contained in said advertisements were, and are, deceptive or unfair.

PAR. 10. Said Exhibits A and B and others substantially similar thereto (hereinafter referred to as said advertisements) represent *inter alia* that the Environmental Protection Agency (hereinafter EPA) had conducted a test of gasoline economy (hereinafter EPA test) and in that test had found the Eldorado model of Cadillac to be superior in terms of gasoline mileage to the other automobile models listed in said advertisements.

PAR. 11. In truth and in fact the Eldorado model of the Cadillac automobile was not shown in the EPA test to be superior in terms of gasoline mileage to all of the other models of automobiles listed in those advertisements. Therefore, the representations contained in the said advertisements were, and are, deceptive or unfair.

PAR. 12. Respondent failed to disclose in said advertisements that many of the other models of automobiles listed in said advertisements were represented by more than one data car in the EPA test and that in several cases one or more or even a majority or the data cars representing the models of automobiles listed were found to be superior in terms of gasoline mileage in the EPA tests to both data cars of the Cadillac Eldorado. For example, the American Motors Wagoneer, listed sixth on Exhibit A, was represented by three data cars, two of which were superior in terms of gasoline mileage to both data cars of the Cadillac Eldorado.

PAR. 13. Respondent failed to disclose in said advertisement that there were two Cadillac Eldorado data cars tested in the EPA test, and that in many cases, one of these two Eldorado data cars was inferior in terms of gasoline mileage to some or even to all of the data cars representing the other models of automobiles listed in those advertisements. For example, one of the two Eldorado data cars was inferior in terms of gasoline mileage to both of the data cars representing the Mercedes MB-116, listed third on Exhibit A.

PAR. 14. The facts set forth in Paragraphs Twelve through Thirteen are each material in light of the representation contained in said advertisements and their omission makes these advertisements misleading in a material respect. Therefore, the said advertisements were, and are, deceptive or unfair.

PAR. 15. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent D'Arcy-MacManus & Masius, Inc. has been and now is in substantial competition in commerce with corporations, firms and individuals engaged in the advertising of automobiles of the same general kind and nature as the Cadillac Eldorado.

PAR. 16. The use by respondent of the aforesaid unfair or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of automobiles manufactured by clients of respondent including General Motors. As a result thereof, substantial trade is being unfairly diverted to respondent and to clients of respondent from their competitors.

PAR. 17. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair or deceptive acts or practices in commerce unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

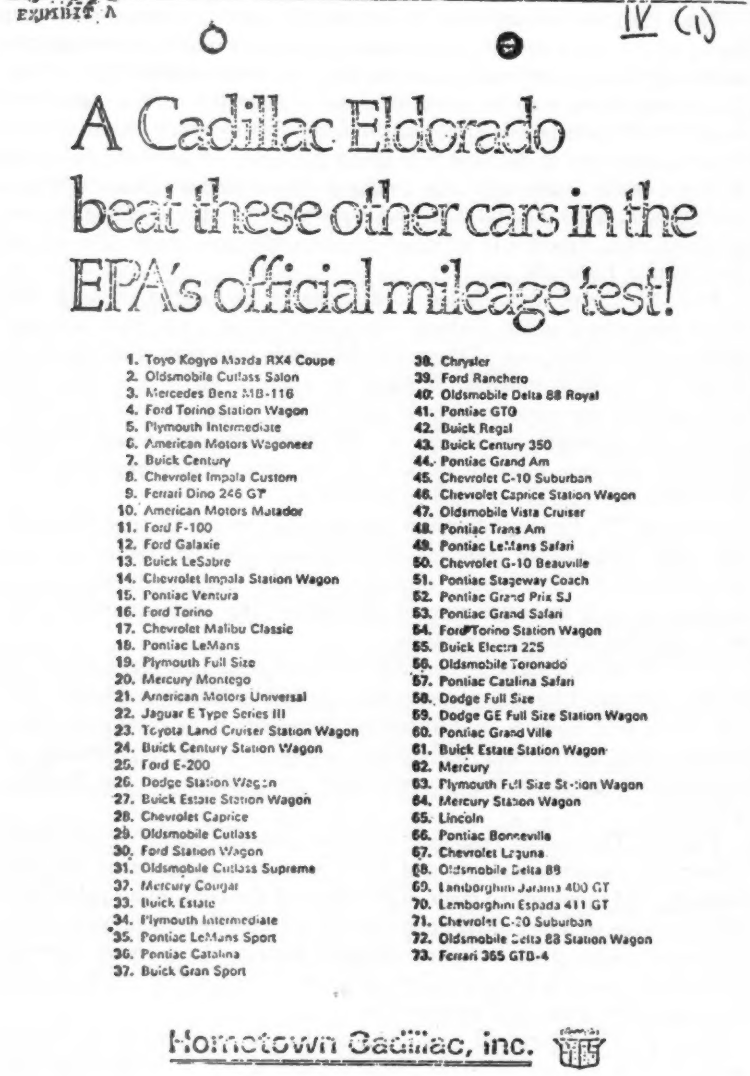


EXHIBIT A

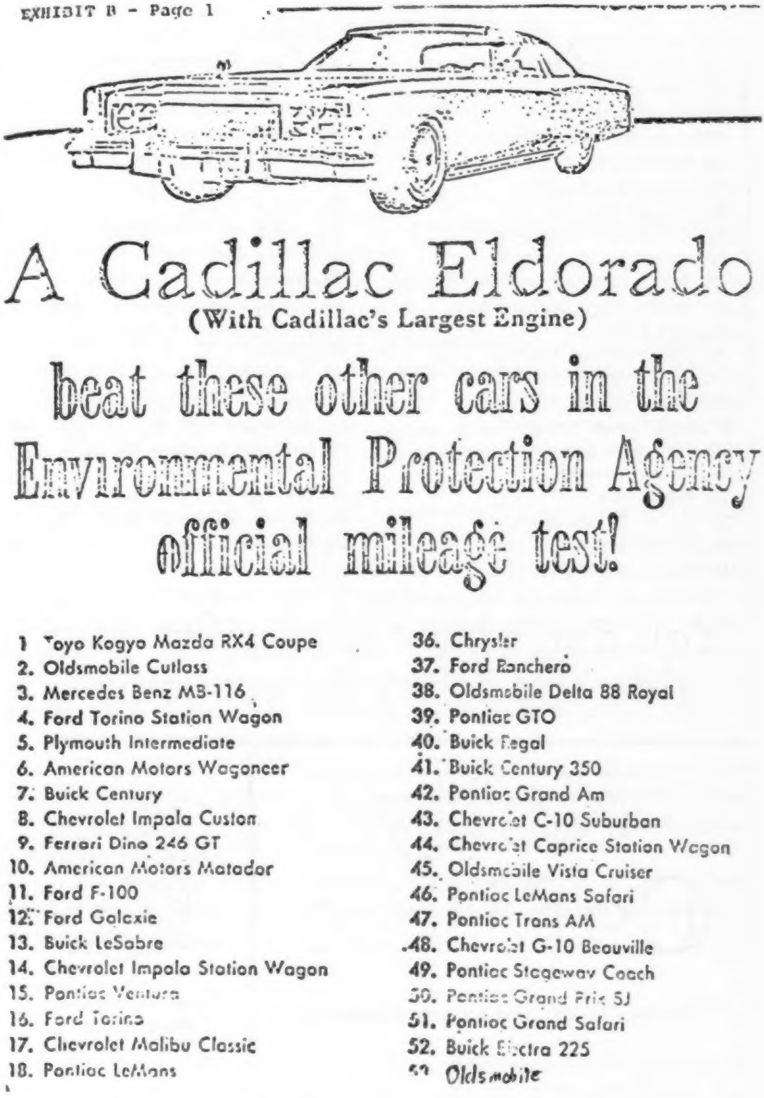
IV (1)

A Cadillac Eldorado beat these other cars in the EPA's official mileage test!

1. Toyo Kogyo Mazda RX4 Coupe
2. Oldsmobile Cutlass Salon
3. Mercedes Benz MB-116
4. Ford Torino Station Wagon
5. Plymouth Intermediate
6. American Motors Wagoneer
7. Buick Century
8. Chevrolet Impala Custom
9. Ferrari Dino 246 GT
10. American Motors Matador
11. Ford F-100
12. Ford Galaxie
13. Buick LeSabre
14. Chevrolet Impala Station Wagon
15. Pontiac Ventura
16. Ford Torino
17. Chevrolet Malibu Classic
18. Pontiac LeMans
19. Plymouth Full Size
20. Mercury Montego
21. American Motors Universal
22. Jaguar E Type Series III
23. Toyota Land Cruiser Station Wagon
24. Buick Century Station Wagon
25. Ford E-200
26. Dodge Station Wagon
27. Buick Estate Station Wagon
28. Chevrolet Caprice
29. Oldsmobile Cutlass
30. Ford Station Wagon
31. Oldsmobile Cutlass Supreme
32. Mercury Cougar
33. Buick Estate
34. Plymouth Intermediate
35. Pontiac LeMans Sport
36. Pontiac Catalina
37. Buick Gran Sport
38. Chrysler
39. Ford Ranchero
40. Oldsmobile Delta 88 Royal
41. Pontiac GTO
42. Buick Regal
43. Buick Century 350
44. Pontiac Grand Am
45. Chevrolet C-10 Suburban
46. Chevrolet Caprice Station Wagon
47. Oldsmobile Vista Cruiser
48. Pontiac Trans Am
49. Pontiac LeMans Safari
50. Chevrolet G-10 Beauville
51. Pontiac Stageway Coach
52. Pontiac Grand Prix SJ
53. Pontiac Grand Safari
54. Ford Torino Station Wagon
55. Buick Electra 225
56. Oldsmobile Toronado
57. Pontiac Catalina Safari
58. Dodge Full Size
59. Dodge GE Full Size Station Wagon
60. Pontiac Grand Ville
61. Buick Estate Station Wagon
62. Mercury
63. Plymouth Full Size Station Wagon
64. Mercury Station Wagon
65. Lincoln
66. Pontiac Bonneville
67. Chevrolet Laguna
68. Oldsmobile Delta 88
69. Lamborghini Jarama 400 GT
70. Lamborghini Espada 411 GT
71. Chevrolet C-20 Suburban
72. Oldsmobile Delta 88 Station Wagon
73. Ferrari 365 GTB-4

Hometown Cadillac, inc.

EXHIBIT B - Page 1



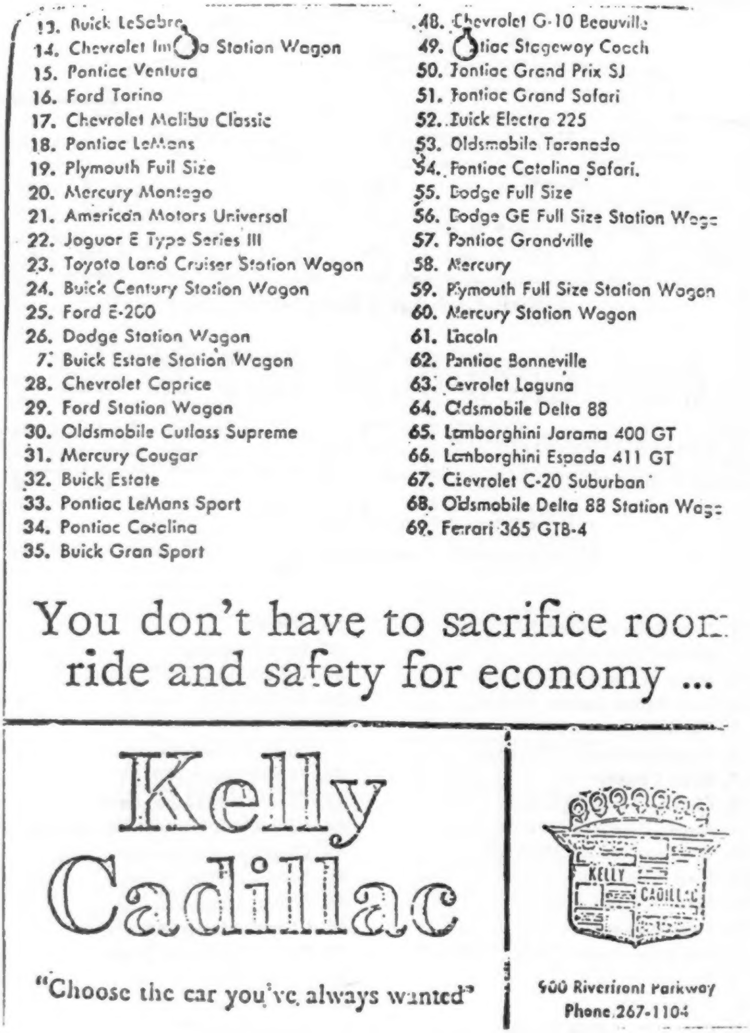
A Cadillac Eldorado

(With Cadillac's Largest Engine)

beat these other cars in the Environmental Protection Agency official mileage test!

1. Toyo Kogyo Mazda RX4 Coupe
2. Oldsmobile Cutlass
3. Mercedes Benz MB-116
4. Ford Torino Station Wagon
5. Plymouth Intermediate
6. American Motors Wagoneer
7. Buick Century
8. Chevrolet Impala Custom
9. Ferrari Dino 246 GT
10. American Motors Matador
11. Ford F-100
12. Ford Galaxie
13. Buick LeSabre
14. Chevrolet Impala Station Wagon
15. Pontiac Ventura
16. Ford Torino
17. Chevrolet Malibu Classic
18. Pontiac LeMans

36. Chrysler
37. Ford Ranchero
38. Oldsmobile Delta 88 Royal
39. Pontiac GTO
40. Buick Regal
41. Buick Century 350
42. Pontiac Grand Am
43. Chevrolet C-10 Suburban
44. Chevrolet Caprice Station Wagon
45. Oldsmobile Vista Cruiser
46. Pontiac LeMans Safari
47. Pontiac Trans AM
48. Chevrolet G-10 Beauville
49. Pontiac Stageway Coach
50. Pontiac Grand Prix SJ
51. Pontiac Grand Safari
52. Buick Electra 225
53. Oldsmobile



13. Buick LeSabre
14. Chevrolet Im[illegible]a Station Wagon
15. Pontiac Ventura
16. Ford Torino
17. Chevrolet Malibu Classic
18. Pontiac LeMans
19. Plymouth Full Size
20. Mercury Montego
21. American Motors Universal
22. Jaguar E Type Series III
23. Toyota Land Cruiser Station Wagon
24. Buick Century Station Wagon
25. Ford E-200
26. Dodge Station Wagon
7. Buick Estate Station Wagon
28. Chevrolet Caprice
29. Ford Station Wagon
30. Oldsmobile Cutlass Supreme
31. Mercury Cougar
32. Buick Estate
33. Pontiac LeMans Sport
34. Pontiac Catalina
35. Buick Gran Sport
48. Chevrolet G-10 Beauvill
49. [illegible]tiac Stageway Coach
50. Pontiac Grand Prix SJ
51. Pontiac Grand Safari
52. Buick Electra 225
53. Oldsmobile Toronado
54. Pontiac Catalina Safari.
55. Dodge Full Size
56. Dodge GE Full Size Station Wag
57. Pontiac Grandville
58. Mercury
59. Plymouth Full Size Station Wagon
60. Mercury Station Wagon
61. Lincoln
62. Pontiac Bonneville
63. Chevrolet Laguna
64. Oldsmobile Delta 88
65. Lamborghini Jarama 400 GT
66. Lamborghini Espada 411 GT
67. Chevrolet C-20 Suburban
68. Oldsmobile Delta 88 Station Wag
69. Ferrari 365 GTB-4

You don't have to sacrifice room
ride and safety for economy ...

Kelly
Cadillac

"Choose the car you've always wanted"

900 Riverfront Parkway
Phone 267-1104

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent D'Arcy-MacManus & Masius, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 437 Madison Ave., New York, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent D'Arcy-MacManus & Masius, Inc., its successors and assigns, its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution of products in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by reference to a test or

tests, that any automobile is superior with regard to fuel economy to any other automobile, unless:

(a) such superiority has been demonstrated, as to the model(s) for which it is claimed, by such test or tests with respect to each sample, or the valid average of all identical samples, of each model represented to have been tested; or

(b) the valid test results for each sample, or the valid average of all identical samples, of each model so compared, including the advertised model as well as such makes and models to which the advertised model is compared, are clearly and conspicuously disclosed.

For the purpose of this order "sample" shall mean an actual automobile tested. It is *Provided, however*, That nothing contained in this paragraph is intended to conflict with any guidelines, rules or regulations with respect to fuel economy testing or advertising that may hereafter from time to time be promulgated by any agency of the United States Government, and, if such conflict does occur, the guidelines, rules or regulations shall govern.

2. Misrepresenting in any manner the fuel economy of any automobiles or the superiority of any automobile over competing products in terms of fuel economy.

3. Representing, directly or by implication, by reference to a test or tests, that the performance of any consumer automotive product has been tested either alone or in comparison with other consumer automotive products unless such representation(s) accurately reflect the test results and unless the tests themselves are so devised and conducted as to substantiate each such representation concerning the featured tests.

4. Misrepresenting in any manner the purpose, contents or conclusion of any test, report or study relating to the performance of any consumer automotive product.

For purposes of Paragraphs 3 and 4 of this order "test" shall include demonstrations which are claimed to be proof of the representations made.

5. It shall be a defense under Paragraphs 1-4 of this order that respondent neither knew nor should have known of the facts concerning the test, fuel economy or performance which make the advertising false or misleading.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IN THE MATTER OF

TRI-WEST CONSTRUCTION COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2758. Complaint, Oct. 31, 1975-Decision, Oct. 31, 1975

Consent order requiring a Boise, Idaho, home construction, repair and rehabilitation firm, among other things to cease using false pricing claims and other misrepresentations to sell its home improvement products or services; using coercive tactics to increase the contract price; and obtaining certificates of completion before actually completing the work. Further, respondent is required to complete the work agreed to in the original contract at the original price, to obtain a supplemental contract for any additional work desired by a customer, and to comply with requirements of the Truth in Lending Act that credit cost disclosures be made and that credit customers whose homes have been taken as security be allowed a three-day right of rescission period.

Appearances

For the Commission: *Sharon Armstrong.*

For the respondents: *Richard M. Clinton, Bogle, Gates, Dobrin, Wakefield & Long*, Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that Tri-West Construction Company, Inc., a corporation, and William B. Cafarelli, individually and as an officer of Tri-West Construction Company, Inc. (hereinafter respondents), have violated Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) and various provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint:

PARAGRAPH 1. Respondent Tri-West Construction Company, Inc.

(hereinafter Tri-West) is an Idaho corporation with its principal office and place of business located at 3826 W. State St., Boise, Idaho.

Respondent William B. Cafarelli is president and sole owner of Tri-West. He controls the policies, acts and practices of Tri-West, including those hereinafter set forth. His address is the same as that of Tri-West.

PAR. 2. Respondents operate a home improvement and renovation business in which they offer for sale, sell, distribute and install residential siding materials and other home improvement products, and services related thereto.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim. All allegations stated in the present tense include the past tense.

PAR. 3. In the course and conduct of their business, respondents cause their products, when sold, to be shipped from their place of business in the State of Idaho to purchasers thereof located in various other States of the United States including Washington, Oregon and Nevada, and cause work orders, contracts and other business papers and documents to be transmitted across State lines by and between respondents' representatives, in implementation and facilitation of their said sales of products and services. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in these products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their home improvement products and services, respondents through their salesmen and representatives make numerous statements in oral sales presentations with respect to the nature and time limitations of their offer, their prices, their business affiliations, and savings available to purchasers.

By and through their use of such statements, respondents represent directly or by implication that:

A. Tri-West is a subsidiary or division of United States Steel Corporation.

B. Tri-West has an exclusive arrangement with United States Steel Corporation whereby Tri-West is the only distributor of such company's residential siding materials in the particular trade area.

C. Tri-West and United States Steel Corporation advertise their siding materials and/or services by means of Tri-West's work on customers' homes.

D. After the installation of respondents' siding is completed, the homes of their customers will be used for demonstration and advertising purposes; and, as a result of allowing or agreeing to allow their homes to be used as models, demonstrators, or before-and-after examples, such customers will be granted discounts or reduced prices.

E. The prices offered by respondents to customers are discount or special prices available for only a limited period of time, and which afford savings to customers because of reductions from respondents' regular selling prices.

PAR. 5. In truth and in fact:

A. Tri-West is not a subsidiary or division of United States Steel Corporation.

B. Tri-West does not have an exclusive or any other arrangement with United States Steel Corporation whereby Tri-West is the only distributor of such siding materials in any particular area.

C. Neither Tri-West nor United States Steel Corporation advertise their siding materials and/or services by means of Tri-West's work on customers' homes.

D. After the installation of respondents' siding is completed, the homes of respondents' customers are not and will not, in most instances, be used for demonstration or advertising purposes; and customers are not granted discounts or reduced prices as a result of allowing or agreeing to allow their homes to be used as models, demonstrators, or before-and-after examples.

E. The prices offered by respondents to customers are not special or reduced prices available for only a limited period of time, and do not afford savings to customers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices; the prices at which their home improvement products and services are sold vary from purchaser to purchaser.

Therefore, the statements and representations set forth in Paragraph Four are false, misleading, and deceptive.

PAR. 6. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their home improvement products and services, respondents and their salesmen or representatives in many instances engage in the following additional unfair, misleading and deceptive acts or practices:

A. After a binding purchase order has been signed between respondents and the customer, specifying the work to be done and the agreed price therefor, respondents attempt by various means, either before or after starting the work, to coerce or induce an increase in the price of such work. Among such means are statements and declarations by respondents that the contract price was a mistake, that the work cannot be done at the contract price, that Tri-West will stop work if a higher price is not agreed on, and other statements of similar import. Respondents thereby deprive customers of the opportunity to choose freely the products and services that they desire, and place at a severe bargaining disadvantage those customers for whom work has already started before respondents demand the higher price.

B. Prior to actual completion of the work, respondents obtain and attempt to obtain the customer's signature on a "Certificate of Completion" or other document attesting to respondents' completion of the work contracted for. In order to obtain this signed certificate respondents make oral statements and representations that it is only a technical requirement, and otherwise disparage the importance of the certificate. By obtaining such signed certificate prematurely, respondents deprive customers of bargaining leverage in instances where respondents fail to complete the work promptly or to the satisfaction of the customer.

C. Respondents fail to disclose to the customer that their furnishing of home improvement products and services gives respondents and others the right, under State law, to file a lien for materials and/or labor on the customer's home. Such fact, if known to respondents' customers, would be likely to affect their consideration of whether or not to purchase such products and services from respondents. Thus, respondents have failed to disclose a material fact.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents are and have been in substantial competition in or affecting commerce with corporations, firms and individuals in the sale of home improvement products and services of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements and representations and the aforesaid unfair and deceptive acts and practices, and respondents' failures to disclose material facts, as alleged above, have the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that said statements and representations are true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices in commerce and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two above are incorporated by reference in Count II as if fully set forth verbatim. All allegations stated in the present tense include the past tense.

PAR. 10. In the ordinary course and conduct of their business, respondents regularly extend and arrange for the extension of consumer credit, as "arrange for the extension of credit," and "consumer credit" are defined in Regulation Z, the implementing regulation of the Truth in Lending Act, promulgated by the Board of Governors of the Federal Reserve System.

PAR. 11. Subsequent to July 1, 1969, in the ordinary course of business and in connection with their credit sales, as "credit sale" is defined in Regulation Z, respondents have caused and are causing their customers to execute a binding purchase order, hereinafter referred to as the "Order Contract." Respondents do not provide customers with any other consumer credit cost disclosures before the transaction is consummated.

PAR. 12. By and through their use of the order contract, respondents:

A. Fail to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

B. Fail to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

C. Fail to use the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

D. Fail to use the term "deferred payment price" to describe the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and fail in some instances to disclose that sum, all as required by Section 226.8(c)(8)(ii) of Regulation Z.

E. Fail to disclose the date on which the finance charge begins to accrue when different from the date of the transaction, as required by Section 226.8(b)(1) of Regulation Z.

F. Fail to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

G. Fail in some instances to disclose the due dates or periods of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

H. Fail to describe or identify the type of security interest retained or acquired by the creditor in connection with the extension of credit, as required by Section 226.8(b)(5) of Regulation Z.

I. Fail to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation when said obligation includes a precomputed finance charge, as required by Section 226.8(b)(7) of Regulation Z.

J. Fail to include in the finance charge certain charges or premiums for credit life insurance when respondents did not disclose to the customer in writing that such insurance is not required and did not obtain a specific dated and separately signed affirmative written indication of the customer's desire for such insurance as prescribed by Section 226.4(a)(5) of Regulation Z, and thereby fail to state the finance charge accurately as required by Section 226.8(c)(8)(i) of Regulation Z.

K. Fail to furnish to the customer a duplicate of the instrument or other statement containing the disclosures prescribed by Section 226.8 of Regulation Z, as required by Section 226.8(a) of Regulation Z.

PAR. 13. By and through the use and acceptance of the Order Contract and by virtue of the work performed by respondents on the customer's residence, a security interest, as "security interest" is defined in Section 226.2(z) of Regulation Z, is or will be retained or acquired in real property which is used or expected to be used as the principal residence of the customer. The retention or acquisition of such security interest in said real property confers upon respondents' credit customers the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later, as prescribed by Section 226.9 of Regulation Z.

By and through their use of the order contract respondents fail to furnish such customers with any copy whatever of the notice of opportunity to rescind required by Sections 226.9(a) and (b) of Regulation Z, and to set forth on such notice the "Effect of rescission," Section 226.9(d) of Regulation Z, in the manner and form prescribed by Section 226.9(b) of Regulation Z.

Further, in some instances respondents make physical changes in such customers' property and performed work or services on such property before expiration of the rescission period provided in Section 226.9(a) of Regulation Z. Respondents' failure to refrain from commencing work pursuant to rescindable contracts, before the rescission period has expired, is in violation of Section 226.9(c) of Regulation Z.

PAR. 14. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of

Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and of the Truth in Lending Act and the implementing regulation promulgated thereunder; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, and having duly considered the comment filed thereafter pursuant to Section 2.34 of its rules, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent Tri-West Construction Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its office and principal place of business located at 3826 W. State St., Boise, Idaho.

Respondent William B. Cafarelli is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Tri-West Construction Company, Inc., a corporation, and William B. Cafarelli, individually and as an officer of said corporation, and respondents' successors, assigns, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, distribution or installation of home improvement products or services, or other products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication that:

1. Respondents' organization is a subsidiary or division of United States Steel Corporation or is otherwise affiliated with such company or any other manufacturer of construction materials.

2. Respondents have an exclusive arrangement of any kind with United States Steel Corporation or are the only distributor of such company's products in any area.

3. Respondents have an exclusive arrangement with or are the only area distributor of products of any manufacturer of construction materials.

4. Respondents, United States Steel Corporation, or any other supplier of construction materials advertises its products and/or services by means of work done on individuals' homes.

5. The homes of any of respondents' customers are or will be used for demonstration or advertising purposes or as model homes; or that as a result of allowing or agreeing to allow their homes to be used as models, demonstrators, or before-and-after examples, customers are or will be granted reduced prices, discounts, or other special prices.

6. Any price for respondents' products and/or services is a discount price, reduced price, or otherwise special price, unless respondents can affirmatively show by documentary evidence that such price constitutes a significant reduction from an established selling price at which such products and/or services have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting, in any manner, respondents' prices or the savings available to customers.

7. The price or terms offered by respondents are limited as to time or limited in any other manner, unless respondents can affirmatively show by documentary evidence that the represented limitations are actually in force and are in good faith adhered to.

B. Refusing or failing to perform work at the contract price after entering into an agreement therefor with a customer. In each instance where respondents and the customer determine upon additional goods or services to be provided by or through respondents, beyond those originally agreed upon, the complete terms of such supplementary agreement shall be set forth in a separate contract which shall clearly and conspicuously disclose in bold print:

> This is a contract for additional goods and/or services. You are *not required* to purchase these goods and/or services. If you do not wish these additional goods and/or services, Tri-West will perform all the requirements of the original contract for the original contract price.

C. Obtaining from any customer a signed certificate of completion or other document attesting to the completion of contracted work unless the customer has in fact received all products and services contracted for, and a copy of each applicable guarantee.

D. Representing directly or by implication that a certificate of completion is only a technical requirement, or disparaging in any manner the importance of the customer's waiting until completion of all contracted work before signing such a document.

E. Failing to disclose to the customer that respondents' furnishing of home improvement products and services gives respondents and others the right, under State law, to file a lien for materials and/or labor on the customer's home.

II

It is further ordered, That respondents Tri-West Construction Company, Inc., a corporation, and William B. Cafarelli, individually and as an officer of said corporation, and respondents' successors, assigns, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

A. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

B. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

C. Failing to use the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

D. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

E. Failing to disclose the date on which the finance charges begins to accrue when different from the date of the transaction, as required by Section 226.8(b)(1) of Regulaton Z.

F. Failing to disclose the number, amounts and due dates or periods of payments scheduled to repay the indebtedness, and the sum of such payments, and to describe said sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

G. Failing to describe or identify the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and to provide a clear identification of the property to which the security interest relates, as required by Section 226.8(b)(5) of Regulation Z.

H. Failing to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation when said obligation includes a precomputed finance charge, as required by Section 226.8(b)(7) of Regulation Z.

I. Failing to itemize and include in the finance charge, for purposes of disclosure of the finance charge and computation of the annual percentage rate, any and all charges or premiums for credit life and/or disability insurance unless respondents have clearly and conspicuously disclosed to the customer in writing that such insurance is not required and have obtained a specific dated and separately signed affirmative written indication of the customer's desire for such insurance as prescribed by Section 226.4(a)(5) of Regulation Z.

J. Failing to furnish to the customer, before the transaction is consummated, a duplicate of the instrument or other statement containing the disclosures prescribed by Section 226.8 of Regulation Z, as required by Section 226.8(a) of Regulation Z.

K. Failing, in any transaction in which a security interest is or will be retained or acquired in real property which is used or expected to be used as the principal residence of the customer, to comply with all requirements regarding the right of rescission set forth in Section 226.9 of Regulation Z.

L. Making any physical changes in a customer's property or performing any work or services on such property before expiration of the rescission period provided for in Section 226.9(a) of Regulation Z, in any transaction in which a security interest is or will be retained or acquired in real property which is used or expected to be used as the principal residence of the customer, as provided in Section 226.9(c) of Regulation Z.

M. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, at the time and in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondents hereafter maintain complete business records relative to the manner and form of their compliance with the provisions of this order. Each such record shall be retained for not less than three years, and shall be furnished to representatives of the Federal Trade Commission upon request.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen and/or other persons engaged in the sale of respondents' products and/or services, and to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation, or placing of advertising, and that respondents shall secure from each such salesman and/or other person a signed statement acknowledging receipt of said order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include the respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

DIESEL TRUCK DRIVERS TRAINING SCHOOL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2759. Complaint, Nov. 3, 1975-Decision, Nov. 3, 1975

Consent order requiring a Sun Prairie, Wis., seller and distributor of courses of instruction in truck driving, among other things to cease misrepresenting business affiliations, earnings, nature of business and opportunities in their services. Respondents are further required to make certain affirmative disclosures to prospective students and to give students a three-day cooling-off period during which they may cancel their contract with full refund of all monies paid.

Appearances

For the Commission: *William M. Rice, Jr.*

For the respondents: *Robert L. Klabacka, Klabacka & Kirkhuff,* Sun Prairie, Wis.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Diesel Truck Drivers Training School, Inc., a corporation, and Robert L. Klabacka, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Diesel Truck Drivers Training School, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at rural route #1, Sun Prairie, Wis.

Respondent Robert L. Klabacka is an individual and officer of respondent corporation. His business address is the same as that of said corporate respondent.

The said individual respondent formulates, directs and controls that acts and practices of the corporate respondent, including the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and have been for some time last past, engaged in the advertising, offering for sale, sale or distribution of courses of study and instruction purporting to prepare graduates thereof for employment as truck drivers and related occupations. Said courses when pursued to completion include a three-week period of in-residence training at a training facility located at Sun Prairie, Wis.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the publication of advertisements concerning the said courses in newspapers of general circulation and have utilized the services of salesmen and franchisees who induce prospective purchasers of said courses, located in States other than the State of Wisconsin, to contact said salesmen and franchisees at respondents' and franchisees' offices. Said salesmen and franchisees transmit to and receive from respondents contracts, checks and other instruments of a commercial nature relating to the sale of said courses to said purchasers. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, respondents have published or caused to be published in the "Help-Wanted" and other columns of newspapers advertisements containing statements regarding job opportunities, training and wages for persons interested in becoming truck drivers. Typical and illustrative, but not all inclusive, of such advertisements are the following:

ACTIVE MEN
The Growing Truck Industry Needs Trained
Semi-drivers. These Men Earn up to $350
Per Week.

Train Now - Pay Later
. 3 Weeks Training
. Free Job Placement
Over 300 Firms have hired our graduates

DIESEL DRIVING SCHOOL
400 Brooks Lane, Hazelwood, Mo.

DIESEL SEMI-DRIVERS

75 Men Wanted

Men * * * 21 to 44 years who want to train to become professional (over the road) diesel semi-truck drivers, we will train you in just three weeks at our training grounds at Sun Prairie, Wis. You too can earn that "Big Pay Check" that professional drivers earn. Free placement service. Tuition can be financed. School is approved for veterans. For information, phone or mail this ad to:

DIESEL TRUCK DRIVER TRAINING 3701 East State St., Room 103, Rockford, Ill. 61108 - Phone 397-0430

PAR. 5. By and through the use of the statements contained in the advertisements set forth in Paragraph Four, and others of similar import and meaning but not expressly set out herein, respondents represent, directly or by implication, that:

1. The corporate respondent operates, or is affiliated with, or represents a trucking company.
2. Respondents are offering employment to qualified applicants who will be trained as truck drivers.
3. Persons receiving training from respondents will earn $350 per week as truck drivers or in related occupations upon completion of training.
4. There is a reasonable basis from which to conclude that there is now or will be a need or demand for truck drivers which respondents' training is designed to meet.

PAR. 6. In truth and in fact:

1. The corporate respondent does not operate or represent and is not affiliated with any trucking company but, to the contrary, is engaged in the sale of courses of instruction to prospective purchasers.
2. Respondents do not offer employment to persons who have been trained as truck drivers but attempt to and do sell courses of instruction to said purchasers.
3. Few persons who received training from respondents pursuant to said offer have earned amounts such as $350 per week as truck drivers or in related occupations as a result of such training.
4. Respondents had no reasonable basis from which to conclude that there is now or will be a need or demand for truck drivers which respondents' training is designed to meet.

Therefore, the statements and representations as set forth in Paragraphs Four and Five were, and are, false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business as aforesaid, respondents cause persons who respond to the aforesaid or similar advertisements to contact respondents' salesmen and franchisees. For the purpose of inducing the sale of said courses, such salesmen and franchisees make to prospective purchasers many statements and representations, directly or by implication, regarding opportunities for employment as truck drivers available to purchasers of said courses, the assistance furnished to graduates of courses offered by respondents in obtaining employment and other matters. Some of the aforesaid statements and representations appear in brochures, pamphlets and other printed material furnished to said salesmen and franchisees by respondents and in other statements and representations made orally by said salesmen and franchisees. Among and typical, but not all inclusive, of such statements and representations are the following:

1. Respondents have been requested by trucking companies to train drivers for jobs as truck drivers with their companies upon completion of said training.

2. Respondents provide a placement service which will secure jobs as truck drivers for graduates of said courses and who want to work in such capacities.

3. Graduates of said courses who want to work are assured jobs as truck drivers as a consequence of graduating from said courses.

4. Respondents have a free placement service and free job assistance for their graduates.

PAR. 8. In truth and in fact:

1. Respondents have not been requested by trucking companies to train people for jobs as truck drivers, which jobs shall be offered by such companies to graduates of said training.

2. The placement service provided by respondents will not secure a job as a truck driver for graduates of said courses who want to work in such capacity.

3. Graduates of said courses who want to work are not assured jobs as truck drivers as a consequence of graduating from said courses.

4. Such placement assistance as is furnished by respondents is not free, but rather is included in the tuition cost of courses offered by respondents.

Therefore, the statements and representations as set forth in Paragraph Seven hereof were, and are, false, misleading and deceptive.

PAR. 9. Respondents offered for sale courses of instruction to prepare graduates thereof for jobs as truck drivers without disclosing in advertising or through their sales representatives or franchisees: (1) the recent percentage of graduates of each school that were able to obtain the employment for which they were trained; (2) the employers that hired any such graduates; (3) the initial salary any such graduates received; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Knowledge of such facts would indicate the possibility of securing future employment upon graduation and the nature of such employment. Thus, respondents have failed to disclose a material fact, which, if known to certain prospective enrollees, would be likely to affect their consideration of whether or not to purchase such courses of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair.

PAR. 10. Respondents have entered into contracts with purchasers of said courses of instruction which contain provisions for the cancellation of said contracts and the refund of tuition monies paid by said purchasers. In many instances, respondents have failed to offer to refund and refused to refund to purchasers who have cancelled their contracts such monies as may be due and owing according to the terms of said contracts.

The use by respondents of the aforesaid practice and their continued retention of said sums, as aforesaid, is an unfair act or practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 11. (a) Respondents have been using the aforesaid unfair, false, misleading or deceptive acts and practices, which a reasonably prudent person should have known, under all of the facts and circumstances, were unfair, false, misleading or deceptive, to induce persons to pay or to contract to pay over to them substantial sums of money to purchasers in connection with their future employment and careers was of little value compared to the sums of money paid by said purchasers. Respondents have received the said sums and have failed to offer refunds and have failed to refund such sums to rescind such contractual obligations of substantial numbers of enrollees and participants in such courses who were unable to secure employment in the positions and fields for which they have been purportedly trained by respondents.

The use by respondents of the aforesaid acts and practices, their continued retention of said sums and their continued failure to rescind such contractual obligations of their customers, as aforesaid, are unfair acts or practices.

(b) In the alternative and separate from Paragraph Eleven (a) herein, respondents, who are in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of courses of vocational instruction, have been and are now using, as aforesaid, false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money to purchase courses of instruction.

The effect of using the aforesaid acts and practices to secure substantial sums of money is or may be to substantially hinder, lessen, restrain, or prevent competition between respondents and the aforesaid competitors.

Therefore, the said acts and practices constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

PAR. 12. By and through the use of the aforesaid acts, practices, statements and representations, respondents place in the hands of others the means and instrumentalities by and through which they mislead and deceive the public in the manner and as to the things hereinbefore alleged.

PAR. 13. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals engaged in the sale and distribution of similar courses of study and instruction.

PAR. 14. The use of respondents to the false, misleading and deceptive statements, representations, acts and practices and their failure to disclose material facts, as aforesaid, has had, and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and to induce a substantial number thereof to purchase said courses of study and instruction offered by respondents by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Diesel Truck Drivers Training School, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at rural route #1, in the City of Sun Prairie, State of Wisconsin.

Respondent Robert L. Klabacka is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Diesel Truck Drivers Training School, Inc., a corporation, its successors and assigns, and officers and Robert L. Klabacka, individually and as an officer of said corporation, and respondents' officers, agents, franchisees, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of courses of study and instruction in truck driving or in any other subject, trade or vocation, or any other product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

1. Representing, directly or by implication, orally or in writing, that:

A. They are, or represent, or are affiliated with, trucking companies or any industry for which enrollees of any courses offered by respondents are being trained; or misrepresenting, in any manner, the nature of their business.

B. Persons receiving training will, or may, earn any specified amounts, or misrepresenting in any manner the prospective earnings of such persons.

C. They have been requested by trucking companies or any other business or organization to train persons for specific jobs, or misrepresenting, in any manner, respondents' connection or affiliation with any industry or any member thereof.

D. Graduates of any courses will be qualified thereby for employment at jobs for which said graduates were purportedly trained, when additional training or experience is required.

E. There is a substantial demand, or a demand of any size or proportion, for persons completing any of the courses offered by the respondents in the field of truck driving or any other field, or otherwise representing, orally or in writing, that opportunities for employment, or opportunities of any type or number, are available to such persons, except as hereinafter provided in Paragraph 4 of this order. *Provided, however*, That respondents shall cease and desist making such representations unless the respondents in each and every instance:

(1) Until the passage of a base period to be determined pursuant to Paragraph 4(b) of Part I of this order, after the establishment of a new school location by respondents in any metropolitan area or county, whichever is larger, where they did not previously operate a school, and after the introduction by respondents of any new course of instruction at any school or location, shall:

(A) have in good faith conducted a statistically valid survey which establishes the validity of any such representation at all times when the representation is made, and

(B) have disclosed in immediate and conspicuous conjunction with any such representation, that:

> All representations for potential employment demand or opportunities for graduates of this school (course) are merely estimates. This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

(2) After the passage of a base period to be determined pursuant to Paragraph 4(b) of Part I of this order, and until two years after the establishment of a new school location by respondents in any metropolitan area or county, whichever is larger, where they did not previously operate a school, and after the introduction by respondents of any new course of instruction at any school or location, shall:

(A) make any such representations in the form and manner provided in Paragraph 4(b) of Part I of this order, and

(B) disclose in immediate and conspicuous conjunction with any such representation, that:

> This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

2. Placing ads in "Help-Wanted" columns or representing by any means that employment is being offered when such offer is not a bona fide offer of employment.

3. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any course offered by respondents, the full cost of such course including the fee for any home study lessons and for any residential training.

4. Failing to deliver to each person who shall contract for the

purchase of any course of training or instruction, at the time such person so contracts, a notice, in a form approved by the Commission, which shall disclose the following information and none other:

(a) The title "IMPORTANT INFORMATION" printed in boldface type across the top of the form.

(b) A paragraph reciting the following affirmative disclosures which shall be based upon information compiled not more than one year prior to the delivery of such notice:

(1) The placement data for graduates determined in the following manner:

> Respondents shall, following the graduation of each student graduating during each six-month period, commencing with the six-month period ending on the last day of the month in which this order is finally accepted by the Commission, undertake to determine the following information with respect to each such graduate: (a) his employment status; (b) the name of his employer and position, if any; and (c) his salary. The disclosure shall indicate the total number of graduates of the course; the number of those who have indicated to respondents a desire for employment; the number of those desiring employment known by respondents to be employed; the number of those desiring employment known to be unemployed; and the number of those desiring employment whose employment status is not known.

Separate placement data shall be calculated for each course of instruction offered in each school location or facility during such six-month period.

(2) a list of types of employers as indicated in responses to questionnaires sent pursuant to subparagraph (1) above or otherwise within the actual knowledge of respondents which have hired the graduates referred to in subparagraph (1) above in the positions for which such graduates were trained, and the percentage of employed graduates working for each type of employer.

(3) the salary range of the graduates referred to in subparagraph (1) above. The "salary range" shall be the highest and lowest salary for full time employment indicated in responses to questionnaires sent pursuant to subparagraph (1) above or otherwise within the actual knowledge of respondents with respect to such graduates.

Provided, however, That this subparagraph (b) shall be inapplicable until the first day of the seventh month following the month in which this order is finally accepted by the Commission.

(c) An explanation of the cancellation procedure provided in this order, namely that any contract or other agreement may be cancelled for any reason until midnight of the third business day after receipt by the customer, via the U.S. mails, of this notice.

(d) A detachable form which the person may use as notice of cancellation, which indicates the proper address for accomplishing any such cancellation.

This notice shall be sent by respondents no sooner than the next day after the person shall have contracted for the sale of any course of instruction; respondents, during such period provided for in subparagraph (c) above, shall not initiate contact with such person other than that required by this paragraph.

Provided, however, That subparagraph (b) above shall be inapplicable to any newly established school that respondents may establish in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or to any course newly introduced by respondents, until such time as the new school or course has been in operation for the base period to be established pursuant to subparagraph (b) above. The following statement shall be included in such notice during such period:

> All representations of potential employment or salaries are merely estimates. This school (course) has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this school (course).

After such time as the new school or course has been in operation for the base period to be established pursuant to subparagraph (b) above, and until two years after the establishment of a new school location in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or the introduction of any new course by respondents, the following statement shall be included in such notice:

> This school (course) has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this school (course).

5. Contracting for any sale of any course of instruction in the form of a sales contract or other agreement which shall become binding prior to midnight of the third business day after the date of receipt by the customer of the form of notice provided for in paragraph 4 above. Upon cancellation of any said sales contract or other agreement as provided in paragraph 4(c) above, respondents are obligated to refund within thirty business days to any person exercising the cancellation right, all monies paid or remitted up until the notice of cancellation.

6. Failing to disclose, clearly and conspicuously, in advertisements, in catalogs, brochures and on letterheads that respondents' business is solely and exclusively that of a private school, not affiliated with any members of the trucking industry or of any member of any other industry.

7. Failing to refund within thirty days to purchasers who have

cancelled their contracts such monies as may be due and owing according to the terms of such contracts.

II

1. *It is further ordered,* That:

(a) Respondents herein deliver, by registered mail, a copy of this decision and order to each of their present and future franchisees, licensees, employees, sales representatives, agents, solicitors, brokers, independent contractors or to any other person who promotes, offers for sale, sells or distributes any course of instruction included within the scope of this order;

(b) Respondents herein provide each person or entity so described in subparagraph (a) of this paragraph with a form returnable to the respondents clearly stating his or her intention to be bound by and to conform his or her business practices to the requirements of this order; retain said statement during the period said person or entity is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request;

(c) Respondents herein inform each person or entity described in subparagraph (a) of this paragraph that the respondents will not use or engage or will terminate the use or engagement of any such party, unless such party agrees to and does file notice with the respondents that he or she will be bound by the provisions contained in this order;

(d) If such party as described in subparagraph (a) of this paragraph will not agree to file the notice set forth in subparagraph (b) above with the respondents and be bound by the provisions of this order, the respondents shall not use or engage or continue the use or engagement of such party to promote, offer for sale, sell or distribute any course of instruction included within the scope of this order;

(e) Respondents herein inform the persons or entities described in subparagraph (a) above that the respondents are obligated by this order to discontinue dealing with or to terminate the use or engagement of persons or entities who continue on their own the deceptive acts or practices prohibited by this order;

(f) Respondents herein institute a program of continuing surveillance adequate to reveal whether the business practices of each said person or entity described in subparagraph (a) above conform to the requirements of this order;

(g) Respondents herein discontinue dealing with or terminate the use or engagement of any person described in subparagraph (a) above, who continues on his or her own any act or practice prohibited by this order as revealed by the aforesaid program of surveillance.

(h) Respondents herein maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for examination by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business for inspection and copying.

2. *It is further ordered*, That respondents herein present to each interested applicant or prospective student immediately prior to the commencement of any interview or sales presentation conducted at any location other than respondents' offices during which the purchase of or enrollment in any course of instruction offered by respondents herein is discussed or solicited, a 5" x 7" card containing only the following language:

YOU WILL BE TALKING TO A SALESPERSON.

3. *It is further ordered*, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

4. *It is further ordered*, That the respondent Diesel Truck Drivers Training School, Inc., shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

5. *It is further ordered*, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged as well as a description of his duties and responsibilities.

6. *It is further ordered*, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ALLIED STORES CORPORATION T/A THE BON MARCHE, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2760. Complaint, Nov. 3, 1975-Decision, Nov. 3, 1975

Consent order requiring a New York City department store chain and its wholly-owned subsidiary in Boise, Idaho, among other things to cease making unsubstantiated effectiveness claims for cosmetic skin care preparations. Respondents are required to have in their possession a written certification from a reliable source that there is a reasonable scientific basis for claims made and a summary of the reasonable basis.

Appearances

For the Commission: *Dennis D. McFeeley.*

For the respondents: *David Rigney, Sullivan & Cromwell,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Allied Stores Corporation, dba The Bon Marche, and C. C. Anderson Stores Company, corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Allied Stores Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1114 Avenue of the Americas, New York, N.Y.

C. C. Anderson Stores Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its principal office and place of business located at 918 Idaho St., Boise, Idaho. C. C. Anderson Stores Company is a wholly-owned subsidiary of Allied Stores Corporation.

PAR. 2. Respondent Allied Stores Corporation is now, and for some time last past has been, a full-line department store chain. It operates 161 retail outlets throughout the United States and its gross sales for 1972 were $1,311,775,590. Allied Stores Corporation owns and operates full-line department stores doing business under the name "The Bon Marche" in the States of Washington, Oregon, and Idaho.

Respondent C. C. Anderson Stores Company owns full-line department stores doing business under the name "The Bon Marche" in the States of Idaho and Utah.

Among other products, respondents have advertised for sale, sold, and distributed, drug and cosmetic skin preparations, as "drug" and "cosmetic" are defined in Sections 15(c) and 15(e) of the Federal Trade Commission Act, as amended.

PAR. 3. In the course and conduct of their business, respondents have disseminated and caused to be disseminated certain advertisements and other written statements by United States mails and by other means in, or having an effect upon, commerce, as "commerce" is defined in the Federal Trade Commission Act. These advertisements and written materials have been disseminated for the purpose of inducing or with the likelihood of inducing, directly or indirectly, the purchase of drug and cosmetic skin preparations or for the purpose of inducing or with the likelihood of inducing, directly or indirectly, the purchase of drug and cosmetic skin preparations in, or having an effect upon, commerce.

PAR. 4. Typical and illustrative, but not all inclusive, of the statements and representations made in some of said advertisements and written materials pertaining to various products are the following:

> A. Wrinkles are an accumulation of dead skin which can be removed with a gentle new creme product * * *.;
>
> B. Smile lines, aging-lines, laugh-lines, thought-lines are minimized and subtracted gently;
>
> C. [The product] was created to help overcome crepey skin on the neck, lines over the lips, pitting and blackheads, blotching and discoloration;
>
> D. * * * Welcome to a demonstration of the process which removes the horny outer layer of skin * * * which is responsible for * * * broken capillaries, dark spots, general flaking, enlarged and clogged pores, certain allergies, etc.;
>
> E. * * * is * * * completely harmless you could use it 500 times a day;
>
> F. [The product is] between a medical and cosmetic treatment;
>
> G. * * * will slow down the aging process by 40 percent;
>
> H. Age is a disease and it has to be combated like any other;
>
> I. Women's faces * * * age 50 percent faster than men's * * *;
>
> J. * * * how smooth, soft and blissfully younger-looking your skin will seem * * * [the product's] power to defeat signs of lines and dryness is nothing short of incredible;
>
> K. It smooths little lines into seeming non-existence. Helps keep new ones from happening;
>
> L. Penetrates 6 layers deep for a lasting smoothness;
>
> M. Actually makes wrinkles, lines and crows feet disappear from sight for up to 6 to 8 hours or longer. Did you ever wonder why models and movie personalities seem to look 10 to 15 years younger than they really are?; and
>
> N. It actually makes wrinkles vanish completely for hours at a time.

PAR. 5. At the time respondents made the representations set forth in Paragraph Four, and other generally similar representations, respondents had no reasonable basis in their possession which would substantiate the representations or implications of the said representations.

Therefore, the statements and representations of respondents set forth in the above paragraph were, and are, deceptive and unfair acts or practices and are misleading in material respects.

PAR. 6. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been and now are in substantial competition in commerce with corporations, firms and individuals engaged in the sale of drug and cosmetic skin preparations.

PAR. 7. The use by respondents of the aforesaid deceptive and unfair statements and representations has the capacity and tendency to induce members of the public to rely thereupon and to purchase from respondents substantial quantities of drug and cosmetic skin preparations.

PAR. 8. Respondents' aforesaid acts and practices are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair, deceptive, and false acts and practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent Allied Stores Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1114 Avenue of the Americas, New York, N.Y.

Respondent C. C. Anderson Stores Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its principal office and place of business located at 918 Idaho St., Boise, Idaho. C. C. Anderson Stores Company is a wholly-owned subsidiary of Allied Stores Corporation.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Allied Stores Corporation, a corporation, doing business as The Bon Marche or under any name or style successor to The Bon Marche, and C. C. Anderson Stores Company, a corporation (hereinafter "respondents"), their successors and assigns, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device engaged in the advertising, offering for sale, sale or distribution of any cosmetic skin care product, or skin care product which is both a drug and cosmetic product (hereinafter "products"), as "drug" and "cosmetic" are defined in Sections 15(c) and 15(e) of the Federal Trade Commission Act, marketed by respondent C. C. Anderson Stores Company or The Bon Marche Division of Allied Stores, or any successor divisions thereof, in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said products or for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce in said products, do forthwith cease and desist from:

Disseminating any affirmative representation in any advertising or other written promotional material, including leaflets or other written promotional material prepared by respondents or others (but excluding labels or labeling, as defined in 21 U.S.C. §§321(k) and (m)) (hereinafter "advertisement") which represent, directly or indirectly, that:

A. Such products will remove or prevent age wrinkles or age lines on the face, hands or other parts of the body;
B. Such products will remove or prevent discolorations, broken capillaries or other disorder of the skin;
C. Unlimited amount of use of such products is safe and beneficial;
D. Such products are drugs (unless such products are registered or labeled as drugs);
E. Such products will retard the aging process in humans;
F. Age is a disease; or
G. Women's faces age 50 percent faster than men's, or at any other differential rate;

without having in their possession before the time an advertisement containing such representation is first disseminated to the public by respondents, a written certification from the manufacturer, proprietor or licensee of the brand name, or qualified testing laboratory, that there is a reasonable scientific basis, or reasonable scientific bases, for the making of such representation; *Provided*, That such certification shall include a summary of the nature of the reasonable scientific basis (or bases) for such representation; *Provided, further*, That respondents neither know nor have reason to know that such scientific basis does not in fact substantiate such representation.

Provided, further, That respondents shall maintain the certification described herein for a period of three years from the date an advertisement containing a representation described herein is first disseminated to the public and shall upon reasonable notice make such certification available to authorized representatives of the Federal Trade Commission at respondents' premises in Seattle, Wash.

II

It is further ordered, That respondents shall distribute a copy of this order to each of their affected operating divisions, subdivisions, and subsidiaries and to each of the affected officers, agents, representatives or employees of said respondents who are engaged in the preparation or placement of advertisements or distribution of advertisements prepared by others.

III

It is further ordered, That respondents notify the Commission at least thirty days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, or any other changes in said respondents which may materially affect compliance obligations arising out of the order.

IV

It is further ordered, That respondents shall, within sixty days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

CARSON PRODUCTS COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 & 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2761. Complaint, Nov. 3, 1975-Decision, Nov. 3, 1975

Consent order requiring a Savannah, Ga., manufacturer of facial depilatory and beard removal products, among other things to cease failing to make material disclosures as to the safety and correct use of its products.

Appearances

For the Commission: *Barry E. Barnes.*

For the respondents: *A. Pratt Adams, Jr., Adams, Adams, Brennan & Gardner*, Savannah, Ga.

COMPLAINT

The Federal Trade Commission, having reason to believe that Carson Products Company, a corporation, and Parker A. Reische, Jr., individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Unless otherwise required by context, the following definition shall apply for purposes of this complaint and the accompanying order:

"Material facts" means facts material in light of representations made or material with respect to consequences which may result from the use of the commodity to which the advertisement or representations relate under such conditions as are customary or usual or under the conditions prescribed in the advertisement or representations.

All allegations in this complaint stated in the present tense include the past tense.

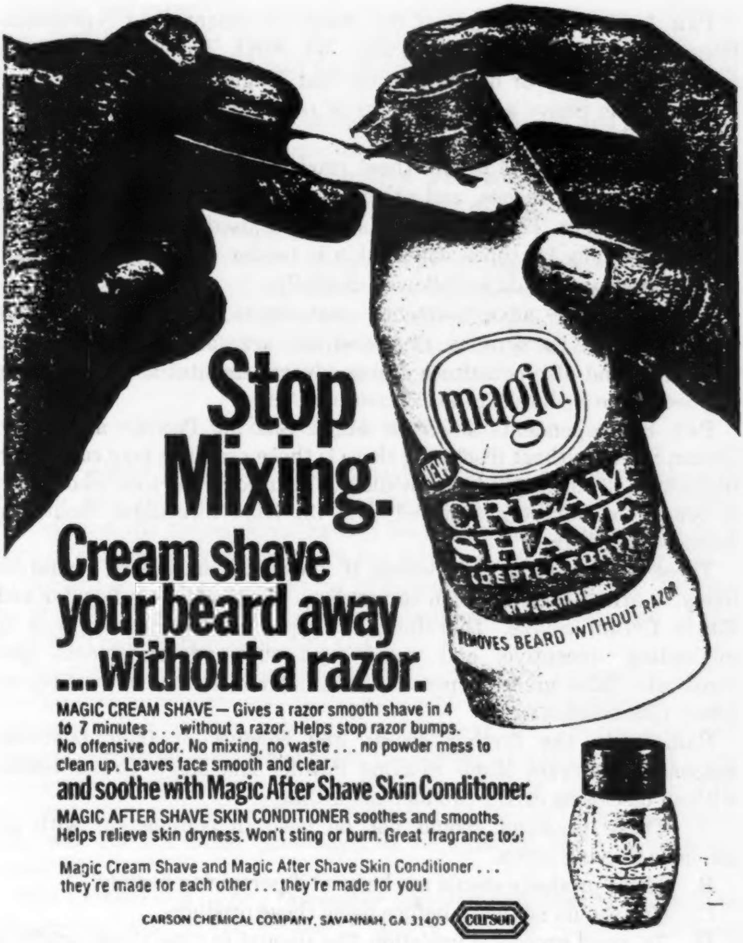
PAR. 2. Respondent Carson Products Company, formerly known as Carson Chemical Company, Inc., is a Georgia corporation with its office and principal place of business located at P.O. Box 3457, Savannah, Ga.

Respondent Parker A. Reische, Jr. is an officer of Carson Products Company. He formulates, directs and controls the policies, acts and practices of Carson Products Company, including those hereinafter set forth. His address is the same as that of said corporation.

PAR. 3. Respondents Carson Products Company and Parker A. Reische, Jr. engage in the manufacturing, advertising, offering for sale, sale and distribution of Magic Shaving Powder and Magic Cream Shave, facial depilatory or beard removal products, which are "drugs" or "cosmetics," or both, as those terms are defined in Section 15 of the Federal Trade Commission Act. When applied to the skin, said products remove facial hair through chemical action. They are used frequently by men who suffer from pseudofolliculitis, or "razor bumps," a painful skin condition caused by shaving with a razor.

PAR. 4. In the course and conduct of its business, respondents cause these depilatory products, when sold, to be shipped and distributed from their place of business to retail stores and other purchasers located in various other States of the United States and in foreign countries. Respondents disseminate or cause to be disseminated certain advertisements concerning Magic Shaving Powder and Magic Cream Shave (1) by United States mails, newspapers and magazines of interstate circulation, radio broadcasts of interstate transmission, and by various other means in or having an effect upon commerce, for the purpose of inducing or which are likely to induce, directly or indirectly, the purchase of these depilatory products; or (2) by various means, for the purpose of inducing, or which are likely to induce, the purchase of these products in or having an effect upon commerce. Thus, respondents maintain a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Typical and illustrative of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the following:



Stop Mixing.

Cream shave your beard away ...without a razor.

MAGIC CREAM SHAVE — Gives a razor smooth shave in 4 to 7 minutes . . . without a razor. Helps stop razor bumps. No offensive odor. No mixing, no waste . . . no powder mess to clean up. Leaves face smooth and clear.

and soothe with Magic After Shave Skin Conditioner.

MAGIC AFTER SHAVE SKIN CONDITIONER soothes and smooths. Helps relieve skin dryness. Won't sting or burn. Great fragrance too!

Magic Cream Shave and Magic After Shave Skin Conditioner . . . they're made for each other . . . they're made for you!

CARSON CHEMICAL COMPANY, SAVANNAH, GA 31403 carson

PAR. 6. Through the use of the above statements and representations, and others not specifically set forth herein, respondents represent, directly or by implication, that Magic Shaving Powder and Magic Cream Shave are safe means of removing facial hair without a razor for virtually everyone.

PAR. 7. In truth and in fact these products contain chemicals which can cause burns, rashes, and other skin irritations for a substantial number of users. These products should be used with caution at all times, especially by those whose skin is tender or severely irritated. Label directions should be followed carefully.

Therefore, the advertisements, statements and representations referred to in Paragraphs Five and Six are false, misleading and deceptive, and also constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 8. Respondents advertise Magic Shaving Powder and Magic Cream Shave without disclosing that (1) these products may cause skin irritations; (2) these products should not be used by persons whose skin is tender or severely irritated; and (3) label directions should be followed carefully.

These are material facts which, if known to consumers, would be likely to affect their decision to purchase Magic Shaving Powder and Magic Cream Shave. Therefore, failure to disclose such facts is misleading, deceptive, and unfair and such advertisements also constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 9. In the further course and conduct of their business, respondents market Magic Shaving Powder and Magic Cream Shave without disclosing on the product labels that:

A. These products should not be used in conjunction with an alcoholic shaving lotion.

B. These products should not be used if perspiring heavily.

C. One should not wash before using these products.

D. To avoid excessive irritation, the amount of time these products are left on the skin is crucial.

E. If hairs remain after the first application, one should not immediately reuse these products, but should wait at least 36 hours before reapplication.

These are material facts which, if known to consumers, would be likely to affect their decision as to whether or not to purchase these products. Therefore, failure to disclose such facts on the product labels is unfair and deceptive.

PAR. 10. Respondents' aforesaid use of false, misleading and deceptive advertisements and unfair and deceptive labeling has the tendency and capacity to mislead and deceive consumers into erroneous and mistaken beliefs about the safety of Magic Shave Powder and Magic Cream Shave and into the purchase of substantial quantities of these products.

PAR. 11. In the course and conduct of their business, and at all times mentioned herein, respondents have been and are now in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as sold by respondents.

PAR. 12. The aforesaid acts and practices of respondents are all to the prejudice and injury of the public and respondents' competitors and constitute unfair or deceptive acts or practices and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent Carson Products Company, formerly known as Carson Chemical Company, Inc., is a Georgia corporation with its office and principal place of business located at P.O. Box 3457, Savannah, Ga.

Respondent Parker A. Reische, Jr. is an officer of Carson Products Company. He formulates, directs and controls the policies, acts and practices of Carson Products Company. His address is the same as that of said corporation.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Carson Products Company, a corporation, its successors and assigns, and its officers, and Parker A. Reische, Jr., individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Magic Shaving Powder, Magic Cream Shave, or any depilatory product, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated by United States mails or by any means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which fails to clearly and conspicuously disclose the following statement in boldface capital letters exactly as it appears below, with nothing in contradiction thereof:

CAUTION: THIS PRODUCT MAY CAUSE SKIN IRRITATIONS. DO NOT USE IF SKIN IS TENDER OR SEVERELY IRRITATED. FOLLOW DIRECTIONS CAREFULLY.

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of any such product in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which fails to meet the requirement of part IA of this order.

II

It is further ordered, That respondents Carson Products Company, a corporation, its successors and assigns, and its officers, and Parker A. Reische, Jr., individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of Magic Shaving Powder, Magic Cream Shave, or any depilatory product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from failing to clearly and conspicuously disclose on the outer package box, if such is used, and on the product label:

A. The following statement in boldface capital letters exactly as it appears below with nothing in contradiction thereof:

CAUTION: THIS PRODUCT MAY CAUSE SKIN IRRITATIONS. DO NOT USE IF SKIN IS TENDER OR SEVERELY IRRITATED. FOLLOW DIRECTIONS CAREFULLY.

The above statement shall appear as the first item on the information panel of the product label and package box, if such is used.

B. A statement that use of the product should be discontinued if irritation, burning or allergic reactions occur.

C. Complete directions for use of the product, including but not limited to the following:

1. The product should not be used in conjunction with an alcoholic shaving lotion;
2. The product should not be used if perspiring heavily;
3. One should not wash before using the product;
4. To avoid excessive irritation, the amount of time the product is left on the skin is crucial; and
5. If hairs remain after the first application, do not immediately reuse the product. The product should not be used in any event within 36 hours or longer after shaving with a razor or a depilatory.

III

It is further ordered, That respondents forthwith deliver a copy of this order to their present and future officers, directors and operating divisions and that respondents secure from each such person and division a signed statement acknowledging receipt of this order.

IV

It is further ordered, That respondents maintain complete business records relative to the manner and form of their continuing compliance with the terms and provisions of this order. Each record shall be retained by respondents for at least three years after such record is made.

V

It is further ordered, That the individual respondent promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

VI

It is further ordered, That respondent Carson Products Company notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

VII

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

IRA SACHS T/A BURGLAR KING

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2762. Complaint, Nov. 4, 1975–Decision, Nov. 4, 1975

Consent order requiring a Chicago, Ill., door-to-door seller of burglar gates, among other things to cease violating provisions of the Trade Regulation Rule on Door-to-Door Sales (16 CFR 429) by failing to disclose to customers of their right to cancel contracts during a specified cooling-off period with full refund of any monies paid.

Appearances

For the Commission: *Walter R. Baron.*
For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ira Sachs, an individual, trading and doing business as Burglar King, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ira Sachs is an individual trading and doing business as Burglar King with his principal office and place of business located at 30 W. Washington St., Chicago, Ill. He formulates, directs and controls the policies, acts and practices hereinafter set forth.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale and retail sale and distribution of burglar gates to the general public.

PAR. 3. In the course of advertising the products and services which respondent offers for sale and sell, as aforesaid, respondent transmits and causes to be transmitted advertisements or other promotional material among or between different States of the United States.

Accordingly, respondent has maintained, and now maintains, a substantial course and conduct of business in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of his business as aforesaid, respondent regularly engages in door-to-door sales, as such sales are defined in the Federal Trade Commission Trade Regulation Rule concerning a Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. §429 (1974).

PAR. 5. In the ordinary course and conduct of his business, as aforesaid, respondent engages in door-to-door sales of consumer goods, as the terms "door-to-door sales" and "consumer goods" are defined in the Federal Trade Commission Trade Regulation Rule concerning a Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. §429 (1974) (hereinafter referred to as the "Commission Rule") duly promulgated by the Federal Trade Commission.

PAR. 6. Subsequent to June 7, 1974, respondent, in the ordinary course and conduct of his business, as aforesaid, and in connection with his door-to-door sales of consumer goods:

a. Now fail and have failed to furnish the buyers with a fully completed receipt of the sale in accordance with subsection (a) of the Commission Rule; and

b. Now include and have included in their door-to-door contracts a confession of judgment clause, in violation of subsection (d) of the Commission's Rule; and

c. Now fail and have failed to inform each buyer orally of his right to cancel, in the form and manner provided by subsection (e) of the Commission Rule.

Therefore, respondent's aforesaid failure to comply with subsections (a), (d) and (e) of the Commission Rule constitute unfair and deceptive acts or practices in violation of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Ira Sachs, an individual trading, existing and doing business as Burglar King, with its office and principal place of business located at 30 W. Washington St., Chicago, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Ira Sachs, an individual, trading and doing business as Burglar King, or under any name or names, its successors and assigns and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other devise, in connection with any door-to-door sale of consumer goods or services, as such sales are defined in the Federal Trade Commission Trade Regulation Rule concerning a Cooling-Off Period

Rule for Door-to-Door Sales (16 C.F.R. §429.1) (hereinafter "the Commission Rule"), do forthwith cease and desist from:

1. Failing to furnish their buyers with a fully completed copy of the contract used in door-to-door sales, as such transactions are defined in the rule, which contains in immediate proximity to the space reserved in the contract for the signature of the buyer a summary notice of the buyer's right to cancel in substantially the same form as that required in subsection (a) of the Commission's Rule.

2. Failing to inform each buyer orally at the time he signs the contract or purchases the goods or services of his right to cancel as required in subsection (e) of the Commission's Rule.

3. Including in their door-to-door contracts a confession of judgment clause.

4. Engaging in any act or practice which constitutes an unfair or deceptive act or practice pursuant to the Commission's Trade Regulation Rule entitled "Cooling Off Period for Door-to-Door Sales," effective June 7, 1974, 16 C.F.R. §429 (a copy of which is attached hereto as Appendix A), and any amendments thereto.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the door-to-door sale of the respondent's goods or services, as such transactions are defined in the Commission's Rule, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the company ownership, such as dissolution, assignment or sale, the creation or dissolution of subsidiaries, incorporation, or any other change in the ownership which may affect compliance obligations arising out of the order.

It is further ordered, That respondent, in connection with the promotion, offering for sale, sale or distribution of any consumer goods or services included in this order, offer to cancel the sale of such goods or services and to refund immediately all monies paid by any customer who was procured by or involved a violation of any of the provisions of this order; and make such cancellation and refund to any customer who so elects. Respondent shall maintain a list of the names and addresses of such customers requesting a cancellation of their contracts or a refund under the terms of this paragraph for a three (3) year period together with a record of the action taken in each case and make such records available for inspection by the Commission.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the form and manner in which they have complied with this order.

IN THE MATTER OF

HEUBLEIN, INC.

Docket 8904. Order, Nov. 11, 1975

Granting of joint motion to withdraw matter from adjudication for settlement purposes.

Appearances

For the Commission: *William A. Arbitman*, *Nelson M. Ishiyama* and *Jeffrey Klurfeld*.

For the respondents: *Ralph J. Savarese*, *John D. Wintrol*, *J. Wallace Adair* and *Robert E. Hebda*, *Howrey, Simon, Baker & Murchison*, Wash., D.C. *George J. Casper*, Secretary and General Counsel, Hartford, Conn. and *McCutchen, Doyle, Brown & Enevsen*, San Francisco, Calif.

ORDER GRANTING JOINT MOTION TO WITHDRAW MATTER FROM ADJUDICATION

The administrative law judge has certified a joint motion to withdraw this matter from adjudication for settlement purposes (Rules of Practice, Section 3.25(b)). The motion is opposed by Allied Grape Growers, whom we allowed to participate in these proceedings on the limited issue of relief by our order of June 26, 1973 (82 F.T.C. 1826).

The complaint alleged that on or about Feb. 21, 1969, respondent Heublein acquired a controlling interest in United Vintners, Inc., a wholly-owned production and marketing subsidiary of Allied. United is now a wholly-owned subsidiary of Heublein Allied Vintners, Inc., in which Heublein has an 82 percent interest and Allied the remainder.

The acquisition was alleged to have violated Section 7 of the Clayton Act. The notice order would require divestiture, within nine months from the date the order becomes final, of all assets acquired by Heublein and would allow individuals or groups of individuals who were members of Allied on Aug. 31, 1968, first option to purchase the divested property.

The proposed consent order, agreed to by complaint counsel and counsel for respondent Heublein, would exclude from divestiture certain trademarks,[1] properties and equipment and does not provide that members of Allied will have a first option.[2] The proposed order requires that divestiture be accomplished within two years from the date the order becomes final subject to the following proviso:

> That the running of the period within which respondent must divest shall be suspended until the effect of this consent agreement and the obligations imposed on Heublein by this consent agreement on the rights and obligations of Heublein, United and Allied Grape Growers ("Allied") relating to the grape supply contract executed by said firms on February 19, 1969, and the legality of said supply contract are finally adjudicated or resolved and, *Provided, further*, however, that the divestiture period will not be suspended unless a proceeding to resolve any unresolved issues with respect to the effect of this consent agreement upon said rights and obligations and the legality of said supply contract is instituted no later than sixty (60) days after this order becomes final.

The grape supply contract purports to grant Allied the right to supply United's grape requirements for up to 80 years as well as much of Heublein's California grape requirements for the same period. The contract also provides that Allied would have a first option to purchase United's capital stock.

The proposed consent order makes no further reference to the supply contract. However, Exhibit A to the joint motion provides that, in the event the current supply agreement is held to be illegal or inoperative, alternative supply agreements for shorter periods of time and smaller percentages of requirements would become effective.

The Commission granted Allied leave to participate in these proceedings with respect to the issue of relief "either at a special hearing devoted to the issue of relief, or during such parts of the trial as may relate to the issue of relief* * *." (82 F.T.C. 1826, 1828). The Commission, in granting Allied limited participation, recognized "that in selling 82 percent of its marketing arm to Heublein, Allied intended thereby to retain sufficient contractual rights so that United would remain a large purchaser of grapes produced by Allied's grower-members.[3] Allied now sees the rights and expectations with which it entered into its joint venture threatened by the Commission's complaint." (82 F.T.C. at 1828).

Although the instant motion was opposed by Allied, the law judge concluded that the motion was "unopposed" within the meaning of Section 3.25(b) of the rules of practice, and that he was, accordingly, required to certify the motion to the Commission. The law judge, however, included in his certification a recommendation that the joint motion be denied.

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[1] Inglenook, Annie Green Springs, T.J. Swann and any trademark owned by respondent for a refreshment wine product.

[2] Respondent has, however, indicated a willingness to add to the proposed consent order a provision granting Allied a right of first refusal.

[3] Heublein asserts that the supply contract was not consideration for the acquisition. However, whether or not it was consideration, the important point is that Allied claims that its contract rights could be jeopardized by a divestiture order.

We agree with the law judge's determination that he was required to certify the joint motion to the Commission. We also concur in his conclusion that the opposition of a non-party participant does not necessarily preclude acceptance of a consent order. Non-parties are permitted to participate in our proceedings upon a determination that they will make a sufficiently important contribution to our understanding of one or more issues to outweigh any delays and other added costs resulting from their participation. We see no reason why non-party participants should be afforded a right to veto a proposed agreement. We disagree, however, with the law judge's recommendation that the joint motion be denied. The judge recommended that we deny the motion for the following reasons:

1. The number of issues and the prolonged hearings that may be required preliminary to acceptance of the consent agreement and the possibility that the consent agreement may then not be accepted, in which event the entire case would still have to be tried anew, but would be substantially delayed by virtue of the interim proceedings;
2. The apparent reliance of complaint counsel and respondent in agreeing upon the consent order upon the mistaken belief that an order allowing the transfer of the property back to Allied under right of first refusal would *per se* violate the principles of the antitrust laws;
3. The inappropriateness of submission of a consent order where the meaning and effect thereof on interested parties requires subsequent adjudication with provision for delay in implementing that order of two years following finality of that subsequent adjudication. A consent order should be intrinsically clear as to its meaning and intent. This comment is particularly applicable to complaint counsel who recognize, but take no position on, issues that have been raised;
4. The approach of determining private rights as between parties as a condition precedent to considering the consent order-as opposed to considering the consent order but taking into account private rights and equities as appropriate;
5. The determination of contractual rights and obligations between Heublein and Allied as to property proposed to be kept by Heublein, and a rewriting of the contractual obligations between Heublein and Allied as to such property. These appear to be individual rights and obligations not appropriate for Commission determination.

We disagree that any hearings, prolonged or otherwise, would be required preliminary to provisional acceptance of the consent agreement. The first step in our consideration of a consent agreement is our determination whether the proposed consent order is adequate to protect the public interest. In the event that the Commission determines that the proposed order is inadequate, the agreement will be rejected and there will, of course, be no need to hear Allied's objections to the agreement.

In case the agreement is provisionally accepted, it will be placed on the public record, and members of the public, including Allied, will have an opportunity to raise any and all objections to the agreement. At that time Allied would have an opportunity to argue that hearings were required on its claim that the proposed order is inconsistent with its rights and interests.

Other questions raised by the law judge and Allied about the merits of the consent agreement can best be considered by the Commission in connection with its determination whether to provisionally accept the agreement. Accordingly,

It is ordered, That the joint motion to withdraw this matter from adjudication be, and it hereby is, granted.

IN THE MATTER OF

ELECTRONIC COMPUTER PROGRAMMING INSTITUTE, INC., ET AL.

Docket 8952. Order, Nov. 11, 1975

Administrative law judge's order denying complaint counsel's application for subpoena duces tecum remanded for reconsideration in accordance with guidelines on Section 19 evidence set forth in the interlocutory order.

Appearances

For the Commission: *Deirdre E. Shanahan* and *D. McCarty, IV*.

For the respondents: *Robert E. Fischer, Lowenthal, Landau & Fischer*, New York City.

IN THE MATTER OF

LAFAYETTE UNITED CORPORATION, ET AL.

Docket 8963. Order, Nov. 11, 1975

Denial of motion for stay of further proceedings.

Appearances

For the Commission: *Raymond J. McNulty, David W. DiNardi, Charles M. LaDue*, and *Alice C. Kelleher*.

For the respondents: *Peter J. Mansback, Kronish, Lieb, Shainswit, Wiener & Hellman*, New York City.

IN THE MATTER OF

CONTROL DATA CORPORATION, ET AL.

Docket 8940. Order, Nov. 11, 1975

Affirmation of administrative law judge's order denying motion by Control Data Corporation to strike Paragraph Eleven of the complaint.

Appearances

For the Commission: *Sharon S. Feather, Peter E. Greene* and *Edward D. Steinman.*

For the respondents: *Oppenheimer, Wolff, Foster, Shepard & Donnely,* St. Paul, Minn. and *James F. Hogg,* Bloomington, Minn.

INTERLOCUTORY ORDER

These matters are before us upon two applications for review and a certification by an administrative law judge. In *Electronic Computer Programming Institute, Inc.,* the administrative law judge denied complaint counsel's application for a subpoena duces tecum seeking, in part, evidence needed to support restitutionary relief and granted complaint counsel the right to appeal pursuant to Section 3.23(b) of the rules of practice. Respondents had argued that the subpoena sought information which was irrelevant in view of *Heater* v. *F.T.C.,* 503 F.2d 321 (9th Cir. 1974), which held that the Commission lacks authority under Section 5 to order restitution for deceptive practices that occurred prior to the issuance of a final cease and desist order ("retroactive restitution."). The law judge, without deciding the relevancy of the subpoena's specifications, suggested that the Commission might consider whether further proceedings in this matter should be deferred pending final review of *Heater* in the Supreme Court.[1]

In *Lafayette United Corporation,* the administrative law judge issued an order denying respondents' motion to strike the notice order provision providing that consumer redress might be sought, granted in part and denied in part respondents' motion to quash a subpoena duces tecum, and granted respondents' motion for a protective order. The law judge certified to the Commission the limited question whether further proceedings should be stayed, in whole or in part, pending the Commission's decision whether it would be in the public interest to allow complaint counsel to continue to seek restitutionary relief.

Finally, in *Control Data Corporation,* respondent Control Data filed a motion to strike Paragraph Eleven of the complaint which alleges in part that Control Data's retention of funds obtained for "virtually worthless" courses of instruction was an unfair act or practice in violation of Section 5. Respondent contended that the paragraph was included in the complaint solely to lay the groundwork for an award of retroactive restitution, barred by the *Heater* decision. The law judge denied the motion but granted respondent permission to appeal under Section 3.23(b).

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[1] The Commission subsequently decided not to seek review in the Supreme Court.

On July 15, 1975 [p. 180, herein], the Commission placed the above-captioned matters on its docket for review pursuant to Section 3.23(b) of the rules of practice and invited the parties to brief the following issues:

> (1) To what extent, if any, should evidence be presented and findings be made in the administrative proceedings regarding the nature and extent of the injuries sustained by consumers as a result of the challenged acts or practices?
>
> (2) To what extent, if any, should evidence be presented and findings be made on the issue whether the challenged acts or practices are such that "a reasonable man would have known under the circumstances [that they are] dishonest or fraudulent"? [Federal Trade Commission Act, 9(a)(2), as amended by Federal Trade Commission Improvement Act, Pub. Law 93-637, §206 (Jan. 4, 1975)].

Although the Commission adheres to its view that *Heater* was wrongly decided, we have determined that restitution under Section 5 will not be ordered in these cases. In the event, however, that cease and desist orders issue in these matters, and should the circumstances warrant, the Commission reserves the right to bring consumer redress actions under these cases is whether inquiry into issues relating solely to redress under Section 19 should be permitted before the administrative law judges.

Section 19(a)(2) authorizes the Commission, after it has issued a final cease and desist order, to seek consumer redress in a court of competent jurisdiction. "If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b)."[2]

Section 19(c)(1) provides that in a consumer redress action, "the findings of the Commission as to the material facts in the proceeding under Section 5(b)* * *shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of Section 5(g)(1) [providing that a cease and desist order becomes final if a timely appeal is not taken], in which case such finding shall be conclusive if supported by evidence."

Section 19 clearly contemplates that the Commission will make all findings pertinent to the Section 5(b) proceeding and the court will make those additional determinations relevant to the redress action. Thus, the court will decide whether redress is warranted under the "reasonable man" standard, applicable to actions brought under Section 19(a)(2), the nature of the relief necessary to redress any injury to consumers, and which consumers, if any, are entitled to relief.

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[2] Subsection (b) authorizes the court to grant such relief as may be necessary to redress injury, including, but not limited to "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting * * * the unfair or deceptive act or practice * * *."

However, as complaint counsel argue, the roles of the Commission and the court will frequently overlap. Subject to the exceptions set forth in Section 19(c)(1), "the findings of the Commission as to the material facts in the proceeding under Section 5(b) * * * shall be conclusive * * *." Frequently, findings material to the Section 5 proceeding will also have a bearing on whether the "reasonable man" standard has been satisfied and on consumer injury issues.

For instance, while an advertiser's knowledge of the falsity of a representation is not an element of a Section 5 violation, see, *e.g.*, *D.D.D. Corp.* v. *F.T.C.*, 125 F.2d 679 (7th Cir. 1942), it may be relevant to issues relating to the scope of relief and the degree to which a respondent must be "fenced in" to prevent recurrences of the illegal conduct in the future. See, *e.g.*, *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *William H. Rorer, Inc.* v. *F.T.C.*, 374 F.2d 622, 626 (2d Cir. 1967); *Joseph A. Kaplan & Sons, Inc.* v. *F.T.C.*, 347 F.2d 785, 789 (D.C. Cir. 1965); *Taylor-Friedsam Co., Inc.*, 69 F.T.C. 483, 497 (1966).

Moreover, while a showing of actual injury to consumers is not necessary to a finding that Section 5(b) has been violated, see, *e.g.*, *Northern Feather Works, Inc.* v. *F.T.C.*, 234 F.2d 335 (3d Cir. 1956), evidence relevant to injury may, under some circumstances, also be pertinent to whether the challenged representations were false and, hence, in violation of Section 5. The complaints in the instant cases allege that respondents falsely represented the availability of jobs for which their students were trained. A finding that graduates were not placed in such jobs would be relevant both to whether the representations were false and to whether consumers were injured.

Nevertheless, it is clear that findings pertinent to Section 19 issues, but not material to Section 5 issues, would not be conclusive in a consumer redress action. This does not mean that inquiry into Section 19 consumer redress issues[3] should await the issuance of a cease and desist order. If consumers are to be afforded the relief to which they are entitled, redress actions must be commenced as soon as possible and the actions must be prosecuted expeditiously. Delay in such cases would often reduce the chances of granting fully effective relief to consumers since, with the passage of time, evidence inevitably becomes more difficult to obtain, assets are dissipated or hidden, and some of the consumers to be granted redress become impossible to locate.

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[3] Issues relevant to the Section 19 action but not to the determination of Section 5 liability will henceforth be referred to as "Section 19 issues." Evidence relevant to whether a Section 19 action should be brought and to the determination of Section 19 liability, but not to liability under Section 5, will be referred to as "Section 19 evidence."

There can be little doubt that during the pre-complaint stage of an investigation, the Commission can collect Section 19 evidence since the prospect of obtaining consumer redress will often be a factor in deciding whether the issuance of a complaint would be in the public interest. Information collected during the pre-complaint investigation will, of course, also be available at the close of the administrative proceedings to assist the Commission in deciding, assuming law violations have been found, whether to commence a redress action. It is likely that information collected during the pre-complaint investigation and the record of the Section 5 proceeding will provide the Commission with most of the information it will need to decide whether to commence a redress action.

Therefore, we can see little reason why proceedings before the law judges should be delayed by the discovery and reception of evidence relevant only to Section 19 issues. We have, thus, determined that the law judges should not permit the discovery or introduction of evidence relevant only to Section 19. On the other hand, efforts to obtain or introduce evidence material to the Section 5(b) proceeding shall not be objectionable merely because the evidence might also be relevant to a Section 19 redress action.[4]

With these guidelines in mind, we shall consider the motions now before us:

1. Control Data Corporation, et al.

We agree with complaint counsel that Paragraph Eleven should not be stricken from the complaint. Since a seller's retention of its customer's money can be an unfair trade practice in and of itself, *e.g., Curtis Publishing Co.*, 78 F.T.C. 1472, 1516 (1971), the paragraph states a cause of action, and, if proved, might warrant the ordering of other than restitutionary relief.

2. Electronic Computer Programming, Inc., et al.

Now that we have ruled how the redress issues in these cases should be treated, there is obviously no need to defer further proceedings. Since the law judge has not ruled on the propriety of complaint counsel's discovery requests, he should now consider their application in accordance with the guidelines set forth in this opinion.

3. Lafayette United Corporation, et al.

As in *Electronic Computer Programming Institute, Inc.*, there is now no need to stay further proceedings. Respondents' claim that restitution is inappropriate in this matter because their services were not "worthless" has largely been mooted, in view of our decision not to order retroactive restitution under Section 5 in this matter. To the extent that it might be relevant to other kinds of relief under Section 5, a determination of respondents' claim will have to await a fuller record. Accordingly,

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[4] Because of our decision not to permit inquiry into Section 19 issues during the proceedings below, we find it unnecessary at this time to decide claims made in Docket Nos. 8940 and 8963 that discovery of Section 19 evidence would be inappropriate because Section 19 does not reach acts that occurred prior to Jan. 4, 1975, the date of enactment of the Improvement Act, or prior to the issuance of the complaints in these matters.

It is ordered, That the administrative law judge's order in Docket No. 8940 denying the motion by respondent Control Data Corporation to strike Paragraph Eleven of the complaint is affirmed; the order of the administrative law judge in Docket No. 8952 denying complaint counsel's application for a subpoena duces tecum is remanded for reconsideration in accordance with the guidelines set forth at p. 5 of this interlocutory order; and the motion in Docket No. 8963 that further proceedings in this matter be stayed is denied.[5]

In the Matter of

INTER-CONTINENTAL SERVICES CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2763. Complaint, Nov. 14, 1975-Decision, Nov. 14, 1975

Consent order requiring two Shawnee Mission, Kans., debt collection agency affiliates, among other things to cease using legal-looking forms, letterheads or language that might deceive debtors or credit card holders, and making telephone misrepresentations. Further, the order limits the times during which the credit card holder or debtor may be called.

Appearances

For the Commission: *E. Eugene Harrison.*

For the respondents: *William S. Glickfield, Glickfield, Riley & Gillie*, Marion, Ind.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Inter-Continental Services Corporation, a corporation, and North American Credit

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[5] The Commission denies the motions by respondents in Docket Nos. 8940 and 8963 for oral argument.

Services, Inc., a corporation, and Jerome E. Baker, Jerry L. Nickell and James F. Bell, individually and as officers of said corporations, and Ronald A. Green and Thomas F. Fangrow, individually and as officers of Inter-Continental Services Corporation, and Richard L. Wilson, individually and as an officer of North American Credit Services, Inc., hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Inter-Continental Services Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 2000 Johnson Dr., in the city of Shawnee Mission, State of Kansas.

Respondent North American Credit Services, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its principal office and place of business located at 2000 Johnson Dr., in the city of Shawnee Mission, State of Kansas.

Respondents Jerome E. Baker, Jerry L. Nickell and James F. Bell are officers of both corporations. They formulate, direct and control the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

Respondents Ronald A. Green and Thomas F. Fangrow are officers of Inter-Continental Services Corporation. They formulate, direct and control the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondent Richard L. Wilson is an officer of North American Credit Services, Inc. He formulates, directs and controls the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past, have been engaged in the business of collection of delinquent accounts and the retrieval of credit cards for business organizations throughout the United States.

PAR. 3. In the course of their business as aforesaid, respondents, and each of them, now cause, and for some time last past have caused, money, contracts, business forms, information requests, payment demands and other commercial paper and printed materials, in connection with said collection and retrieval business, to be sent by United States mail from respondents' place of business to creditors, debtors and other persons located throughout the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their collection and retrieval business, respondents have, at all times mentioned herein, been in substantial competition, in commerce, with other corporations, firms and individuals engaged in the collection of delinquent accounts and the retrieval of credit cards.

PAR. 5. In the course and conduct of their collection and retrieval business, respondents have made, and are now making, numerous statements and representations, both orally, in conversations with consumers, and written, in various form letters, forms, documents and other printed materials which respondents mail or otherwise transmit to consumers. Typical of such oral and written statements and representations, but not all inclusive thereof, are the following:

> Your promptness may bear on your future credit.
>
> We have been retained in an action against you.
>
> If these cards are not received in three days, it may be necessary to take legal action to recover them.
>
> Further delay in settlement of this action will leave our firm with no recourse but to institute proceedings.
>
> We would like to discuss this matter with your employer.
>
> RECOMMENDATION FOR CIVIL SUIT
>
> NOTICE OF INTENT TO FILE SUIT

PAR. 6. By and through the use of the above-quoted statements, and others of similar import and meaning but not specifically set forth herein, respondents have represented, and are now representing, directly or by implication that:

1. Respondents are credit reporting agencies and maintain general files as to the credit-worthiness of members of the public.
2. Failure to pay amounts requested will result in immediate legal action.
3. Failure to pay amounts requested will result in garnishment of wages or attachment of the property of the debtor.
4. Respondents are empowered to file legal actions against the debtor.

PAR. 7. In truth and in fact:

1. Corporate respondents are not credit reporting agencies and perform no credit reporting functions and keep no credit records other than those associated with accounts referred to them for collection.
2. Failure by debtors to pay amounts requested by respondents does not, normally, result in legal action.
3. Failure by debtors to pay amounts requested by respondents does not result in prejudgment garnishment of wages or attachment of property of the debtor.

4. Respondents are not empowered to file legal action against the debtor.

Therefore, the statements and representations set forth in Paragraphs Five and Six hereof were and are false, misleading and deceptive.

PAR. 8. In the further course and conduct of their business, respondents have engaged, and are now engaging, in numerous acts and practices intended to induce payment of amounts requested from debtors or the retrieval of credit cards. Typical of such acts and practices, but not all-inclusive thereof, are the following:

1. Respondents have mailed or caused to be delivered to debtors forms that resemble legal process.

2. Respondents have mailed or caused to be delivered to debtors letters which, taken as a whole, represent that such letters are from a law firm contemplating legal action.

PAR. 9. In truth and in fact:

1. Such forms are not legal process.

2. Such letters are not from a law firm, but in fact are from certain of corporate respondents' employees who are not licensed attorneys.

The use of such forms and letters misleads the recipient as to their nature, import, purpose and urgency. Therefore, the use by respondents of said forms and letters as set forth in Paragraph Eight was and is false, misleading and deceptive.

PAR. 10. In the further course and conduct of their business, respondents have contacted persons not liable for the alleged debts and discussed debtors' accounts with such persons.

PAR. 11. The aforesaid acts and practices of respondents as described in Paragraph Ten hereof have had and now have the tendency and capacity to endanger the alleged debtor's employment and job advancement and to invade his privacy. Therefore, the use by respondents of such acts and practices was and is unfair.

PAR. 12. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had and now has the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that such statements and representations were and are true and to induce recipients thereof into the payment of accounts and other actions by reason of the said erroneous and mistaken belief.

The use by the respondents of the aforesaid unfair acts and practices has had and now has the tendency and capacity to induce alleged debtors into the payment of accounts and other actions by reason of the said unfair acts and practices.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its rules, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Inter-Continental Services Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 2000 Johnson Dr., city of Shawnee Mission, State of Kansas.

Respondent North American Credit Services, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its office and principal place of business located at 2000 Johnson Dr., city of Shawnee Mission, State of Kansas.

Respondents Jerome E. Baker, Jerry L. Nickell and James F. Bell are officers of said corporations. They formulate, direct and control the policies, acts and practices of said corporations and their principal office and place of business is located at the above-stated address.

Respondents Ronald A. Green and Thomas F. Fangrow are officers of Inter-Continental Services Corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above-stated address.

Respondent Richard L. Wilson is an officer of North American Credit Services, Inc. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Inter-Continental Services Corporation, a corporation, its successors and assigns, and its officers, and North American Credit Services, Inc., a corporation, its successors and assigns, and its officers, and Jerome E. Baker, Jerry L. Nickell and James F. Bell, individually and as officers of said corporations, and Ronald A. Green and Thomas F. Fangrow, individually and as officers of Inter-Continental Services Corporation, and Richard L. Wilson, individually and as an officer of North American Credit Services, Inc., and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of accounts or the retrieval of credit cards in or affecting commerce as "commerce" is defined by the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any legal action is being considered, will be taken, or has been taken, or using any forms, letters or other documents which simulate legal process.

2. Representing, directly or by implication, that respondents or their agents or employees are attorneys, or misrepresenting in any manner the position or function of any of respondents, their agents or employees.

3. Representing, directly or by implication, that the failure of any individual to pay amounts requested, or to take any other action, will result in garnishment of wages, attachment of any property, or will affect the individual's credit rating.

4. Communicating or threatening to communicate with any alleged debtor's employer or any other person not liable for the debt, other than the spouse or attorney of the alleged debtor, except by order of a

court, or solely to locate an alleged debtor whose whereabouts are genuinely unknown by respondents, *Provided That*, in these circumstances, no mention of the alleged indebtedness is made.

5. Placing of any telephone call to any alleged debtor or to any individual from whom respondents wish to retrieve a credit card, in the time zone of such person, before the hour of 8:00 a.m. or after the hour of 9:00 p.m. on weekdays, including Saturdays; or before the hour of 11:00 a.m. or after the hour of 9:00 p.m. on Sundays unless permission is received from such person to so call.

6. Misrepresenting in any manner the consequences of individuals' or alleged debtors' failure to comply with any of respondents' requests or demands.

It is further ordered, That respondents maintain and make available records relative to complaints received by respondents involving the acts and practices prohibited by this order and which describe steps taken by respondents to investigate and dispose of said complaints. Said records shall be maintained for a period of six (6) months from the date such complaint is received, for inspection and copying by the Federal Trade Commission.

It is further ordered, That respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions, to each of their branch offices, and to each of their customers.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KENNECOTT COPPER CORPORATION

Docket 8765. Order, Nov. 18, 1975

Denial of petition to reopen proceeding to enlarge time for compliance.

Appearances

For the Commission: *Fiodie P. Favarella* and *Joseph Eckhaus.*

For the respondent: *John L. Warden, Sullivan & Cromwell,* New York City and *John Bodner, Jr.* and *Francis A. O'Brien, Howery, Simon, Baker & Murchison,* Wash., D.C.

ORDER DENYING PETITION TO REOPEN THE PROCEEDING TO ENLARGE THE TIME FOR COMPLIANCE

On Oct. 14, 1975, respondent Kennecott Copper Corporation filed a "Petition To Reopen the Proceeding To Enlarge the Time for Compliance." By answer dated Nov. 10, 1975, the Bureau of Competition has opposed the petition.

The Commission is of the view that respondent's petition to reopen is not a proper vehicle for seeking an extension of time within which to comply with an order, and has determined to deny the petition, for the reasons elaborated in its order of May 5, 1975 [85 F.T.C. 848], denying a similar petition to reopen these proceedings to enlarge the time for compliance.

The Commission will consider separately respondent's request, filed simultaneously pursuant to Section 4.3(b) of the rules of practice, for an extension of time within which to comply with the order to cease and desist in this matter. Therefore,

It is ordered, That the "Petition To Reopen the Proceeding To Enlarge the Time for Compliance" be, and it hereby is, denied.

IN THE MATTER OF

AMERICAN GENERAL INSURANCE COMPANY

Docket 8847. Order, Nov. 18, 1975

Denial of motion by respondent and intervenor for reconsideration of 1972 order vacating administrative law judge's initial decision and remanding case for further proceedings.

Appearances

For the Commission: *Harold E. Kirtz, Karen G. Bokat* and *Charles W. Corddry, III.*

For the respondent: *Michael J. Henke, Vinson, Elkins, Searls, Connolly & Smith,* Wash., D.C.

ORDER DENYING MOTION FOR RECONSIDERATION

Respondent American General Insurance Company and intervenor Fidelity and Deposit Company of Maryland move for reconsideration of an order by the Commission, dated Dec. 5, 1972 [81 F.T.C. 1052], vacating the administrative law judge's initial decision and remanding the case for further proceedings. The administrative law judge filed an initial decision sustaining the complaint in this matter on Aug. 7, 1975.

Respondent and intervenor have failed to make a sufficient showing why the Commission should grant their motion for reconsideration, especially after the lapse of almost three years from the date of issuance of the order they seek to challenge. Accordingly,

It is ordered, That the aforesaid motion for reconsideration be, and it hereby is, denied.

IN THE MATTER OF

KOSCOT INTERPLANETARY, INC., ET AL.

ORDER, OPINION ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2 OF THE CLAYTON ACT

Docket 8888. Complaint, May 24, 1972-Final Order, Nov. 18, 1975

Order requiring an Orlando, Fla., seller and distributor, of cosmetics and cosmetic distributorships, among other things to cease using its open-ended, multilevel marketing plan; engaging in illegal price fixing and price discrimination and imposing selling and purchasing restrictions on its distributors; and to cease making exaggerated earnings claims and other misrepresentations in an effort to recruit distributors.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., corporations, and Glenn W. Turner, Terrell Jones, Malcolm Julian, Ben

Bunting, Michael Delaney, Hobart Wilder, and Raleigh P. Mann, individually and as former officers, officers, or directors of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Florida, with their principal office and place of business located at 4805 Sand Lake Rd., Orlando, Fla.

Respondent Glenn W. Turner is chairman of the board of directors of Koscot Interplanetary, Inc., and is the sole stockholder of Glenn W. Turner Enterprises, Inc. Mr. Turner was the founder of Koscot Interplanetary, Inc., and instituted the marketing plan and distribution policies. He, with others named herein, has been and is responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondents Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., including the acts and practices hereinafter set forth. Mr. Turner's address is the same as that of the corporate respondents.

Respondents Terrell Jones, Malcolm Julian, Ben Bunting, Michael Delaney, Hobart Wilder, and Raleigh P. Mann are officers, or directors of said corporate respondents. Together with others, said respondents have been and are responsible for the formulation, control and direction of the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition in commerce with corporations, firms and individuals in the sale of cosmetics, toiletries and associated items of the same general kind and nature as those sold by respondents.

PAR. 3. Respondents are now, and for some time last past have, engaged in the advertising, offering for sale, sale and distribution of cosmetics, toiletries and associated items and distributorships and franchises to the public, and are inducing, and have induced, persons to invest substantial sums of money in respondents' multilevel marketing program as hereinafter more fully described.

PAR. 4. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their products, when sold, to be shipped from their places of business in various States to purchasers thereof located in various States of the United States other than the State of origination, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act.

PAR. 5. In the course and conduct of their business, respondents have used a multilevel marketing program having four levels of distributors and are presently using a multilevel marketing program which allows the potential participant to enter at any one of three levels, *i.e.*, beauty advisor, supervisor or director. All participants are designated as independent contractors and except for the beauty advisors who sell primarily at retail through party plans and door-to-door methods, are permitted to, and do, sell or attempt to sell at both wholesale and retail. A description of these levels, in order of ascendency, follows:

1. Beauty advisor (retailer)—The beauty advisor purchases products from her sponsor (who may be a supervisor or director) at a 40 percent discount, for sale to the consuming public. The beauty advisor receives a refund bonus from her sponsor each month, based on the total retail volume ordered during the month. Entrant qualifies by investing $10 for a starter kit.

2. Supervisor (sub-distributor)—The supervisor purchases products from the company at a 55 percent discount for distribution to his beauty advisors and direct sales to the consuming public. The supervisor receives a special commission for each new supervisor order he creates, $500 or 25 percent of the $2000 paid for the initial order. An entrant qualifies as a supervisor in any one of these ways:

a. By investing $2000 immediately;

b. By purchasing $5400 in Koscot cosmetics (at retail value) from his sponsor;

c. By selling a portion of the required $5400 volume through his organization and purchasing the balance in one lump sum.

3. Director (distributor)—The director purchases products from the company at a 65 percent discount for distribution to his direct distributors (supervisors and beauty advisors) and for direct sales to the consuming public. The director is entitled to a 10 percent special commission on all of his supervisor's purchases. He receives $500 for each supervisor order that he sells. The director sponsoring a new director is also entitled to a 65 percent commission ($1,950) on the $3,000 additional inventory which the new director is required to purchase. An entrant qualifies as a director by: a) becoming a supervisor, purchasing the additional $3000 director inventory and selling a new supervisor order in order to replace himself in his

sponsoring director's organization; or b) by initially investing $5000 and becoming known as an apprentice director until he fulfills all the necessary aforementioned requirements.

These positions are described more fully to the prospective investors at "Opportunity Meetings" held weekly in various locations across the country. At such a meeting, a movie is shown and speeches are made which concentrate upon the unlimited potential to earn large sums of money in a relatively short time by recruiting others into the Koscot program. In most instances, the opportunity meeting will closely follow the script provided by respondents as found in the distributor's training manual. This meeting is run in such a manner as to excite those attending and to induce them into making an emotional decision to invest in the program.

PAR. 6. In the course and conduct of their business as aforesaid, respondents have done and performed and are doing and performing the following:

1. Respondent Koscot Interplanetary, Inc. has entered into contracts, agreements, combinations, or understandings with its distributors whereby said distributors agree to maintain the resale prices established and set forth by respondent corporation, notwithstanding that some of such distributors are located in States which do not have Fair Trade laws.

2. Respondent Koscot Interplanetary, Inc. has entered into contracts, agreements, combinations, or understandings with its distributors whereby said distributors agree to maintain the discounts, overrides, rebates, bonus schedules, finder's fees and release fees, between and among all other distributors, as established and set forth by respondent corporation.

3. Respondent Koscot Interplanetary, Inc. has entered into contracts, agreements, combinations, or understandings with its distributors whereby said distributors understand that a violation of any company rule or regulation is reason for immediate termination of their status as distributors by the company board of directors.

4. Respondent Koscot Interplanetary, Inc. has instituted certain rules and regulations, among which are those set out below, whereby its distributors:

(a) Agree to purchase merchandise only from respondent or his sponsor in accordance with Koscot's marketing program,

(b) agree that all purchases of merchandise from respondent corporation or his sponsor constitutes a nonrefundable sale,

(c) agree not to engage in the sale of a competitive line of products or individual products which would be considered competitive to respondent corporation,

(d) agree never to make any consignment of merchandise to anyone without receiving written notice of approval by Koscot Interplanetary, Inc.,

(e) agree to restrict retail sales and display of cosmetics to home service routes and beauty forums, and to certain categories of retail outlets specified by respondent but only with Koscot's approval,

(f) agree to obtain prior written approval from Koscot for any promotion or advertising of Koscot products or his distributorship,

(g) agree to maintain a record of the names and addresses of all his customers and to provide Koscot with such information through his supervisor or director,

(h) agree not to transfer to another organization without prior written consent of all distributors above him in his organization, including respondent corporation,

(i) agree to have a financial interest in only one Koscot distributorship at a time and that he cannot be part of two separate distributorships,

(j) agree not to enter into any agreement with a distributor in another Koscot organization to make a division of profits, assets, or new recruits in violation of the "Koscot Marketing Koncept."

5. Respondent Koscot Interplanetary, Inc. has entered into contracts, agreements, combinations or understandings with its distributors whereby respondent:

(a) Prohibits a corporation from becoming a Koscot distributor,

(b) requires that the organization of a distributor, who quits or loses his status as a distributor, becomes a part of the organization of the distributor immediately preceding him on Koscot's organizational chart.

6. Respondent Koscot Interplanetary, Inc. discriminates in price, directly or indirectly, between different purchasers of its products of like grade and quality by selling said products at lower prices to some purchasers than to other purchasers, many of whom have been and now are in competition with the purchasers paying the higher price. For example, director-distributor purchases his products directly from respondent corporation at approximately: (a) 22.2 percent discount as compared with the cost to a supervisor-distributor, (b) 41.7 percent discount as compared with the cost to a beauty advisor.

There are approximately 7,988 director-distributors and approximately 10,726 supervisor-distributors in the program.

The supervisor-distributor who purchases his products directly or indirectly from respondent corporation, purchases at approximately a 25 percent discount as compared with the cost to a beauty advisor.

In addition, respondent corporation has agreed to pay the director-distributor a 2 percent override on the purchases of the entire organization of each supervisor-distributor recruited by said director-distributor when such supervisor-distributor works up or buys in and becomes a director himself. Thereafter, although both director-distributors buy from respondent corporation, only the first will receive the 2 percent override from respondent corporation.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Six hereof are incorporated by reference in Count I with respect to respondents, as if fully set forth herein.

PAR. 7. Respondents make various oral and written statements to prospective investors regarding the sale of their cosmetics, toiletries and associated items and the recruitment of additional participants in their marketing program. Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

> 1. To become a Director a Supervisor * * * must go out, create a new Supervisor's initial order, and bring this order to *you*, the Director, before you *release* this Supervisor to become a Director * * *. When this new Supervisor entered the program, he ordered $2000 in retail products. This Supervisor created the order, so he receives the 25% commission on products. But *you* are the Director, so *you* earn the 10% Director's commission of $200.
>
> As soon as this Supervisor's initial order is received by the company, the company sends *you* the 65% commission on this $3000 additional inventory. This is $1,950! You now have earned a total of $2,850!
>
> Create this volume once a month and at the end of the year you will have earned over $34,000.
>
> 2. As a Director with one Supervisor in your organization, your job is to help this Supervisor become successful. See that he and his retail manager are thoroughly trained and make certain he fully understands the program. When he is ready to enjoy additional benefits, help him create a new Supervisor's initial order for kosmetics and he will become a Director.
>
> Continue to help the one Supervisor you will always have. Help him sell only one Supervisor's order per month for your organization and you will earn over $26,000 per year! But work with your Supervisor full-time to make him a success! Do this twice a month and your income will exceed $52,000 per year!
>
> 3. Let's assume you decide to recruit girls to be trained as Beauty Advisors * * * Let's look at your third month in the business. Again sponsor only eight girls who produce the part-time volume of only $300 a month. This new group will produce $2,400 their first 30 days. The last group you sponsored has learned the benefits of our incentive plan. They have learned that by increasing their efforts and continuing to service their customers they can produce a monthly volume of $900 each. When this occurs, this group will give you an additional $7,200 in volume.
>
> Your first group of girls may have increased their volume even *more*, but suppose they are producing only $900 each per month or $7,200 for the group. Then your total monthly volume is $16,800!
>
> At this point you will *certainly* want to become a Director and enjoy the benefits of a 65% discount! You continue to sponsor eight girls a month and train them to produce the

necessary volume, and you will be giving yourself an $1,800 a month *raise* in income every month.

PAR. 8. Respondents' multilevel marketing program, as represented by the above-quoted statements, contemplates an endless recruiting of participants since each person entering the program must bring in other distributors to achieve the represented earnings. The demand for prospective participants thus increases in geometric progression whereas the number of potential investors available in a given community or geographical area remains relatively constant. Consequently, a person coming into the program at a later stage will be unable, in a substantial number of instances, to find additional investors because the recruiting of participants into the program at an earlier stage by others has exhausted the number of prospective participants. It is self-evident that respondents' marketing program must of necessity fail when the market for potential distributors has become saturated.

Although some participants in respondents' multilevel merchandising program may realize a profit, all participants do not have the income potentiality represented by respondents, such as described in Paragraph Seven through recruiting other participants and the resultant finder's fees, commissions, overrides, rebates and other compensation arising out of the sale of respondents' products. In reality, some participants in the program will receive little or no return on their investment.

Respondents' multilevel merchandising program is organized and operated in such a manner that the realization of profit by any participant is predicated upon the exploitation of others who have virtually no chance of receiving a return on their investment and who had been induced to participate by misrepresentations as to potential earnings. Therefore, the use by respondents of the aforesaid program in connection with the sale of their merchandise was and is an unfair act and practice, and was and is false, misleading and deceptive.

PAR. 9. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their products, and the purchase of distributorships and participation in their multilevel marketing program, the respondents have made, and are now making numerous statements and representations in certain promotional materials, including, but not limited to, film strips, newsletters, information manuals, marketing plan booklets, meeting scripts, and other materials.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are those set out below, as well as those in the distributor's training manual.

1. The world's largest kosmetic company sponsors over 200,000 girls a year. Knowing

this, with a full-time effort in our program, don't you believe you can sponsor 2 girls a week?

2. There are ordinary men and women in KOSCOT like you and me who are earning five and even ten thousand dollars per month!

3. Ladies and gentlemen, this is over $50,000 a year and now *we are* talking about a great deal of money aren't we? Do you know what excites me about this figure? Many KOSCOT Distributors are presently earning this kind of money and more! The point you should consider is this: When we can do so much, surely you can do as well or even better when you exert the necessary effort.

PAR. 10. By and through the use of the above-quoted statements and representations, as well as the exposition of the "Koscot Marketing Koncept," as found in the distributor's business manual, and other statements and representations of similar import and meaning, but not expressly set out herein, respondents and their agents and representatives, represent, and have represented, directly or by implication, to prospective participants, that:

1. It is not difficult for participants in the Koscot program to recruit and retain distributors and sales personnel to work home routes and sell respondents' products door-to-door enabling said participants to recoup their investment and to earn the represented profits set forth herein.

2. Participants in the Koscot marketing program have the potentiality and reasonable expectancy of receiving large profits or earnings.

3. The Koscot marketing program is commercially feasible for all participants and the supply of available entrants and investors is virtually inexhaustible.

PAR. 11. In truth and in fact:

1. It is difficult for participants in the Koscot program to recruit and retain distributors and sales personnel to work home routes and sell respondents' products door-to-door, hence, many participants cannot even recoup their investment, much less earn the represented profits set forth herein.

2. Participants in respondents' marketing program do not have the potentiality and reasonable expectancy of receiving large profits or earnings (for the reasons hereinbefore set forth).

3. The Koscot marketing program is not commercially feasible for all participants and its operation exhausts the supply of available entrants and investors as hereinbefore explained.

Therefore, the statements and representations as set forth in Paragraphs Nine and Ten have been and are, false, misleading and deceptive.

PAR. 12. Respondents' merchandising program is in the nature of a lottery in that participants are induced to invest substantial sums of money on the possibility that by the activities and efforts of others, over whom they exercise no control or direction, they will receive the profits described in Paragraphs Seven and Nine herein. The realization of such financial gain is not dependent on the skill and effort of the individual participant, but is the result of elements of chance including the number of prior participants and the degree of saturation of the market which exists when the participant is induced to make his investment.

The use by respondents of a multilevel marketing program, which is in the nature of a lottery, is contrary to the public policy of the United States and is an unfair act and practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 13. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and into the investment of substantial sums of money to participate in the respondents' multilevel marketing program and the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors in commerce and unfair methods and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Fourteen hereof are incorporated by reference in Count II as if fully set forth herein.

PAR. 15. The acts and practices, courses of conduct and methods of competition engaged in, followed, pursued or adopted by respondents, as alleged hereinabove, have had and continue to have the purpose and effect of substantially lessening, restraining, preventing and excluding free and open competition by, between, and among respondents' distributors in the marketing, sale and distribution of respondents' products throughout the United States in the following manner:

a. By fixing, maintaining and otherwise controlling the prices at which respondents' products are resold in both the wholesale and retail markets.

b. By fixing, maintaining or otherwise controlling the various fees, bonuses, rebates, or overrides required to be paid by one distributor or class of distributors.

c. By restricting the sellers from whom respondents' distributors may purchase their products and the customers to whom they may sell their products.

d. By restricting their distributors to reselling respondent corporation's products only in certain categories of retail outlets.

e. By unreasonably restricting the freedom of respondents' distributors to market their products in the manner of their own choosing.

Said acts, practices, courses of conduct and methods of competition are prejudicial and injurious to the public; have a tendency to hinder and prevent competition and have actually hindered and restrained competition, and constitute unfair acts or practices and unfair methods of competition in commerce within the meaning and intent of Section 5 of the Federal Trade Commission Act.

COUNT III

Alleging violation of Section 2(a) of the Clayton Act, the allegations of Paragraphs One through Five and subparagraph (6) of Paragraph Six hereof are incorporated by reference in Count III as if fully set forth herein.

PAR. 16. The difference in net cost among the various distributors of respondents' products, each of whom is in competition with other distributors of respondents' products, results in substantial discrimination in the net prices for products sold to the nonfavored customers, who are both direct purchasers and indirect purchasers of respondents' products.

In addition, the various fees, overrides, or other payments result in discriminations among the direct and indirect purchasing distributors who are in competition with one another. These monies are direct and indirect payments by respondent Koscot Interplanetary, Inc. and are in effect discriminations in the net price of products to the various distributors.

The effect of respondent Koscot Interplanetary, Inc.'s discrimination in net price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which its favored purchaser is engaged, or to injure, destroy, or prevent competition between the favored and nonfavored purchasers or with the customers of either of them, except to the extent that competition has been lessened by the acts and practices alleged in Counts I and II hereof.

The aforesaid acts and practices of respondents constitute violations of the provisions of Section 2(a) of the Clayton Act as amended.

COUNT IV

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Fourteen hereof are incorporated by reference in Count IV with respect to respondents, as if fully set forth herein:

PAR. 17. In the course and conduct of their business as aforesaid, respondents' multilevel merchandising program is organized and operated in a manner that results in the recruitment of many participants who have virtually no chance to recover their investments of substantial sums of money in respondents' program and who have been induced to participate by misrepresentations as to potential earnings. Respondents have received the said sums and have failed to offer to refund and refused to refund such money to participants that were unable to recover their investment.

The use by the respondents of the aforesaid program and their continued retention of the said sums, as aforesaid, is an unfair act and practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 18. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors in commerce and are unfair acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Appearances

For the Commission: *Quentin P. McColgin* and *David C. Keehn.*

For the respondents: *Jerris Leonard* and *Kenneth Michael Robinson, Leonard, Cohen & Gettings*, Wash., D. C. for Koscot Interplanetary, Inc., Glenn W. Turner Enterprises, Inc., Glenn W. Turner, Malcolm Julian, Ben Bunting and Hobart Wilder.[1]

INITIAL DECISION BY DONALD R. MOORE, ADMINISTRATIVE LAW JUDGE

MARCH 20, 1975

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[1] A supplemental memorandum of law was submitted on behalf of Koscot Interplanetary, Inc., by Levy, Levy & Ruback, New York, N. Y., as special bankruptcy counsel. Various other counsel participated at earlier stages of the proceeding but subsequently withdrew. Regarding respondents Terrell Jones, Michael Delaney, and Raleigh P. Mann, see *infra*, pp. 3-4, 15[pp. 1119, 1127, herein].

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PRELIMINARY STATEMENT

The complaint in this proceeding, charging violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and of Section 2(a) of the Clayton Act, 15 U.S.C. § 13, was issued on May 24, 1972, and was thereafter duly served on all respondents except Terrell Jones (see *infra*). The complaint, containing four counts, charges as unlawful certain of respondents' practices in connection with the sale and distribution of toiletries and cosmetics and the recruitment of distributor-investors.

Count I of the complaint charges that respondents' "multi-level marketing program" was not only inherently deceptive and unfair but also involved numerous misrepresentations. Count II alleges that agreements between respondent Koscot and its distributors were in unlawful restraint of trade. Count III alleges that respondents discriminated in price among various classes of customers, in violation of the Clayton Act as amended. Count IV charges in effect that respondents' retention of funds obtained through misrepresentation constituted an unfair practice.

Respondents filed answers on Aug. 22, 1972, and on Sept. 7, 1972, which put in issue most of the material allegations of the complaint.[2]

After extensive prehearing procedures, including several prehearing conferences, hearings were held between July 30, 1973, and Oct. 18, 1974, in Washington, D.C., New York City, Kansas City, Mo., and Orlando, Fla. At these hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. The testimony and evidence presented—aggregating 5224 pages of transcript and thousands of pages of documentary exhibits—have been duly recorded and filed.

Forty-one witnesses were called to testify in support of the allegations of the complaint, including the seven individual respondents, one additional former officer of respondent Koscot, two officials of Avon Products, Inc., three expert witnesses (marketing and economics), and 28 distributors or former distributors of respondent Koscot.

Four of the individual respondents—Glenn W. Turner, Malcolm Julian, Ben Bunting, and Hobart Wilder—were excused from testifying after each pleaded his constitutional right to remain silent on the ground that answers to questions propounded or proposed on the subject matter of this proceeding might tend to incriminate him. These Fifth Amendment pleas were made in the light of a pending criminal proceeding in the United States District Court for the Middle District of Florida (*Koscot Interplanetary Incorporated, et al.*, Criminal No. 73-71). (See Tr. 912-91).

Respondents called no witnesses in defense but offered some documentary evidence, primarily relating to the status of respondent Koscot as a result of its petition for an arrangement under Chapter 11 of the Federal Bankruptcy Act.

Hearings were in recess from October 1973 until August 1974, because certain witnesses whose testimony was required to complete the case-in-chief in support of the complaint were prohibited from testifying by protective orders issued on Oct. 17, 1973, by the Honorable Gerald B. Tjoflat, United States District Judge for the Middle District of Florida, in connection with the criminal case styled *United States* v. *Koscot Interplanetary, Inc., et al.*, No. 73-71-Orl-Cr. On Aug. 1, 1974, such protective orders were modified so as to permit the testimony in question, and hearings in support of the complaint were resumed on Aug. 19, 1974, and concluded on Aug. 22, 1974. After further proceedings, including the submission of documentary exhibits on behalf of respondents, the evidentiary record was closed on Oct. 18, 1974.

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[2] The answer filed on Aug. 22, 1972, on behalf of the corporate respondents and respondents Turner, Julian, and Wilder was later amended to reflect that it was also the answer of respondent Michael Delaney (order granting motion to amend answer, Sept. 11, 1972).

The parties were represented by counsel and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues.[3] Also, although respondent Raleigh P. Mann was afforded a full opportunity to participate in the trial, he was not represented by counsel during the hearings and did not participate other than to appear as a witness subpoenaed by complaint counsel and to make a statement under oath on his own behalf at the conclusion of his testimony (Tr. 4814-15). He filed no exceptions or other response to the proposed findings, etc., submitted by complaint counsel. However, on Sept. 26, 1974, he filed *pro se* a motion to dismiss the case as to him on grounds that there had been failure of proof. The motion was taken under advisement for determination as part of the initial decision herein.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order were filed by counsel supporting the complaint, together with a supporting brief. (Certain errors in complaint counsel's proposed findings of fact, etc., as originally filed, were corrected by a "Notice of Corrections" filed on Jan. 2, 1975.)

Counsel for respondents filed a brief in opposition to the submittals of complaint counsel, and complaint counsel filed a reply brief.

In their brief, all respondents except Mann have consented to the issuance of the order proposed by complaint counsel except that part (Section V) which requires that restitution be made by the corporate respondents and by three of the individual respondents. As to the proposed findings of fact submitted by complaint counsel, respondents' exceptions are directed only to those that are intended to provide a factual predicate for the restitution order. Their brief states:

> Counsel strongly disagrees with the opening language used in complaint counsel's brief whereby *Koscot, et al.* are described as inherently deceptive and fraudulent. However, in view of the recognized fact that none of these respondents are presently participating in such illegal marketing deceptions and frauds we do not take issue with the proposed order except for the proposed findings which deal with restitution. [Footnote omitted.]
>
> * * * * * * *
>
> * * * [W]e do not intend to respond or object to the proposed findings of fact and conclusions of law except for those parts regarding restitution. In not objecting to the language of the proposed order which deals with "pyramiding" and fraudulent practices,

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[3] Terrell Jones, although cited in the complaint, was not a party since he was not served with a copy of the complaint (Tr. 4835-37). (He was later located and was called as a witness by complaint counsel.)

> we do not wish for anyone to interpret our silence as a stipulation that such did occur. We simply reaffirm our proffer that the interests of justice can best be served in this case by the issuance of an order which enjoins that conduct which complaint counsel argues existed. If such conduct and practice did exist in the context as complaint counsel argues them then respondents are the first to agree that such activity should be forever stopped.
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> * * * * * * *
>
> * * * [I]t is respectfully submitted that the remedies requested by complaint counsel as regards restitution be denied and that all other injunctive relief be ordered and noted as not objected to by respondents. (RB, pp. 1, 8, 19; see also pp. 17-18).

In view of these concessions by the principal respondents, most of the essential facts are virtually undisputed, and most of the provisions of the proposed order may be entered as "not objected to." Accordingly, despite the size of the record and the volume of counsel's submittals, the administrative law judge has made relatively brief findings of ultimate facts. The proposed findings of complaint counsel are meticulously detailed, with extensive citations to the record. Since, for the most part, respondents have not challenged these proposed findings, they are incorporated by reference as subsidiary findings that support the findings of ultimate fact constituting this initial decision.[4] Respondents' exceptions are essentially limited to those proposed findings that underlie complaint counsel's plea for a restitution order. These exceptions have been carefully considered and are discussed in greater detail than those matters that respondents have not specifically contested. As requested (RB, p. 8), the undersigned has carefully reviewed the testimony, particularly the cross-examination, of Messrs. Delaney, Edwards, Mann, and Jones.

FINDINGS OF FACT

I. *Respondents and Their Business*

A. The Corporate Respondents

1. Koscot Interplanetary, Inc. ("Koscot")[5] is a corporation existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 4805

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[4] Where references are made to proposed findings submitted by the parties, such references are intended to include their citations to the record unless otherwise indicated. Citations to the record, as well as to the proposed findings, are intended to serve as convenient guides to the testimony and to the exhibits supporting the findings of fact, but they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The proposed findings of the parties not adopted, either in the form proposed or in substance, have been rejected as lacking support in the record or as involving immaterial matters.

[5] The name "Koscot" is an acronym for the term "Kosmetics for the Communities of Tomorrow." Spelling cosmetics with a "k" was designed to call attention to the product (CX 11, p. 3). Later, Turner spelled the word "cash" with a "k" for a company called "Kash Is Best," which involved a discount for cash payments (Jones 4896).

Sand Lake Rd., Orlando, Fla. It was organized on or about Aug. 21, 1967 (complaint, ¶ 1; answer of Koscot, et al., ¶ 2; CX 29 C).

2. Glenn W. Turner Enterprises, Inc. ("Turner Enterprises") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 4805 Sand Lake Rd., Orlando, Fla. It was originally organized prior to October 1970 under the name of Dare To Be Big, Inc. (complaint, ¶ 1; answer of Koscot, et al., ¶ 2; CX 30 B).

3. Koscot was founded by respondent Glenn W. Turner, who, directly or indirectly owned the controlling interest in Koscot until August 1973. He was its sole stockholder from December 1970 until August 1971, when Koscot became a wholly-owned subsidiary of Glenn W. Turner Enterprises, Inc., which had previously been a subsidiary of Koscot. Turner was the sole stockholder in Turner Enterprises. Turner Enterprises held 100 percent of the voting stock of Koscot until August 1973, when all of the outstanding capital stock of Koscot was sold by Turner Enterprises to Max Morris for the sum of $15,000 (complaint, ¶ 1; answer of Koscot, et al., ¶¶ 2-3; CX 1 A-C; CX 13 A; CX 27 F; CXs 29-30; CX 190 C-D; CX 357 H, CX 358 H; CX 362 G; CX 759 A; Tr. 5210-11). This stock sale took place about a month after Koscot filed a petition for an "arrangement" with its creditors under Chapter XI of the Federal Bankruptcy Act. A plan of arrangement has been submitted by Koscot, and further proceedings were scheduled in early 1975 (RXs 12 A-Z-102, 16, 17 A).

In this decision, references to the record are made in parentheses, and certain abbreviations are used as follows:

CPF - Complaint counsel's proposed findings—"Proposed Findings of Fact, Conclusions of Law, and Order."

CB - Complaint counsel's "Brief in Support of Proposed Findings of Fact, Conclusions of Law and Order."

CRB - "Complaint Counsel's Reply Brief and Other Submissions."

CX - Commission exhibit.

RB - Respondents' brief—"Brief in Opposition to Commission's Brief in Support of Proposed Findings of Fact and Conclusions of Law, and Order."

RPF - Respondents' proposed findings, as contained in RB (pp. 1-7).

RX - Respondents' exhibit.

Tr. - Transcript. (References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."—for example, Jones 4868.)

References to the proposed findings of counsel are to paragraph numbers, while citations to the briefs are to page numbers.

Having heard and observed the witnesses and having carefully reviewed the entire record in this proceeding, together with the proposed findings and briefs filed by the parties, the administrative law judge makes the following findings of fact, enters his resulting conclusions, and issues an appropriate order.

4. For most of the period 1971 until August 1973, Turner Enterprises controlled and directed the affairs of Koscot (CXs 358 H, 362 G; CXs 271-73, 275 A, 279 A-B, 291 A, 568 B; Mann 4403-06, 4494) and derived most of its income from Koscot. From September 1971 to August 1973, Koscot was required to make weekly transfers of funds to Turner Enterprises amounting to 10 percent of all revenues, net of commissions paid out (CXs 291 A, 358 Q, 362 Q). For the 11-month period ending June 30, 1972, more than one-half of the total income of Turner Enterprises came from Koscot (CXs 179 E, 330 C). Money was transferred regularly between Turner Enterprises and Koscot, as well as between other subsidiaries and affiliates, foreign and domestic, of Turner Enterprises (CX 758 A-B; Jones 4899). As of July 1972, Turner Enterprises had investments in and advances to foreign corporations in excess of $2 million. These foreign corporations included the following:

Koscot of Australia Pty. Ltd.
Fashcot of Australia Pty. Ltd.
Dare To Be Great of Australia Pty. Ltd.
Koscot Interplanetary of Canada (1971) Limited
Koscot GmbH
Dare To Be Great GmbH
Koscot Hellas L.L.C.
Koscot Italia S.R.L.
Koscot Interplanetaria De Mexico, S.A.
Koscot A.G.
Koscot Interplanetary (U.K.) Ltd.
Koscot De Venezuela S.A.

5. During January 1973, all of the outstanding capital stock of one or more of the companies listed in ¶ 4, *supra*, was sold by Turner Enterprises to Ariarnes, a corporation (not otherwise identified), for an amount ranging between $10,000 and $100,000 (CXs 758 A, 759 B-C; Tr. 5210-11).

6. As of July 31, 1972, Koscot had total assets of $22.5 million, but as of July 1973, its total assets had dwindled to $11.7 million (CX 758 A; RX 12 Z-70-71, 76-77, 91).

B. The Individual Respondents

7. *Glenn W. Turner*—Glenn W. Turner was the founder of Koscot[6] and instituted its marketing plan and its distribution policies. He owned a controlling interest, directly or indirectly, in each of the corporate respondents. He was president of Koscot from August 1967 to January 1968 and chairman of its board of directors from January 1968 until at least March 1972. He was also chairman of the board of directors of Turner Enterprises from February 1971 until March 1972 (see ¶3, *supra*).

8. Each of the two corporate respondents was, in essence, the alter ego of Turner. He was primarily responsible for establishing, supervising, directing, and controlling the policies, business activities, and practices of each of the corporate respondents. Despite ostensible changes in corporate officers, as well as the establishment of a voting trust for Koscot, both corporations operated under his ultimate control and domination. He appointed and removed corporate officers and directors. The two corporations had many officers and directors in common and, with other Turner-controlled companies, essentially operated as a single enterprise. Turner controlled the corporate funds and used them for such purposes as he saw fit, borrowing and otherwise using corporate funds as his own.

9. Although there is evidence that Turner resigned as a corporate officer of Turner Enterprises in March 1972,[7] a document submitted by respondents as Appendix I of their brief shows that in October 1974, he signed a stipulation of settlement in a class action suit pending in the United States District Court for the Western District of Pennsylvania as president of Turner Enterprises, as president of Dare To Be Great, Inc., and also on behalf of Koscot (capacity not designated).

(Record references: Complaint, ¶ 1; answer of Koscot et al., ¶¶ 2, 3; Edwards 1129-32; Mann 4375-85, 4391-92, 4399-4403, 4488, 4494, 4592-4612, 4660-64, 4699-4709, 4719; Jones 4880-83, 4888-89, 4899, 5000-01; CXs 1 A-C, 5, 13 A, 27 F, 29-30, 43-49, 190 D, 192, 195 A, 221, 223, 226, 229, 244, 292, 357 H & J, 358 H & L, 362 G & K, 490 A-C, 568 A-B, 618-19, 759 A; Tr. 5210-11; RX 12 Z-98.)

10. Although Turner retained ultimate veto power over corporate operations, he necessarily delegated authority to others. Those who shared with him the responsibility for the formulation, control, and

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[6] Turner established Koscot in August 1967 with $5,000 in borrowed money. He supposedly had no other capital despite the fact that he claimed to have earned $30,000 to $35,000 a month as a "General" in Holiday Magic, with which he had been associated since late 1966. (Jones 4847-48, 4853), and Koscot literature portrayed him as having earned $250,000 in cosmetics in "twelve short months" (CX 11, pp. 19, 34) before he founded Koscot.

[7] Turner resigned as chairman of the board of Turner Enterprises on Mar. 13, 1972, but announced he would serve as a consultant. He requested $250,000 a month for such consulting services, and other financial considerations were to be negotiated (CX 292).

direction of the acts and practices of the corporate respondents included the following respondents:

Ben Bunting
Hobart Wilder
Malcolm Julian
Raleigh P. Mann

The role of each may be outlined as follows:

11. *Ben Bunting*—Respondent Ben U. Bunting played a key role in Koscot operations from 1969 until mid-1971 and was a well-paid "consultant" thereafter. As the "right hand man for Turner" during most of this period, he virtually had total control of Koscot operations. Beginning as a Koscot distributor, he later held the following corporate offices in Koscot:

National director—November 1968-January 1969;
president—January-June 1969;
corporate president[8]—June 1969-July 1970;
member and chairman of voting trust—April-December 1970; and
international corporate president—July 1970-July 1971.

In addition, Bunting was involved in Turner Enterprises, as assistant to the chairman of the board (July 1970-February 1971) and as vice chairman of the board (February-July 1971). Thereafter, he became a consultant to Turner Enterprises while apparently continuing to serve as a director of Turner Enterprises (Mann 4387-88, 4391-92, 4488; Jones 4904-06, 4970, 4991; CXs 2 D-U, 3 A, 5, 13 J, 46 F, 211, 223, 245, 252 A, 253, 279, 490 A, 568 A, 574 A-B, 614 C).

12. On July 8, 1971, Bunting resigned from the boards of directors of all companies except Turner Enterprises and was designated to be in charge of all monies for that corporation (CX 574 A-B). About this same time, Bunting and Turner entered into a contract providing that 3 percent of the gross receipts of Turner Enterprises and its subsidiaries, including Koscot, were to be paid to Bunting for consulting services (Mann 4577-78). Meanwhile, using a loan of $250,000 from Turner, Bunting acquired a foreign "shell corporation," Candida Holdings, NV ("Candida") (Mann 4574-4577, 4580; CX 611 A). In November 1971, Candida became a publicly-held company, but Bunting continued to hold in excess of 50 percent of its stock (CX 611 A; Mann 4577, 4584). Shortly thereafter, Bunting assigned his consulting contract to Candida (CX 611 A; Mann 4578).

13. Bunting continued to meet regularly with Turner and often attended the board meetings of Turner Enterprises in 1971-72 (CX 279 A-B; CX 285; CX 291 A; Mann 4571).

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[8] The distinction between "President" and "Corporate President" is not altogether clear, but it appears that, at least in theory, the corporate president was superior to the president of the corporation (CX 13 J).

14. In a contract dated Aug. 25, 1971 (CX 279 C), Turner and Turner Enterprises retained Candida for management and sales consultation services.[9] Turner Enterprises agreed to pay Candida 3 percent of its gross sales, and Turner individually agreed to cause other corporations that he controlled to pay the same amount. In addition, all expenses for services to Turner corporations were to be reimbursed, and office facilities were to be made available to Candida on request. Although adjustments might be made in the percentage fee, the minimum fee was stated to be 3 percent plus expenses. The arrangement was to continue for five years. The contract was signed by Turner as chairman of the board of Turner Enterprises and as an individual and was accepted by Bunting as managing director of Candida. Candida was to provide "complete management and sales consultation services" (CX 279 C) and "to structure and develop new sales and marketing plans and programs * * *" (CX 611 B).

15. As of Apr. 1, 1972, the contract between Turner Enterprises and Candida was terminated (CX 612 B; Mann 4571, 4581). As a result of the operation of the contract and the agreed settlement for its premature termination, Candida received nearly $2 million, comprising the following:

(a) $475,020, representing 3 percent of the gross sales of Turner Enterprises and its subsidiaries for the months of September, October and November 1971 (CX 611 A).

(b) $666,503, representing 3 percent of the gross sales of Turner Enterprises from Dec. 1, 1971, until the original contract was terminated (CX 612 A).

(c) $270,912, representing one percent of the gross sales of Turner Enterprises from Apr. 1, 1972, until Aug. 31, 1972 (CX 612 A).[10]

(d) $183,375, representing a lump sum payment for the termination of the original contract with Turner Enterprises (CX 612 A-B).

(e) Approximately $400,000 representing notes from F. Lee Bailey and Enstrom Helicopter Corporation transferred from Turner Enterprises upon termination of the original contract between Turner Enterprises and Candida (Mann 4579).[11]

16. *Hobart Wilder*—Respondent Hobart Wilder likewise played a significant role in the operations of Koscot and Turner Enterprises. Beginning as a distributor and advancing to the position of state director, he then held the following offices in Koscot: National director

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[9] A report to Candida's shareholders dated Feb. 4, 1972, shows the contract date as Dec. 1, 1971 (CX 611 A).

[10] Whether Candida has continued to collect one percent of the gross sales of Turner Enterprises is not clear from the record. A report to Candida shareholders states that "Candida has received a lump sum settlement of $183,375, and a fee of 1 percent of Turner Enterprises' gross sales for the remainder of the original contract period which ends Dec. 1, 1976" (CX 612 B).

[11] The directors placed a value of $40,000 on the notes receivable assigned to Candida (CX 612 B).

of field operations—July-October 1970; president—October 1970-February 1971; and corporate president—February-July 1971.

Wilder was also active in Turner Enterprises, serving as international corporate president from July 1971 until March 1972, when he became chairman of the board. He ultimately replaced Bunting as the No. 2 man in the Turner operation. He apparently left the Turner organization between July 1972 and July 1973 (Delaney 874-75; Mann 4390-93, 4403-04, 4488, 4554-55, 4562-64; Jones 4906-07; CXs 234 A, 237 A, 270 A, 279 A, 292, 490 A, 560, 567 A, 568 A, 574 A, 605, 606, 614 D).

17. Wilder received a salary many times greater than Bunting, Julian, and Mann—$102,300 in 1972 (CX 322), compared to a range of $16,000 to $37,000 for such other officials (CXs 297, 299, 300, 307, 309, 324, 326). In May 1973, he also received a loan from Koscot of $161,000, which had not been repaid as of July 1973 (RX 12 Z-74).

18. *Malcolm Julian*—Respondent Malcolm Julian was another top official of Koscot. He served twice as president of Koscot (June 1969-July 1970 and September-December 1971). He was also a member of the voting trust (April-August 1970) and served as international corporate vice-president from July 1970 to September 1971. He was also a member of the board of directors of Turner Enterprises, resigning in December 1972. He subsequently became a consultant to Koscot (Delaney 1044; Mann 4442; CXs 2 D, 5, 13 J, 223, 235, 245 A, 262 A, 271, 279 A, 286, 287, 490, 502 C).

19. *Raleigh P. Mann*—Respondent Raleigh P. Mann also held important positions in Koscot. After joining Koscot as a distributor in June 1968, he later moved to Canada and in early 1969 became president of Koscot's Canadian affiliate. He then served as president of Koscot (July-October 1970), a member of the voting trust (August-December 1970), and international president (October 1970-July 1971). He resigned all offices and directorships in all Turner corporations in July 1971 but was retained as a Koscot consultant until October 1971 (Mann 4347-52, 4358-60, 4386, 4397-4400; CXs 5, 6, 85, 258, 262 A, 490 A, 559, 560, 566, 568 A, 573).

20. As a consultant, Mann initially prepared a memorandum recommending to Turner in effect that Koscot get out of the "wholesale promotion business" and become a real cosmetics marketing company independent of Turner Enterprises (CX 575 A-C; Tr. 4556-57, 4563-65). His later consulting work was unrelated to Koscot (Tr. 4567-70). Meanwhile, Mann had become associated with Bunting as a stockholder and as a consultant in Candida (*supra*) and engaged in consulting work unrelated to Turner Enterprises until August 1972 (Tr. 4570).

21. Mann testified that his salary from Koscot in the course of approximately two and one-half years (including his consulting fees)

amounted to approximately $90,000, while his income from Candida was approximately $60,000 (Tr. 4614-16). Koscot had advanced him $51,000 for a downpayment on his home, but this note was paid off when the house was sold (Tr. 4614-15). Mann initially had 10,000 shares of Candida stock (at $1 a share), which later increased to 100,000 shares as a result of a stock split. He later sold 82,475 shares for approximately $23,000 and retained 17,525 shares, which he characterized as worthless (Tr. 4582-83).

22. Although he was unemployed for most of 1973 because of the "Turner stigma," he was then employed by a drapery and carpet company owned by his wife (Tr. 4617-20). As of August 1974, Mann described his financial condition as "broke." He was living in a rented house, owned one car, and had a minimal bank balance. He concluded: "We have our personal belongings; we have our furnishings; we have our clothing. We have no trust funds, trust accounts, hidden assets or anything else." (Tr. 4619; see also Tr. 4814-15).

23. In November 1974, Mann's address was Route 3, Box 281 (Jacaranda), Orlando, Fla. (attachment to motion to correct the official transcript, filed Nov. 22, 1974).

24. The business address of all the individual respondents was the same as that of the corporate respondents.

25. Respondents Bunting, Wilder, Julian and Mann were responsible, along with Turner and others, for the formulation, direction, and control of the acts and practices of Koscot and Turner Enterprises. They participated actively and knowingly in such acts and practices, as outlined more fully *infra*, ¶¶ 132-39.

26. In summary, respondents Koscot, Turner Enterprises, Turner, Julian, Bunting, Wilder, and Mann cooperated and acted together in carrying out the acts and practices herein found.

27. On the basis of the foregoing facts, as well as those developed *infra* on the record as a whole, the motions to dismiss for failure of proof that were entered by respondent Mann (*pro se* on Sept. 26, 1974) and by counsel for Julian (Tr. 5054-57) are hereby denied.

28. Two other individuals were cited in the complaint but are being dismissed as respondents:

(a) *Terrell Jones*—Although Terrell Jones, whose address in August 1974 was in Indian Hills, Colo., was named as a respondent in the complaint and played a significant part in Koscot's operations, he was never served with a copy of the complaint and thus is not a party to this proceeding. As proposed by complaint counsel (CPF 25), the complaint is being dismissed as to Jones, without prejudice, however, to the right of the Commission to bring further proceedings against him if the public interest so warrants. (See Tr. 4835-37.)

(b) *Michael Delaney*—Respondent Michael Delaney is an individual who was residing in August 1974 at 241 Timberlane Trace, Longwood, Fla. He was associated with Koscot from September 1969 to February 1971 in the following capacities: Assistant director of manufacturing—September-December 1969; director of manufacturing—December 1969-September 1970; voting trust member—April-December 1970; and executive vice-president—December 1970-February 1971.

Thereafter he engaged in various administrative duties until he resigned in July 1973. Since then he has been a Koscot consultant (Delaney 792-98; CXs 2 D-U, 245 A, 269 A, 273 B).

At the conclusion of the hearings, counsel for Delaney (Kenneth Michael Robinson) renewed a previous motion that the complaint be dismissed as to Delaney for failure of proof. Complaint counsel joined in the motion, and it was accordingly granted by the administrative law judge. (Tr. 5041-54) The reasons for this action are essentially summarized in the argument of defense counsel (Tr. 5041-52) and on the basis of the following record references: Delaney 792-910, 994-1120; Mann 4624, 4651-60, 4683, 4709-16, 4720-21, 4753, 4764-65; Jones 4929, 4957, 4962, 4964, 4974.

(Unless otherwise indicated, the term "respondents" as used herein is not intended to refer to Jones or Delaney. The term "Koscot" may sometimes be used to refer to all respondents collectively.)

C. Jurisdictional Findings

29. For several years the respondents have been engaged in the advertising, offering for sale, and sale of distributorships and franchises and of various products and services, including a line of cosmetics, toiletries, and associated items sold and distributed under the trade name Koscot. In so doing, respondents have caused their products to be shipped from their places of business in various States to purchasers located in various States other than the State of origination and have maintained a substantial course of trade in such products in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act (complaint, ¶¶ 3-4; answer of Koscot, et al., ¶¶ 7-9; RPF 9; CXs 29 F, 69 A-S, 72 A-D, 103 A-F, 105 A-J, 110 A-113 V, 120 A-123 K).

30. Respondents have been in substantial competition in commerce with corporations, firms, and individuals in the sale of cosmetics, toiletries, and associated items of the same general kind and nature as those sold by respondents (complaint, ¶ 2; answer of Koscot, et al., ¶ 6; RPF 9).

II. *Unfair and Deceptive Practices*

A. Introduction

31. Glenn Turner had an "impossible dream" (Tr. 5003). And, for a time, the dream became a sort of reality for him, for some of his associates, and for those relatively few who got in on the ground floor. But for thousands of others, it remained an impossible dream and a virtual financial nightmare. The impossible dream was the creation of a distribution network for the sale of cosmetics that was represented as offering an opportunity for untold riches for those who became involved in an "endless chain" of recruiting distributors for this business and in selling Koscot products. The Koscot plan is somewhat complicated to explain, but it was made to appear deceptively simple at "golden opportunity" meetings.

32. Koscot offered a plan that was ostensibly designed to sell cosmetics but that actually operated as a scheme to defraud the gullible—and even the not-so-gullible. To those who were victimized, the description of Turner as a "share-cropper on his way to harvest the world" (CX 11, preface) has an ironic twist.

33. Koscot's distribution method has come to be known as multileveling or pyramid selling (Westing 1197; Darling 1444; Nelson 2057). Such a system has been condemned as unlawful by the Commission, as well as by numerous courts.[12]

34. Cosmetics were to be sold, not through shops, but by direct selling, that is, by sales effected by individuals in the homes of the purchasers. There was a hierarchy of individuals involved, and those at the higher levels had to pay Koscot substantial sums for their so-called franchises (although the term "franchise" does not seem to have been used). The attraction was that the higher level participants received substantial commissions if they or those under them recruited new members to such upper levels. Through this method, a sales force in something of the shape of a pyramid was built up, with Koscot at the top and with two or more levels of individuals beneath, with the bottom level supposedly being the most numerous, and each level being connected with the others by a system of commissions whereby the higher levels profited from the activities of the lower levels.

35. The primary vice under attack in this proceeding is that this system of paying commissions on recruitment has the same appeal and the same ultimate result as a "chain letter."

36. Although, initially, Koscot had no cosmetics to sell, it began an operation ostensibly designed to sell cosmetics in the manner described

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[12] *Holiday Magic, Inc.*, Dkt. 8834, Final Order, Oct. 15, 1974, (slip opinion pp. 11-14 [84 F.T.C. 748, at pp. 1036-1039]); *Ger-O-Mar, Inc.*, Dkt. 8872, Final Order, July 23, 1974 (slip opinion, pp. 8-12 [84 F.T.C. 95, at pp. 145-149]).

in ¶ 34, *supra*. Koscot set up a hierarchy of individuals through whom sales were to be made. At the lowest level, there were beauty advisors, who were to sell Koscot products directly to members of the public through door-to-door selling or through "party plans", involving group selling. These beauty advisors were appointed by supervisors or subdistributors, who were the next rung on the Koscot distribution ladder. The supervisors, in turn, were appointed by the top rung (other than Koscot), who were called distributors or directors. The rights that went with the position of a distributor or supervisor might be analogized to a franchise. Koscot products were to be sold through distributors at a discount of 65 percent off retail price; supervisors in turn were to enjoy a 55 percent discount; and beauty advisers were to have a 40 percent discount.

37. However, product sales were by no means to be the only source of revenue, either for Koscot or for the distributors and supervisors. Each distributor was required to pay to Koscot a stated amount, ranging up to $5,000, for his position, for his initial inventory, and for the right to recruit supervisors and other distributors. If he had been introduced by another distributor, that other distributor received a commission of $2,650, with Koscot keeping the balance of $2,350. A supervisor had to pay Koscot $2,000 for his position. If he had been introduced by a distributor, the distributor got a commission of $700, the balance of $1,300 remaining with Koscot. If the new supervisor had been recruited by another supervisor, the same commission of $700 was payable, but the supervisor who found the new recruit got only $500, with the remaining $200 going to that supervisor's distributor. If a supervisor advanced to distributor, he was required to pay Koscot an additional $3,000, of which $1,950 was paid to the distributor who had sponsored him. He was also required to recruit another supervisor to replace himself, a transaction on which both he and his sponsoring distributor received the fees listed *supra*.

38. This was Koscot's basic "dual level" program, as outlined essentially in CXs 11 and 13. There were earlier and later variations, with different commission and discount figures, including a "single level" plan in which there was no supervisor or subdistributor (CXs 8 A-Z-23, 9, 10, 14, 15, 98 A-J). Many of the changes were made to meet legal objections raised in particular States. The variations are set forth in detail in CPF 116-62.

39. In their literature, and in their presentations in opportunity meetings and on GO-Tours, respondents held out the promise of big profits for all in an "endless chain" of recruiting, supplemented by fat commissions on subsequent sales of cosmetics.

40. A cardinal feature of the Koscot plan was that, irrespective of

any sales of cosmetics to consumers, a distributor or supervisor who had paid his entry fee could supposedly get it back, and more, by means of recruiting further distributors or supervisors, each of whom paid similar sums to Koscot. The one certainty was that Koscot received substantial sums on each appointment. Whether those who recruited the new distributors or the new supervisors got some or all of their money back, or made any profit, depended on the number of new appointments.

41. The beauty advisors, on the bottom rung, were outside these commission arrangements, and their compensation was based on the 40 percent spread between their acquisition cost of product and the retail price at which they sold.

42. It is readily apparent that there existed a strong financial incentive for distributors and supervisors to recruit others to these positions. Whereas the recruitment of beauty advisers merely facilitated increased earnings on sales, the recruitment of other distributors or supervisors, brought immediate and substantial commissions. A distributor who paid $5,000 for his position would get his money back, and more, if he recruited two distributors or eight supervisors, while a supervisor got his money back if he recruited four supervisors. For so-called franchise holders, the commissions on any recruitment above these numbers were all profit. Additionally, apart from any commissions earned by a distributor by his own efforts, there was always a possibility that one of his supervisors would recruit another supervisor and thus bring the distributor $200 without any effort on his part.

43. Stated another way, the system had financial attractions in that both in the franchise structure and in the sales structure, there were rewards not only for work done by the participant himself but also for work done by others, through a system of overriding commissions on sales made by others.

44. This does not purport to describe the system in all its details, nor all of the variations that Koscot instituted. However, this sufficiently describes the essentials of the plan to indicate its nature.

45. The record supports findings that for approximately a year following the establishment of Koscot and the institution of its marketing plan, respondents were engaged solely in the marketing of distributorships; that, thereafter, the sale of cosmetics was merely incidental to the marketing of distributorships; that except for a relatively few distributorships in the early stages of the program, the distributorships conferred few, if any, effective legal rights upon the holders and were virtually worthless; that members of the public were induced to purchase distributorships by a variety of misrepresentations as to their value and as to the income likely to be realized; and that

distributors were encouraged to recoup their losses and to make profits by recruiting others by deceptive means. There follows a more detailed examination of the massive deception involved in the Koscot operation.

B. "Endless Chain"

46. The Koscot marketing program clearly contemplated an "endless chain" in that it involved the continual recruitment of additional participants, since each person entering the program had to bring in other distributors to achieve the specified earnings. The demand for prospective participants thus increased in geometric progression while the number of potential investors available in a given community or geographical area remained relatively constant (Westing 1271-72, 1278; Nelson 1718-19; Darling 1445).

47. The fallacy in the "endless chain" aspect of the Koscot marketing program, with each distributor supposedly recruiting successively two other distributors a month, is that it involves a geometric progression which, carried through to its ultimate result, would mean that in 18 months the entire United States population (203 million in 1970) would be involved in the plan (CX 536; Westing 1273; Darling 1445-48).

48. Aside from the mathematical fallacy inherent in the Koscot plan, an endless chain scheme must, in any event, ultimately fail to provide returns to all participants. Such a scheme must cease when it exhausts the number of people willing to invest in it. The exhaustion of prospects results from over-saturation, leading potential purchasers to realize that their chance for success is limited in view of the numbers already recruited; lack of funds on the part of otherwise potential purchasers; or a negative reaction on the part of potential purchasers for any number of other reasons. Recruiting must always cease, and those recruited into the program at or near its conclusion must lose (Westing 1271, 1273; Nelson 1729-30). And the fact is that most Koscot distributors lost by relying on the endless chain aspect of the Koscot marketing program (CPF 225).

49. Respondents' defense to the endless chain charge (complaint, ¶ 8) is that because of "self-imposed" quotas on the number of distributorships, sales of distributorships "would not be like a chain letter, hence not deceptive or unfair to the investor," so that "Turner believed that if the quota was followed then there could be no misrepresentations involved about it." Respondents state that Turner's original quota of one distributor per 4,000 population was changed in 1969 to one per 7,000 upon the advice of counsel and a marketing consultant. On the basis that the population in 1972 was 207 million, they contend that Koscot complied with its self-imposed quota when it

stopped selling franchises in mid-1972 with just under 30,000 distributorships (RPF 12, 25).

50. This defense is rejected. First, the facts are contrary to the defense claims. Actually, the purported quota of one per 7,000, which had been instituted in February 1970 (CX 233 A), was discontinued in September 1971 in favor of the earlier quota of one per 4,000 population (CX 239), so that the so-called quota nationally was 51,000 distributors. Second, the purported quotas were on a State basis rather than on a national basis (Mann 4623). Third, the quotas were not always "self-imposed;" in several States, a quota was imposed as the result of legal action by State authorities (Westing 1278-79; Jones 4892-93). Fourth, the quotas were deliberately ignored and circumvented by respondents. Among other things, Koscot classified numerous distributors as "inactive" and thus not chargeable against the quota. Other devices were encouraged and permitted to evade the so-called quota. (CPF 173, 178-89) Fifth, distributors were either not told of the quota or of its specific impact (CPF 172), or, if they were, it was "used as a high pressure tactic" to enroll the prospect before it was too late (Jones 4893).

51. In addition, even where there was ostensible compliance with the quota as far as Koscot sales were concerned, respondents established additional companies operating on a similar basis and allowed Koscot distributors to participate in them and thus continue the chain of recruitment (CPF 191-216). The fact that respondents deliberately provided distributors with the opportunity to continue recruiting when enforcement of the so-called quota might otherwise have stopped such activity is sufficient to show their intent to operate an endless chain recruitment scheme.

52. Finally, even if the quota had been adhered to, the theory that this would defeat any chain letter aspect and prevent the Koscot program from being deceptive or unfair will not withstand scrutiny. First, even with the purported limitations of one Koscot distributor for each 7,000 people, this would involve the recruitment of 29,000 distributors within ten months; and if the limitation were one distributor for each 4,000 people, this would involve the recruitment of nearly 51,000 distributors, or a saturation point likewise reached within ten months (CX 536; Westing 1273; Darling 1445-48). Second, the imposition of an inappropriate statewide quota did not negate the endless chain representation, nor did it prevent the chain from soon reaching the saturation point in numerous local areas. This was largely because, with rare exceptions, distributors naturally tended to recruit in their own circumscribed local areas, and the chain soon ended in such an area before a statewide quota was breached (CPF 174-77).

53. In summary, the imposition of quotas that ostensibly limited the number of distributors within each State did not really affect the endless chain aspect of the Koscot program. Respondents continued to recruit distributors by portraying the program as an endless chain; they devised numerous means to circumvent the quotas; and they established and promoted numerous other companies whose distributorships could be sold by Koscot distributors (CPF 172-216). Meanwhile, distributors learned to their sorrow that the chain was not endless but that all too soon it reached its inevitable end in their communities.

C. Other Misrepresentations

Distributor Earnings

54. The deception inherent in the endless chain aspect of Koscot's marketing plan is but one of numerous misrepresentations made by respondents. This basic deception necessarily involved, of course, gross misrepresentations of the income to be made through recruitment.

55. The earnings claims varied with the various programs. Again using CX 11 as typical, we find Koscot claiming that a distributor could readily sell a minimum of 12 distributorships a year or, with a little more effort, 24 distributorships a year. Depending on how many were directly recruited as distributors and how many were "promoted" from the supervisor level, the annual income was represented as ranging from $26,000 to $52,000 (CX 11, pp. 12-13; CXs 531, 532; Darling 1309-13). These claims were scaled down from those in an earlier manual, which had portrayed earnings ranging from $33,000 to $175,000 (CX 15, pp. 21-22). The falsity of such representations as applied to virtually all of Koscot's distributors has already been demonstrated *supra* (¶¶ 47-53). None of the typical distributors who testified even approached such figures.

56. In addition to gross misrepresentation of the earnings from recruitment, respondents also made numerous misrepresentations concerning the status of Koscot and the opportunities for success and wealth in selling Koscot cosmetics.

57. To begin with, respondents misrepresented the ease with which beauty advisors could be recruited and retained; the volume of initial orders that could be realized; and the extent of repeat business. Contrary to respondents' representations, it was difficult to recruit beauty advisors and, for the relatively few recruited by most distributors or subdistributors, it was even more difficult to keep them working (CPF 242-47).

58. Then, using a gross misstatement of the retail market for

cosmetics—average family purchases of $17.82 per month (CX 11, p. 3), when the correct figure was $8.33 (Nelson 1581)—respondents persisted in presenting a totally false and misleading picture of the volume of sales and the profits that could be made by beauty advisors, by subdistributors, and by distributors (CPF 247-71).

59. The falsity of respondents' representations concerning anticipated retail sales is demonstrated not only by mathematical analysis of the market in the light of the representations made but also by Koscot's records and by the actual experience of those who testified in this proceeding.

60. Koscot painted a picture of 400,000 beauty advisors (CX 13 B), each earning over $8,000 a year in commissions on an annual volume (at retail prices) of $21,600 (CX 11, p. 4; Darling 1299-1300). This multiplies out to annual retail sales for Koscot of $8.6 billion, when total retail sales by all companies of the type of products sold by Koscot amounted to only $5.1 billion in 1970 (CX 21; Nelson 1573-79). Similarly, Koscot represented earnings of $50,000 a year by a distributor through sales made by his beauty advisors (CX 11, p. 9). This would necessitate retail sales of over $200,000 for each distributor. With 40,000 distributors (CX 13 B), Koscot's total retail sales would have to be $8.1 billion—again, far in excess of the total market for Koscot-type products. Even if we were to cut in half the represented sales of a distributor's retail organization, this would contemplate an 80 percent saturation of the market by Koscot.

61. However, it is not necessary to rely on mathematical theory. Analysis of Koscot's records shows that in Illinois, Kansas, and New Jersey, average or mean sales per distributor were only a fraction of the figures represented by Koscot. Whereas Koscot depicted a distributor's annual product sales as ranging from $50,000 to more than $200,000 (CX 11, pp. 8-9; Darling 1302-06), the actual annual average or mean sales of distributors in those States in 1971 were reported in hundreds of dollars, not thousands. The national distributor averages were $1125 in 1970, $1733 in 1971, and $938 in 1972. (CPF 270; see also CPF 267-69)

62. Distributors and subdistributors having the greatest volume of sales in New Jersey had retail sales ranging only from $8,507 to $24,384, while in Illinois, the range was from $8,160 to $22,760 (CPF 271).

63. In summary, the average distributor found it difficult to recruit beauty advisors and even more difficult to retain them. Contrary to Koscot's claims, he wound up with just a few, and even fewer stayed on the job for more than three months. For the most part, their sales were minimal, and most distributors wound up trying to sell directly themselves or relying on their wives or other family members (CX 609

A; CPF 246). The claimed volume of sales simply did not materialize, and, of course, neither did the promised profits (Jones 4979-81). Thus, Koscot's representations concerning the earnings of distributors, supervisors, and beauty advisors were vastly overstated, contrary to what might reasonably be expected, and without basis in fact (CPF 239-71).

64. The lack of success at retail by Koscot's distributors was amply demonstrated by Koscot's own books and records, but that did not deter respondents from continuing to make their grossly deceptive claims of huge retail sales with resulting huge profits for distributors, supervisors, and beauty advisers. As a matter of fact, at a meeting attended by Turner, Bunting, and Julian, the suggestion that Koscot literature be revised to reflect the actual retail sales experience of Koscot distributors was rejected by Turner because "the figures weren't high enough to arouse the enthusiasm that he wanted" (Jones 4892).

Status of Koscot

65. Koscot made grandiose claims concerning its status as a seller of cosmetics and its prospects of surpassing within a year or two Avon Products, Inc., as the leading seller of cosmetics—of becoming "Number One in '71" (CX 11, pp. 3, 20, 34-35; CX 3 A; Mann 4450; CPF 272-79).

66. Illustrative of misrepresentations concerning the status of Koscot and its operations is the following:

> KOSCOT was begun with an investment of $5,000. During its first month in operation, it sold $67,000 in retail kosmetics. One year later, its sales were exceeding one million dollars per month, and seven months after that the retail sales were in excess of four million dollars per month (CX 11, p. 20).

67. Contrary to such representations, there was no product for many months after Koscot was launched in August 1967, and total product revenues in 1968 totalled only $255,000 (CX 29 E). During the first year of its operations, Koscot was engaged almost exclusively in the sale of distributorships and devoted almost no effort to providing a basis for future retail sales. Koscot had a minuscule share of the market throughout its history—considerably less than one percent (Mann 4450-51, 4740; CPF 282), and it could not reasonably be expected to become the leading seller of cosmetics for at least ten years (Delaney 1057; Mann 4451, CPF 282-97).

Opportunity Meetings and GO-Tours

68. Distributorship sales were generally accomplished by high-

pressure sales methods applied at golden opportunity meetings and on golden opportunity tours (GO-Tours). The opportunity meetings were carefully contrived and scripted to create a highly-charged emotional atmosphere in which prospects were persuaded that Koscot offered a fantastic opportunity to "achieve financial success beyond [their] greatest expectations" (CX 11, p. 1). Koscot was presented as an opportunity for "ordinary men and women" to earn from $5,000 to $20,000 a month (CX 15, p. 13; CX 11, p. 5; CPF 70, 76, 82). Scripts were generally followed, but even the exaggerated figures that they contained would sometimes be further exaggerated by overly enthusiastic distributors (CPF 71-72).

69. Koscot literature outlined in detail various techniques designed to "close" the prospect (CX 15, pp. 40-51, 55-58, CPF 58, 80-81). Success stories of named individuals were frequently grossly exaggerated or almost entirely fabricated (CPF 83).

70. To create an impression that affiliation with Koscot was the pathway to success and wealth, hundred dollar bills and thousand dollar bills, as well as Koscot checks for large sums of money—some of them fakes—were ostentatiously displayed (Jones 4856, 4861-62; CPF 84).

71. Through its literature, and particularly through its opportunity meetings and GO-Tours, Koscot represented that there was a virtually unlimited potential to earn large sums of money in a relatively short time by affiliating with Koscot (CPF 67-70, 80). None of the witnesses could fully articulate the atmosphere of the opportunity meetings, but it is apparent that they were generally conducted in such a manner as to excite most of those attending and to induce them to make an emotional decision to invest in the program (CPF 62, 66). Opportunity meetings took on the charged atmosphere of an old-fashioned revival meeting, except that the god was Mammon. For example, there "was a 'money hum,' where the crowd would hum 'money' and then shout it loudly" (Jones 4909). Another widely-favored chant was "Get that check; get that check" (*ibid.*).

72. Anyone who had or could get the amount of the enrollment fee was a prospect (CPF 59). Under the extreme psychological and emotional pressures established at opportunity meetings and on GO-Tours, individuals were sold on the idea that anyone could succeed in the Koscot program. For those who had reservations about their qualifications, Koscot promised to provide the necessary training.[13]

73. One former Koscot official described the "extremely high pressure" tactics used by respondent Hobart Wilder to "get that check" from a prospect:

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[13] See *infra*, p. 35 [p. 1145, herein].

> things like grabbing people's lapels, pulling their ties off, hitting them on the back, yelling in their ear, * * * any bizarre, odd things that could change a person's state of consciousness so much that he would just unthinkingly invest in the company, on the spot sometimes (Jones 4908-09).

74. Opportunity meetings were supplemented periodically with GO-Tours. A GO-Tour was a trip by bus or plane to a Koscot facility, climaxed by an opportunity meeting. With a captive audience of distributors and prospective distributors, the GO-Tour presented an extended opportunity for Koscot to use all its high-pressure recruitment techniques. The technique was to "keep everyone enthused, vibrating. You had to keep them excited until you got the money * * *. This was the whole thing, constant sing, shout, holler, go, go, go." (Tell 3887-88; CPF 85-96)

One GO-Tour participant reported:

> When I got back home I didn't sleep for five nights after this, neither did my wife. The guy got us so jacked up, in thousands, I was ready to sell the Brooklyn Bridge to Eisenhower. (Vaz 2476)

Company Support of Retail Sales

75. The failure of distributors and their so-called sales organizations (subdistributors and beauty advisors) to achieve any substantial consumer sales was due in major part to Koscot's failure to make good on its representations as to company support of retail sales.[14] Respondents concede that the "promises attached to the sale of Koscot distributorships" included commitments (1) to provide product availability—initial inventory and a distribution system for the delivery of products; (2) to provide free training with respect to both recruitment and retail selling; and (3) to provide advertising (RPF 26). Respondents have put in issue the question whether or not Koscot lived up to those commitments. They have proposed numerous findings that purportedly "rebut much of the evidence complaint counsel sought to adduce" respecting product, training, and advertising, as well as other subjects (RB, p. 8). Respondents claim too much. Many of their proposed findings lack record support or are actually contrary to the record, and others are irrelevant to the issues presented. Each of these aspects of the Koscot operation will be examined in turn.

Product Availability

76. It is undisputed that ready availability of product is necessary for a successful retail operation. In recognition of this truism, Koscot promised ready availability of product to its distributors and their

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[14] See *infra*, p. 41 [pp. 1149-50, herein].

retail sales organizations. Respondents argue that they met their commitments with regard to provision of product and that therefore no fraud occurred with respect to this aspect of the Koscot marketing program. Respondents' proposed findings regarding product may be summarized as follows:

1. Koscot did better in providing product than did Holiday Magic (RPF 14, 16, 18, 31).

2. Events beyond the control of Koscot or Turner caused whatever shortages occurred (RPF 19, 21, 32, 34, 40).

3. Koscot and Turner actually desired to have product (RPF 23, 33, 39).

4. Koscot took actions to obtain product (RPF 27, 35-38).

5. Koscot provided an effective product distribution system (RPF 30).

6. Koscot provided adequate product availability from late 1968 on (RPF 40).

77. A comparison of the foregoing summary with complaint counsel's contentions (CRB, pp. 4-5) shows that the principal dispute relates to the question of product availability and distribution methods after 1968, with subsidiary questions relating to the reasons for the lack of product in 1967-1968 and Turner's intent respecting retail operations.

78. Respondents concede that product "was not readily available in 1967 and most of 1968" but they blame this situation on factors "beyond Koscot's control" and contend that by the end of 1968 "product was beginning to pour into Koscot and thereafter product was always plentiful" (RPF 40). Thus, the acknowledged fact is that for more than a year after Koscot was organized and began recruiting and making claims of product availability, neither Koscot nor any of its distributors had any product available for immediate sale (Edwards 1132-36, 1163; Mann 4349, 4639, 4648; Jones 4921-24, 4928-29, 4952-54; CXs 196 A, 198). It is by no means clear that this initial lack of product was due to factors beyond Koscot's control. And, in any event, such a circumstance does not justify the continuing misrepresentations as to product availability.

79. It is true that cosmetics worth millions of dollars were produced or purchased by Koscot thereafter (Jones 4952). The record establishes, however, that even after the first year, Koscot was consistently unable to fill immediately its distributors' orders with the products desired, particularly the most popular products. There were significant lags in obtaining product necessary to fill completely the orders of distributors. (CXs 275 A, 277 A, 609 A; Jones 4876-77, 4989; CPF 334-35)

80. Some of the production and distribution problems encountered

by Koscot, particularly in the first year or so, might be rationalized as simply the growing pains of a new company, complicated by mismanagement due to the lack of qualified personnel, as well as certain other factors. Actually, the factors allegedly beyond Koscot's control which respondents cite to excuse their initial failure to deliver product apply only to the first year of Koscot's operation. Respondents blame the incompetence of the personnel assigned to get product (RPF 19, 21, 32, 34).

81. This excuse must be assessed against the fact that no one with any experience in cosmetics was brought into the company in its early days and that officials were selected on the basis of their ability to sell distributorships rather than skill in managing a cosmetics sales operation (Delaney 1084-86, 1090, 4452, 4468; Mann 4792; Jones 4902-03, 4962). Thus, by selecting personnel unqualified to successfully obtain product, Koscot and Turner took actions whose predictable consequence was the shortages of product they experienced, particularly in the early history of Koscot.

82. Respondents also refer to a glass industry strike in 1968 (RPF 34), but the record fails to establish sufficient details concerning the date or the duration of the strike or its actual impact on Koscot operations (Delaney 1051-53; Edwards 1163; Mann 4639).

83. It is true, moreover, that efforts were ultimately made to develop good products and to employ some personnel knowledgeable in the field of cosmetics production and marketing. Nevertheless, this record establishes that product sales were constantly subordinated to recruitment. Koscot and its distributors were primarily in the business of selling distributorships (Westing 1214-16; Nelson 1726). The extent and nature of Koscot's product inventories demonstrated its expectation of limited product sales (Westing 1237-39).

84. That the principal activity of Koscot was the sale of distributorships is shown by financial records reflecting that during the period 1967-1972 distributorship sales accounted for the bulk of its revenues. The breakdown is as follows:

Period	*Total Revenues**	*Recruitment Revenues**	*% of Total*	*Product Revenues**	*% of Total*
1967	143	143	100%		
1968	2,932	2,676	91.3%	255	8.7%
1969	13,658	11,400	83.5%	1,474	10.8%
1970	22,716	13,200	58%	9,516	42%
1971	56,204	36,700	65%	19,504	35%
1971**	46,135	37,363	81%	8,772	19%
1972	19,485	11,807	60.6%	7,677	39.4%

* In thousands of dollars. Figures have been rounded.

** For 11 months ended June 30, 1971; see *infra*.

Notes: The figures are drawn primarily from CPF 464 and the sources there listed (by "Notice of Corrections"), except that the figures for the fiscal years 1970 and 1971 have been inserted from CXs 357 G-H and 358 F, I. Although the Koscot financial records from which this analysis was drawn are not models of clarity, and there are a few discrepancies, they appear to be the best information available. Some explanation is required as to methodology.

CX 29 E, a Koscot report to the Commission, is the source for the 1967 and 1968 figures. For the fiscal year ended July 31, 1969, the total revenues figure is found at CX 26 F; the recruitment figure at CX 26 G. For fiscal 1969, product revenues were derived by subtracting the recruitment revenues from total revenues and then adjusting that figure by subtracting revenues for sales aides, newspaper income, and trucking, as shown on CX 26 Q. Here there are two discrepancies: (1) CX 26 G cites distributor revenues of $11.4 million, "of which $9,816,000 is included in revenue;" and (2) CX 26 Q shows "Cosmetic sales" of $9.7 million. If the $9.8 million figure were used instead of $11.4 million, the percentage figures would be 71 percent and 29 percent respectively. As a further complication, CX 29 E presents another set of figures, showing "gross sales" of $13.03 million, distributorship revenues of $8.9 million, and product revenues of $4 million. These figures would result in percentages of 69 percent and 31 percent respectively.

The 1970 figures, shown in CPF 464 as not available, were derived from CX 357 G-H for the fiscal year ended July 31, 1970. Product revenues were obtained by subtracting the recruitment revenues from total revenues.

The first set of 1971 figures (for the fiscal year ended July 31, 1971) was similarly derived from CX 358 I (but see 358 F). The second set of 1971 figures, taken from CPF 464, is for the eleven months ended June 30, 1971. The total revenues figure was arrived at by adding "Receipts from New Contracts" (CX 168 B) to "Receipts—Product Sales" (CX 168 B), except that this product figure has been adjusted to reflect net prices by subtracting the "Territory Override." (Since the year-to-date override entry on CX 168 B is illegible, it was arrived at by using the year-to-date figure on CX 167 D and adding to it the June 1971 figure shown on CX 168 B.) The substantial variance between the 1971 figures has not been explained. Presumably, complaint counsel considered CX 168 more reliable than CX 358.

The figures for the fiscal year ended July 31, 1972, were derived from CX 180 D. Recruitment revenues represent the sum of the "New contracts" figure plus "GO Tour" revenue. The product revenue figures represents the "Product sales" figure from which the "Territory override" was subtracted to reflect net prices. (See also Westing 1214-16 and Nelson 1727-38.)

85. Whatever the shortcomings of the data in ¶ 84, there nevertheless is no doubt that during the period covered, distributorship sales accounted for most of Koscot's revenues (Edwards 1173; Westing 1216; Nelson 1728).[14]a

86. Respondents also plead good intentions on the part of Turner and his associates (RPF 23, 33, 39). The evidence tends to show that Turner initially wanted to establish a successful company to sell cosmetics at retail, but there are also indications that this desire may have changed in the face of the constant need of the Turner empire for more cash, which could be more quickly realized through recruiting activities than through cosmetic sales (Delaney 1057, 1089-91; Edwards 1152-56, 1160-61, 1173; Mann 4564-65, 4589-91, 4650-55, 4670-75, 4695-99, 4794-95, 4802-05; Jones 4875, 4926-36, 4949-50, 4990-94, 4998, 5001-03).

87. Regardless of respondents' intentions, the fact remains that from the inception of Koscot, there were serious misrepresentations regarding retail operations—(1) the availability of product; (2) the extent and nature of supporting advertising; (3) the training offered with respect to retail operations; as well as (4) the likelihood of success and the amount of income to be realized through retailing of Koscot products (*supra*). And these were knowing misrepresentations.

88. Until early 1969, the only method used by Koscot to distribute its products was by direct factory shipment to distributors. All initial inventories, less out-of-stock items, were shipped direct to the distributors. These initial inventories consisted of an assortment of products chosen by Koscot. All reorders for product had to be made in case lots direct from Koscot (CPF 315).

89. Beginning in March 1969, distributors, with Koscot's advice and assistance, began establishing local cooperative warehouses ("co-ops") in which their inventories were stored. The idea was that such co-ops would provide immediate product availability on a local basis by establishing a larger inventory assortment than would have been available to a distributor under the direct factory shipment method. Although distributors could continue to get direct factory shipment, they were strongly discouraged from doing so and encouraged, instead, to join in the co-op warehouse (CPF 316-17).

90. To establish a co-op, existing distributors put in the inventory which they already possessed, while new distributors either received their initial inventory direct from Koscot and placed it in the co-op or Koscot simply credited the co-op account with the amount of product due a new distributor (CPF 318).

91. Distributors were required to maintain a minimum inventory account at the co-op. A distributor could withdraw products without

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[14]a From August 1967 until July 1972, Koscot netted $14.1 million after paying recruiting fees (CPF 226-228).

additional charge only so long as his inventory value exceeded this minimum. The co-ops soon encountered difficulties in re-stocking (CPF 319-20).

92. Within a few months, Koscot acquired control of the co-ops and their inventory and converted them to "satellite warehouses" and also opened additional satellites. By June 1970, there were 350 satellite warehouses in operation (CPF 321) Koscot obtained control of existing inventories of the co-ops and assumed their liability to distributors for their inventory accounts. As new distributors were recruited, Koscot established for them an inventory account at the nearest satellite. There were restrictions on withdrawal of inventory. Distributors had to maintain a minimum inventory value at the satellite and paid immediately for all product withdrawn once this minimum was reached (CPF 322-23).

93. In 1971, Koscot began closing down the local satellites and replaced them with five regional mail-order satellites. These mail-order satellites assumed the obligations of the local satellites and were operated in the same manner as the local satellites with respect to the crediting of distributor inventory and the withdrawal of product by distributors or their sales organization. (CPF 325-27). The mail-order satellites disadvantaged, rather than helped, retail sales (CPF 344). There are indications that the mail-order satellites were later closed and that all orders thereafter were shipped from Orlando, Fla. (Bennett 3709).

94. Thus, Koscot's successive modifications of its distribution system, so that a distributor's initial inventory was not physically delivered to him, meant that Koscot was receiving payment for product that it did not actually deliver. As a matter of fact, between July 1969 and July 1973, Koscot had less finished goods inventory on hand than the amount for which it already had been paid by its distributors. During this period, Koscot steadily reduced the amount of finished goods that it had on hand, in comparison to the initial inventories for which it had been paid by distributors but had not furnished. The table prepared by complaint counsel from respondents' own records tells the story as follows:

Fiscal Year	*Koscot's Finished Goods Inventory*	*Cost of Product Due Distributors*	*Percentage Relationship**
1969	$995,000	$1,155,000	86
1970	2,579,000	4,291,000	60
1971	5,557,000	10,362,000	54
1972	4,793,592	9,693,000	49
1973	1,400,000	9,693,000**	14.4

* Finished inventory as a percentage of product due distributors.

** Assuming no change from 1972.

Sources: CXs 26 E, H; 357 F, I; 358 E, K; 758 A-B; RX 12 Z-71; Nelson 1713-15; CPF 336-37.

95. Such a practice allowed funds paid for product to be diverted to other uses (Westing 1237-39; Darling 1459-60).

96. The weakness in respondents' defense is pointed up by the fact that they are driven to claim that Koscot did better in providing product than did Turner's "alma mater," Holiday Magic (RPF 14, 16, 18, 31). Complaint counsel concede that Koscot supplied a better and more extensive line of cosmetics than did Holiday Magic. But this is irrelevant, as is the disputed claim of respondents that Koscot provided its distributors a greater availability of product than Holiday Magic. Even if we accept respondents' contention that Holiday Magic had "little product" and was "not interested in the retail cosmetics business" (RPF 31), this would merely show that Koscot, in its failure to provide what it promised, may not have been as derelict as another firm that the Commission has found to have engaged in a fraudulent operation (*Holiday Magic, Inc., supra*).

97. As a matter of fact, the Koscot plan was adopted from the Holiday Magic plan. Turner quit Holiday Magic and established Koscot when Holiday Magic curtailed the opportunity to earn large commissions on recruiting by imposing certain requirements for retail sales. Koscot's manuals were based on those of Holiday Magic, and Turner's instructions were to out-magic Holiday Magic by raising the ante on the earnings claims (Jones 4851-53, 4860-61). Although there is some testimony that does tend to introduce some ameliorating factors and to suggest some "honorable parts of Koscot's history" different from the Holiday Magic scheme" (RB, p. 8), the undersigned has not made a detailed comparative study of the two plans, and he sees no occasion to do so. To predicate a defense on the theory that Koscot's offenses were not as bad as those of a similar operation (Holiday Magic) already found to have been fraudulent is to confess the bankruptcy of the defense. Degrees of fraud are somewhat akin to degrees of pregnancy.

98. However anomalous it may seem for Koscot to operate in a manner apparently designed to discourage consumer sales of its products, that was the effect of its supply and distribution policies and practices (CPF 338-41, 344; see *infra*, p. 41 [p.1149, herein]). Whatever the cause of its failure to provide ready availability of product for resale, Koscot plainly did not make good on its representations in that regard.

Training

99. Because of the lure of the money to be made through

recruitment, many Koscot distributors sold distributorships to others whom they knew or believed to be unqualified (Hatcher 3115; Brown 3390-91; Tell 3883-86; Fletcher 3977). So long as it was possible to "get that check," anybody with a "pulse and two legs" (Vaz 2465) or "anyone that was breathing" (Tell 3883) was a prospect by Koscot standards (Mann 4475-76; CPF 97-98, 100, 104).

100. Many persons who purchased Koscot distributorships were unqualified to operate a cosmetics selling business by reason of their age, lack of education and training, or lack of business, administrative, or sales experience. Koscot's recruitment methods tended to result in the enrollment of persons without any special qualifications, including frequently the credulous, who in turn tended to recruit others with similar profiles. By reason of their limited education and modest backgrounds, such persons tended to have a limited degree of sophistication in financial and business matters. (CPF 100, 103, 106-09, 111, 304-06, 310-11) They were particularly vulnerable to the misrepresentations and the high-pressure enrollment techniques used at opportunity meetings and on GO-Tours (*supra*, p. 26 [p.1137, herein]).

101. Consistent with the Turner philosophy, respondents represented that anyone could achieve success by becoming a seller of Koscot cosmetics-that no special qualifications or experience were necessary (CX 11, pp. 5, 34; CPF 100, 305-06. To those who expressed doubts on this score, Koscot promised to provide training that would overcome any such shortcomings (CPF 307, 345-47, 349). This record demonstrates that Koscot's representations of this nature were false and misleading (CPF 310-11, 350-354a).

102. Koscot deliberately chose a method of recruitment that enrolled distributors who, for the most part, did not know how to set up and manage a wholesale or retail business and then, to compound the offense, used the promise of its training program to overcome objections by potential distributors that they were not qualified (CPF 104-11, 348-49).

103. Because of certain terminology used in the findings that follow, it is important to understand that in the operation of the Koscot plan, the sale of distributorships for compensation was known as "wholesale," while the sale of cosmetics, whether at wholesale or at retail, was known as "retail." In theory, and to a very limited extent in practice, a Koscot distributor performed a traditional wholesale function in supplying products to others (supervisors (or subdistributors) and beauty advisors) for eventual sale at retail to consumers. To avoid the possible confusion that may result in referring to the sale of distributorships as "wholesale," the undersigned has usually referred to the sale of distributorships in those words or by the use of the terms

"recruitment" or "recruiting" (see CPF 128). However, in this section, "wholesale training" refers to salesmanship and motivation training designed to teach distributors to recruit others into the Koscot program. As used by counsel and witnesses, "retail training" primarily means business training respecting the establishment and operation of a distributorship for the sale of cosmetics, etc., although the term was also loosely used sometimes to include the training of beauty advisors for retail selling. To avoid confusion, the term "business training" will be used herein except when quoting.

104. Respondents do not dispute that Koscot promised its distributors "free training—both wholesale and retail"[15] (RPF 26). In contending that respondents met this commitment, defense counsel have proposed the following findings:

> Glenn Turner created Koscot with the idea that he would get better product and training to his distributors than Ben Patrick gave his with Holiday Magic. * * * The training was superior. (RPF 14)
>
> Glenn Turner gave Miss Jeri Jacobus 5 percent of Koscot to be in charge of retail training. She was knowledgeable and her judgment was valued. * * * Miss Jacobus did provide training programs for the beauty advisors. In excess of $20,000 per month was spent on such training alone as early as 1968. (RPF 15) Jeri Jacobus provided free, expert training in the early days for Koscot retailers * * * and thereafter, Jerry McLaughlin headed a substantial (perhaps a 100) husband and wife retail training teams. * * * In excess of $35,000 per month was spent by Koscot on salaries and travel expenses for the retail training teams while Mann was president of Koscot. * * * In 1968, Koscot had spent in excess of $20,000 per month for training while Mr. Edwards was president. (RPF 28)

105. The difficulty with such proposed findings is that they fail to meet the issues posed by complaint counsel's proposed findings (CPF 345-354a). And, although the record citations tend to support respondents' proposed findings on the general subject of training, the testimony relied on is principally concerned with "wholesale" training and training of beauty advisors. Complaint counsel concede that respondents provided free training, both "wholesale and retail," and that such training was superior to that offered by Holiday Magic (CRB, pp. 14-15). Complaint counsel also concede that respondents spent considerable sums on training Koscot distributors how to recruit and that this phase of the training was effective (*ibid.*). However, the allegation is that Koscot falsely promised business training—to teach its distributors and subdistributors how to set up and manage a cosmetics business—a wholesale-retail operation. Respondents' proposed findings simply fail to meet the record evidence in support of this allegation. The testimony relied on by respondents relates almost exclusively to "wholesale" training and to the training of beauty

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[15] See ¶ 103, *supra*.

advisors. At most, the cited testimony (Edwards 1157; Mann 4631-34; Jones 4918-19) simply demonstrates that there was some "retail" training and that this involved the expenditure of Koscot funds (see Mann 4452, 4470, 4473-74, 4773-80; Jones 4952-53, 4982, 4997). The figures cited by respondents in RPF 15 and 28 are not figures for business training but cover wholesale training and beauty advisor training (Edwards 1157; Mann 4635, 4684, 4773-77). As a matter of fact, although Koscot represented that $300 of each distributorship fee went for training, company records indicate that out of $2 million earmarked for training in the fiscal year ended July 31, 1969, Koscot spent only $1.4 million (CXs 13 D-E, 26 Q).

106. The business training that was provided did not qualify distributors to operate a cosmetics business (CPF 353). No training in record-keeping or cost accounting was provided (CPF 353a), although such subject matter was necessary to enable distributors to operate any business successfully (CPF 348).

107. Although Koscot recognized the need for business training and promised to provide it, it actually discouraged distributors from taking it, so that they could be trained instead in recruitment (CPF 353). Frequently, Koscot's so-called business training sessions were devoted in large part to "wholesale" and to motivational aspects or to product description and application and the recruitment, control, and maintenance of beauty advisors (CPF 350, 353b).

108. The former Koscot officials who, according to respondents (RB, p. 17), were "highly complimentary" of the retail training program failed to support the claim of effective business training for distributors as each testified that he was unfamiliar with the nature of such training (Edwards 1174; Mann 4780; Jones 4982, 4997). Even so, one of them, a former president of Koscot, testified that in 1971, the retail training program for distributors "needed a tremendous amount of improvement" (Mann 4473).

109. In summary, Koscot promised to teach its distributors how to set up and manage a business, and it did not do so, regardless of how much money it may have spent.

Advertising

110. Respondents have offered a simplistic defense to the proposed findings of complaint counsel on the subject of advertising. They contend that Koscot promised to spend $75 per distributor for advertising and that Koscot spent from 1968 to 1972, an amount greater than that commitment (RPF 26, 29). These proposed findings of respondents must be rejected as irrelevant and as contrary to the record. First, although there was apparently a contractual commitment

in Koscot's early days to spend $75 per distributor on advertising (Edwards 1143, 1159; Mann 4635-37), Koscot's representations as to advertising were far broader than that narrow commitment. The issue is not whether the contractual commitment was met, but whether Koscot provided the advertising it promised in its manuals, in opportunity meetings, and otherwise. But, second, even if we were to adopt respondents' test, the record fails to support the claim that Koscot spent on advertising $2.25 million between 1968 and 1972. Respondents arrived at this figure by multiplying the supposed number of Koscot distributors (30,000) by the $75 figure and then asking a former president of Koscot whether that amount was indeed spent on advertising. It is true that an affirmative answer was given (Mann 4636), but it is entitled to scant weight when considered in the light of the whole record, including Koscot's own records.

111. Mann's testimony does not demonstrate any basis for his knowing Koscot's advertising expenditures for the period 1968-72, or even having an informed opinion. Moreover, some of his other answers materially detract from his estimate (Tr. 4452-67, 4628-30, 4664-68, and 4672-73). Mann testified that advertising expenditures while he was international president of Koscot totalled $450,000 for October 1970-February 1971 and that he knew of no other period where such an amount was spent for advertising (Tr. 4460-61). He contrasted it with an advertising budget of $60,000 for the last six months of 1971 (Tr. 4461; CXs 570-72).

112. Above and beyond its contractual commitment to spend on advertising $75 per distributor, Koscot promised that it would be spending millions of dollars on advertising within a year or two to create a consumer demand and to make Koscot the leading firm in the cosmetics industry ("No. 1 in '71"). Koscot promised to place effective advertising on network television and radio and in magazines and newspapers (CPF 355-56, 369).

113. Koscot's promises concerning advertising demonstrated recognition by its officials, as well as by its distributors, that extensive advertising would be necessary for a new firm selling cosmetics door-to-door in competition with one or more firms already firmly entrenched in the industry (Mann 4451-52, 4751-52; CPF 355e, 357-59). Yet Koscot's advertising effort was far overshadowed by that of the industry leader, Avon Products, Inc. (CPF 364).

114. Koscot announced its intention "to reach the greatest heights in product recognition—to become the *one* product everyone thinks of when kosmetics are mentioned!" This was said to be a "fantastic idea" but "one that is fast becoming a reality!" (CX 11, p. 3).

115. The "reality" was that more than once Turner disapproved of

advertising expenditures to reach such a goal (Edwards 1141-42; Jones 4875). Jeri Jacobus favored "massive advertising to get product recognition" (Jones 4929-30), but Turner "always said that most of the money was coming out of the wholesale[16] side, and he thought that most of the money should be devoted to that end" (Jones 4875).

116. Thus, the substantial advertising promised by Koscot did not materialize. Advertising was "minimal" in 1968 (Edwards 1140). Later, there were periods when nothing was spent on advertising and other periods when a "good bit" was spent (Edwards 1143-44, 1159-60; Jones 4929-30, 4953-54). Such advertising as Koscot did sponsor was too little and too late, and the glowing promises regarding product recognition were never fulfilled (CPF 369, 371-72). There were some limited local TV commercials, many in other than prime time, and a few magazine and newspaper advertisements (CPF 365, 367).

117. Contrary to respondents' dubious estimate that at least $2.2 million was spent for advertising[17] between 1968 and 1972 (RPF 29), the fact is that only about half of this amount was spent for advertising. As developed from Koscot's own records, its advertising expenditures were as follows:

Year	*Total Amount*	*Media*	*Production*
1967- 1968	$ 24,446*		
1969	$110,512	$ 99,871	$10,641
1970	$311,302	$287,511	$23,791
1971	$317,263	$273,246	$44,017
1972	$370,459	$332,993	$37,466
Total	$1,133,982	$993,621	$115,915

* Includes some expenditures made through 3/14/69.

From CPF 360. Sources: CXs 625, 651, 652, 699 A-B, 743 A-B, 756 A-K (see Tr. 4339-41).

118. Some of these advertising expenditures were forced upon Koscot in the light of legal proceedings instituted or threatened. For example, as a result of negotiations with the attorney general of New York, $100,000 was spent in a single campaign in that State (Mann 4465). Although Koscot designated certain funds for advertising in its financial records, actual advertising expenditures were substantially below the funds so earmarked (Edwards 1143, 1159-60; CPF 362). As a matter of fact, as of July 31, 1972, Koscot had a book entry reflecting $1,876,989 designated for advertising expenses but unspent (CX 758 B).

119. Despite the conceded quality of Koscot cosmetics, they remained largely unknown to the consuming public, and lack of

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[16] See ¶ 103, *supra*.

[17] "Sales aids" were included in respondents' estimate, but Koscot *sold* these items to its distributors at a profit (CPF 378).

advertising was a significant factor leading to this negative result. Koscot failed to make good on its representations concerning the nature and scope of its advertising.

D. "Wholesale v. Retail"[18]

120. Koscot's emphasis on the "get-rich-quick" aspect of its endless chain recruitment had predictable results. Koscot raked in millions of dollars, and a few early birds also realized huge profits before the bubble burst. Meanwhile, the sale of "kosmetics" to the public languished, and Koscot's representations about this phase of its business turned out to be just as false and misleading as those concerning recruiting. Koscot's initial glowing promises about the retailing of cosmetics were at best highly dubious. But the preoccupation of Turner and his cohorts with the "big money" to be made through recruitment virtually ensured the failure of the retail operation.

121. That is one of the saddest and most ironical aspects of this case. There is evidence indicating that Koscot did indeed have a potential for success as a seller of cosmetics. As a matter of fact, now that it is out of the business of selling distributorships, Koscot may yet emerge as a viable cosmetics company. According to most of the distributors and subdistributors who testified, the Koscot products had merit and might have achieved considerable consumer acceptance with proper promotion and advertising. Some of the company officials saw this potential, particularly Delaney, Mann and Julian, and many distributors made prodigious efforts to succeed in the retail sale of the product. However, the steps necessary for success in the sale of cosmetics were almost invariably subordinated to the promotion of the sale of distributorships. Company officials who tried to change the emphasis to retailing either quit in disgust or were forced out of the company or into subordinate positions.

122. The Koscot marketing program was structured so as to maximize recruitment earnings even at the expense of retail earnings. Distributors were encouraged to devote their energies to recruiting by virtue of the apparent opportunity to make big money fast. No real effort was made to obtain distributors interested in or qualified for the operation of a retail business. The incentives in the Koscot marketing program were so structured that recruitment provided the possibility of large immediate rewards. In contrast, the work of building a retail sales organization was very difficult, initial rewards were small, and it took time to develop and build a retail sales organization. Koscot's former president recognized the difficulty of getting distributors to

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[18] See ¶ 103, *supra*.

concentrate their efforts on retail when it appeared that the rewards from recruiting were faster and more substantial (Mann 4473).

123. By encouraging the recruitment of any person who had or who could get sufficient money to buy into the program, regardless of their qualifications or their location in reference to other distributors, the Koscot program virtually foredoomed the retail effort to failure.

124. The result was an inadequate and unbalanced distribution network, with too many distributors serving certain areas and too few serving other areas. Distributors were not evenly distributed in any State in proportion to the relative population of the various marketing areas. Instead, distributors were concentrated in certain marketing areas in numbers greatly disproportionate to the population of those marketing areas. (CXs 537-39)

125. One of complaint counsel's expert witnesses expressed it this way:

> If a manufacturer selects his own distributors, he will look at them very hard headedly in terms of how knowledgeable they are, how financially secure they are, how experienced they are, and so on. He also will strive to put together an organization that covers the territory of the country that he wants to cultivate in an even and balanced manner.
>
> If an organization is put together by other distributors whose primary inducement is the profit they can make from recruiting, they are likely to pay primary attention to whether the prospect can pay the investment. That would be the primary concern because that is going to be the source of their profit.
>
> Secondly, they will tend to recruit from among the people who[m] they have access to, which means that the proximity will be an important consideration and the consequences of this is likely to be an over-development of an organization in certain territories and a scarcity of distributors in other territories. (Westing 1210-11.)

126. The rationalization that the emphasis on recruitment was designed to establish a distribution network as quickly as possible (Mann 4802-05; Jones 4936; CX 13 B) will not withstand analysis. Whether the quota was 30,000 distributors or 40,000 distributors, this was an excessive number for the amount of retail business that was being done or that could reasonably be expected (CPF 385-87, 389-92). Although perhaps not conclusive, a comparison with Avon as a successful company in the field tends to show that there was no necessity for the number of distributors being sought by Koscot other than as a means of realizing a rapid and substantial cash intake. In 1969, Avon had 1,566 district managers to recruit and supervise its retail sales representatives. By 1971, this number had increased to 1,841 district managers, pursuant to the Avon formula of one district manager to 100,000 population (Speer 2121-22).

127. The compensation of Koscot's State directors and their assistants was "based on receipts from new contracts" (CX 164 E).

Understandably, this method of compensation provided an incentive for such officials to favor recruitment over retail. And the record demonstrates their natural reaction to such an incentive: The Illinois State director told a scheduled "business meeting" of distributors: "I don't care about retail. I am here to sell wholesale."[19] (Gittings 3286; CPF 417).

128. Despite his ostensible interest in building a cosmetics company, Turner devoted most of his time to recruitment activity and problems; he promoted officials and employees who emphasized the recruitment aspect of Koscot, to the detriment of those who tried to build up the cosmetics-selling end of the business (CPF 419-26, 431-34, 438-447). At a time when recruiting had to be halted in several States because of legal restrictions or because the so-called quota had been reached, Turner was urged to make a tour designed to encourage retail activity, but he rejected this proposal and elected to devote his time to the promotion of Dare-To-Be-Great as a substitute pyramid plan (CPF 435-37).

129. To the extent that the application of quota limitations or the institution or threat of legal action by State authorities raised questions about the continued sale of Koscot distributorships, distributors were constantly reassured that "there will always be wholesale"[20] —that Turner would create new companies in which distributorships could be sold (CPF 192-193). For example, Turner established in 1969, a corporation called Dare To Be Great, Inc. ("DTBG") which used a marketing plan similar to that of Koscot except that the "product" comprised texts and manuals presenting an attitude course. Koscot distributors were authorized to sell distributorships in DTBG. The purpose was made clear:

> Glenn Turner said they will try to stop me with Koscot but we will just go on with Dare to be Great (Palamara 2572).

Turner "decided that we could start many, many pyramid companies and we could start them faster than the Government could shut us down. And, he stated that he * * * intended to be the pyramid king of the world." (Jones 4896). Several other companies using the same type of marketing program were also established by Turner (CPF 192-216).

130. Dissension developed within Koscot, not only in its Orlando headquarters, but also in the field, between those who wanted to continue to reap the harvest of distributorship sales through "wholesaling" (see ¶ 103, *supra*) and those who wanted Koscot to sell cosmetics. It is not necessary for the purposes of this proceeding to

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[19] See ¶ 103, *supra*.

[20] See § 103, *supra*.

detail the infighting that ensued. It is sufficient to note that in mid-1971 the "wholesalers," led by Wilder, prevailed with Turner's blessing, and "retailing" was further deemphasized (CPF 433-447, 454-61). However, Glenn Turner's "impossible dream" ended in July 1972, when Koscot petitioned for reorganization under the Federal Bankruptcy Act (RX 12). Koscot finally became a marketer of cosmetics instead of the promoter of a fraudulent scheme.

E. Liability of Individual Respondents

131. Although the previous findings (¶¶ 7-26) are sufficient to demonstrate the need for a cease-and-desist order against the individual respondents (except Delaney and Jones), brief additional findings may be desirable with respect to the order of restitution being entered against Turner, Bunting and Wilder. (Obviously, any restitution order should be directed to the corporate respondents.)

132. Turner was the alter ego of the corporate respondents and the "architect and prime mover"[21] of Koscot's marketing scheme. He bears primary responsibility for the unlawful practices herein found. Additionally, he was the primary beneficiary of the income realized from Koscot's operations, manipulating and using corporate funds as his own. (¶¶ 7-9, *supra*)

133. It is possible, though almost incredible, that at the outset, Turner may have been sincere in his intentions and may have believed the representations made by him and by Koscot. Although he may have been shielded, or may have shielded himself, from some of the harsh realities of what was happening to Koscot's distributors, subdistributors, and beauty advisors (Jones 4903-04, 4968-70, 4986, 4989-94, 5002-03) he is nevertheless chargeable with knowledge that the Koscot operation was based on deception and fraud. If he did not know—and the finding here is to the contrary—he should have known. Although defense counsel pleads that Koscot's operation was superior to that of Holiday Magic, the fact is that there exists a deadly parallel between the two (¶ 97, *supra*). Turner professed to want to establish a successful cosmetics operation, but when there had to be a choice between "retailing" of cosmetics and "wholesaling" ("head-hunting" for a profit), he opted to invest time, effort, and funds in the latter. This he did with full knowledge of the fraud and deceit involved.

134. Despite exhortations that "honesty" was necessary for success in Koscot (CX 10, p. 2; CX 88), Turner operated on the theory that "it was okay to lie as long as it was for the benefit of the person that you were lying to" (Jones 4858). Turner's idea of benefitting people was for

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[21] *Holiday Magic, Inc., supra*, at 24.

them "to give up everything they had and go * * * deeply in debt, because he felt like if they had everything to lose they would make it" (Jones 4914).

135. The record is replete with stories of the adverse impact on the finances and the careers of those who took that advice and invested in Koscot. Many borrowed the money,[22] and others quit their jobs to work full time as Koscot distributors. In many instances, net losses were substantial, and some distributors wound up in debt even to the point of bankruptcy or in financial circumstances requiring them to sell their homes (CPF 381-83).

136. Bunting and Wilder each occupied the position of Koscot's chief operations officer for a significant period of time (¶¶ 11, 16, *supra*). Although Bunting's salary was less than one-third of Wilder's (CXs 307, 309, 322), he continued to reap rich financial rewards from Koscot's operations even after he resigned (¶¶ 12-15, *supra*). Wilder not only was high-salaried but also received a substantial loan from Koscot (¶ 17, *supra*). The full extent of their enrichment is not shown by this record, but enough is known to warrant a restitution order against them.

137. There is no question that Bunting and Wilder knowingly and actively directed and participated in the corporate activities. They were familiar with the nature of Koscot's marketing plan, the representations made, and the falsity of such representations. Each had operated as a Koscot distributor, and each had been engaged in field operations (primarily the sale of distributorships) as paid employees before becoming corporate officers. As corporate officers, each participated in opportunity meetings and GO-Tours. Each was aware of the failure of Koscot to deliver the goods (literally and figuratively) to its distributors. Each was actively engaged in day-to-day operations and had available to them computer print-outs showing the facts that contradicted the misrepresentations being made (CPF 538).

138. Under their leadership, high-pressure recruitment methods were intensified through the increasing use of GO-Tours; the method of product distribution was successively modified for the benefit of Koscot and to the detriment of the retail operation; and advertising was not delivered as promised. In addition, plans were made and carried out to avoid the so-called quota restrictions on the continued recruitment of distributors (CPF 539).

139. Wilder occupied a special niche. Next to Turner, he was the chief promoter of recruitment activities. He was ruthless in seeking to "get that check;" he "would do anything to get money" (Jones 4993). He

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[22] Koscot encouraged prospective distributors to borrow the money if necessary and furnished a blueprint that in effect encouraged prospects to mislead a bank in applying for such a loan (CX 96 A-D; CPF 105).

and Turner were the prime movers in subordinating cosmetic sales to recruitment activities. (CPF 552-57)

140. In recommending that Julian and Mann be excepted from the restitution order, complaint counsel state:

> "These two individuals occupied lesser positions of authority in the direction and implementation of the Koscot marketing plan and received no large financial rewards as a result of their position[s] as officers" of Koscot and Turner Enterprises (CB, p. 62).

The undersigned concurs. Despite the identity of some of the corporate positions held by Bunting, Wilder, Julian, and Mann, the record supports a finding that Bunting and Wilder were more dominant figures and played more significant roles in the operations of the corporate respondents. Moreover, the efforts of Mann and Julian to convert Koscot into a legitimate seller of cosmetics may have been among the factors that led complaint counsel to recommend that these respondents be omitted from that part of the order requiring restitution. Finally, Mann's uncontradicted testimony was that, despite a good income from Koscot, he was now "broke" and without hidden assets (¶ 22, *supra*).

III. *Restraints of Trade*

A. Price Fixing and Other Restrictive Practices

141. In addition to its deceptive nature, the Koscot marketing plan also involved unlawful restraints of trade and unlawful price discriminations. As to these matters, the undersigned finds as follows:

142. Koscot distributors entered into contracts with Koscot whereby they agreed to abide by certain published rules and regulations, including provisions that the distributors would sell only at Koscot's suggested retail prices. These agreements, as reinforced by various written and oral representations made by Koscot, constituted contracts, agreements, combinations, and understandings to fix prices. (CPF 482-87) It is so well established that such fixing of prices is illegal per se[23] that the customary case citations are omitted (but see CB, pp. 21-22).

143. Through other provisions in its rules and regulations which were similarly agreed to by Koscot distributors, Koscot established and maintained contracts, agreements, combinations and understandings which (1) provided for exclusive dealing in that a distributor might purchase merchandise only from Koscot or from his sponsor; (2) limited the customers or categories of customers to whom distributors might sell Koscot products; and (3) required Koscot's approval for consign-

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[23] Although respondents did not rely on any exemption provided by so-called Fair Trade laws in certain States, the order provides recognition for any such exemptions.

ment selling. As a means of enforcing these provisions, Koscot required distributors to maintain a record of customers and to make it available to Koscot (CPF 482-83, 488-93; CB, pp. 23-26).

144. On the authority of *Holiday Magic, Inc.*, (slip opinion, pp. 32-35 [*supra*, at pp. 1052-1055]), it is found that these restrictions are unreasonable and anti-competitive.[24] Restraints on the right of a distributor to resell products he has purchased are illegal per se, *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 382 (1967).

B. Price Discrimination

145. The facts as to the price discrimination charge (complaint, Count III) may be briefly stated.

(a) Koscot discriminated in price between competing purchasers of its products. To distributors Koscot sold at 65 percent off the retail price, while to supervisors or subdistributors (hereinafter "subdistributors") it sold at 55 percent off retail price.[25] (¶ 36, *supra*) Since both distributors and subdistributors sold to beauty advisors at 40 percent off the retail price, the distributor's gross margin on such sales was 25 percent, while that of a subdistributor on such sales was 15 percent. On direct sales to consumers, distributors enjoyed a gross margin 10 percentage points above that of subdistributors.

(b) The products involved were of like grade and quality.

(c) Distributors and subdistributors performed the same function in the sale and distribution of Koscot products. Both classes of customers purchased directly from Koscot and resold to consumers, either directly or through beauty advisors.

(d) There was competition between distributors and subdistributors, not only in direct sales to consumers, but also in the recruitment of beauty advisors and in sales to beauty advisors.

(e) There is evidence of actual or potential injury to competition as a result of the discriminations. Irrespective of such evidence, however, the magnitude of the discrimination was such as to warrant an inference that the effect may be to substantially lessen competition.

(f) There was no showing by Koscot that the price discriminations were justified on any of the grounds specified by the applicable statute (CPF 494-508).

146. Accordingly, such discriminations in price were in violation of Section 2(a) of the Clayton Act, as amended.

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[24] Unlike the respondents in *Holiday Magic*, respondents here have not sought to offer any business justification for these restrictions.

[25] The fact that during part of the relevant time period, these discounts were actually reduced by virtue of the imposition of a 5 percent bookkeeping fee applicable to both classes of customers is immaterial (CPF 503-505).

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of all the respondents except Terrell Jones.

2. The complaint states a cause of action, and this proceeding is in the public interest.

3. The Koscot program was organized and operated in such a manner that the realization of profit by any participant was predicated upon the exploitation of others, most of whom had virtually no chance of receiving a return on their investment and all of whom had been induced to participate by inherent misrepresentations as to potential earnings. Therefore, the Koscot marketing plan was false, misleading, and deceptive, and its use by respondents constituted an unfair and deceptive act and practice and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

4. In the course of promoting, selling, and offering for sale distributorships, respondents made and caused to be made various statements and representations which were false, misleading, and deceptive, and which respondents knew to be false, misleading, and deceptive. Many persons, in reliance upon such statements and representations, purchased respondents' distributorships, together with cosmetics and related products, and suffered substantial injury thereby. Therefore, the acts and practices of respondents constituted false, misleading and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act. In addition, such acts and practices by respondents constituted fraud.

5. The use by respondents of such false, misleading and deceptive statements, representations, and practices, as herein found, has had the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that such statements and representations were true and into the investment of substantial sums of money to participate in respondents' marketing program and the purchase of substantial quantities of respondents' products by reason of such erroneous and mistaken belief.

6. Such acts and practices of the respondents, as herein found, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

7. The failure of the corporate respondents, Glenn W. Turner Enterprises, Inc., and Koscot Interplanetary, Inc., and the individual respondents, Glenn W. Turner, Ben Bunting, and Hobart Wilder to

refund to persons who acted in reliance upon the statements and misrepresentations, as herein found, all monies paid to Koscot Interplanetary, Inc., by such persons was and is inherently and unconscionably unfair and deceptive. The retention of funds obtained pursuant to the unlawful and fraudulent acts and practices disclosed by this record constitutes a violation of Section 5 of the Federal Trade Commission Act.

8. The acts, practices, and methods of competition engaged in, followed, pursued, or adopted by respondents, and the combinations, conspiracies, agreements, or common understandings entered into or reached between and among the respondents and others not parties hereto were unfair methods of competition and were to the prejudice of the public because of their dangerous tendency toward, and the actual practice of, fixing, maintaining, or otherwise controlling the prices at which Koscot's products were resold, in both the wholesale and retail markets, and fixing, maintaining, or otherwise controlling the various fees, bonuses, rebates, or overrides required to be paid by one distributor or class of distributors to another distributor or class of distributors. Such acts, practices, and methods of competition constituted an unreasonable restraint of trade and an unfair method of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

9. The acts, practices, and methods of competition engaged in, followed, pursued, or adopted by respondents, and the combinations, conspiracies, agreements, or common understandings entered into or reached between and among the respondents and their distributors constituted unfair methods of competition in that they resulted in, or had a dangerous tendency, toward restricting the customers to whom Koscot's distributors might resell their products; restricting the source of supply from which distributors might purchase their products; and restricting their distributors to reselling their products through specified channels. Such acts, practices, and methods of competition constituted an unreasonable restraint of trade and an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

10. The effect of the price discriminations found herein has been and may be substantially to lessen competition or to tend to create a monopoly in the line of commerce in which the favored purchaser is engaged or to injure, destroy, or prevent competition between the favored and nonfavored customers or with the customers of either of them. Such discriminations constituted violations of the provisions of Section 2(a) of the Clayton Act as amended.

11. It is in the public interest to issue a cease and desist order

against the respondents Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann, respectively, in their individual capacities, as well as against the corporate respondents, Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc.

12. It is in the public interest to issue an order of restitution against the corporate respondents, Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., and against respondents Glenn W. Turner, Ben Bunting, and Hobart Wilder.

13. The complaint must be dismissed as to Terrell Jones for want of jurisdiction and as to Michael Delaney for failure of proof.

Rationale of the Order

Introduction

Although respondents do not concede that they engaged in "pyramiding" or other "fraudulent practices" (RB, p. 8), they do not challenge, for the most part, the proposed findings of complaint counsel, and they also do not object to the entry of the proposed order except for that part dealing with restitution. They do, however, take exception to the description of the Koscot operation as "inherently deceptive and fraudulent" (RB, p. 1) and seek to overcome the cited evidence underlying complaint counsel's proposed findings in that regard.

Thus, the only controverted issues are (1) whether an order of restitution should be issued against the corporate respondents and three of the individual respondents (Turner, Bunting, and Wilder) and (2) whether an order of any kind should be issued against respondent Raleigh P. Mann. The restitution issue may be further subdivided into issues of law and fact as follows: (1) whether the Federal Trade Commission is empowered to issue such an order and (2) whether, assuming such power, the facts and circumstances disclosed by this record warrant the issuance of a restitution order. As reflected in the conclusions, *supra*, all these questions have been answered in the affirmative.

In this state of the record, these remains only the necessity to articulate the basis for such rulings. However, there is no occasion for any lengthy discussion respecting either the basic violations found or the controlling law, except as they may relate to restitution. The findings of fact essentially speak for themselves, and there is no need to rehash them here.

Before dealing with the restitution issue, it may be desirable to comment briefly on the other sections of the order.

The order contained in this initial decision is essentially adapted from that proposed by complaint counsel. Some changes were made, primarily of an editorial nature. It should be noted that the order differs in many respects from the notice order contained in the complaint, although reflecting the substance and intent thereof. It appears that complaint counsel revised the notice order so as to conform, where applicable, to the order entered in the *Holiday Magic* case, *supra*. Almost without exception, the corresponding order provisions herein are either identical or substantially similar to the *Holiday Magic* provisions.

Although Paragraph Twelve of the complaint challenged respondents' merchandising program as "in the nature of a lottery" and thus an unfair practice in violation of Section 5, complaint counsel have not proposed any findings or conclusions with respect to this allegation, and it is being dismissed pursuant to the Commission's rulings in the *Holiday Magic* case, *supra*, at 14 [p. 1039], and in Ger-Ro-Mar, Inc., [*supra*, (slip opinion, pp. 17-21 [*supra*, at pp. 153-155]).

Restitution Provisions

Respondents have presented a three-pronged objection to the entry of any order of restitution:

First, they challenge the authority of the Commission to enter such an order, relying on the case of *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974);

Second, assuming *arguendo* that the Commission has such authority, they contend that complaint counsel have failed to prove fraud or any other factual basis to support a restitution order; and

Third, they deny that there has been a sufficient showing of the retention by these respondents, particularly the individual respondents, of any fraudulently obtained funds or any funds that are properly the subject of a restitution order.

These questions will be considered *seriatim*.

It should be noted first, however, that additionally, respondents offered several affirmative defenses against restitution: (1) That the illegal practices have been discontinued; (2) that the corporate respondents have either ceased to exist or have become inactive; (3) that the individual respondents have severed their relationship with the corporate respondents; and (4) that the issue of restitution in this proceeding has become moot by virtue of actions in progress in other forums. These defenses will be considered after the basic questions stated above are disposed of.

At this level the question of the Commission's authority to issue a restitution order must be answered in the affirmative. The Commission has ruled that it has such authority: *Holiday Magic, Inc.*, (slip opinion, p. 23 [*supra*, at p. 1046]); *Universal Credit Acceptance Corp.*, 82 F.T.C.

570 (1973), *rev'd in part sub nom Heater* v. *F.T.C.* (refund provisions set aside), 503 F.2d 321 (9th Cir. 1974); *Curtis Publishing Co.*, 78 F.T.C. 1472 (1971); *cf. Windsor Distributing Co.*, 77 F.T.C. 204, 222-23 (1969), *aff'd*, 437 F.2d 443, 444 (3rd Cir. 1971).

In ordering restitution in *Holiday Magic, supra*, the Commission said it was "fully aware of the decision by the Ninth Circuit Court of Appeals declaring that it may not order restitution of retained monies obtained as a result of violations of the FTC Act occurring prior to the entry of a cease-and-desist order." However, "[w]ith all due respect for the court," the Commission expressed its belief that the *Heater* decision is "incorrect" and announced its intention to seek Supreme Court review (slip opinion, p. 23, n. 11 [p. 1046]). Subsequently, the Commission determined not to seek Supreme Court review of the *Heater* decision and, in recognition of the pendency of the *Holiday Magic* appeal in the Ninth Circuit, reopened the *Holiday Magic* case and vacated the restitution order. In so doing, the Commission stated that "this determination should not be construed to signify a change in the view of the Commission regarding the correctness of the *Heater* decision" (order reopening proceeding and modifying final order (Jan. 21, 1975), p. 2 [85 F.T.C. at 89]).

Since the Commission has maintained its position that it has restitution authority despite the *Heater* case, the undersigned considers himself bound by this determination.

Accordingly, on the basis that the Commission does have such authority, the undersigned has determined to enter the restitution order proposed by complaint counsel. However, it should be noted that it is possible that, like *Holiday Magic*, these respondents may seek review of such an order in the Ninth Circuit. Whether this circumstance calls for a disposition of the restitution issue in this case similar to that ordered in *Holiday Magic* is for the Commission to determine.

In any event, and in recognition that the Commission might want to utilize in this case the restitution provisions of the recently approved amendments to the Federal Trade Commission Act, the undersigned has made findings relevant to the issue of restitution and has considered the opposing contentions of counsel with respect thereto. In that connection, it should be noted that although the notice order* in the complaint contained no restitution provisions, the Commission was careful to reserve its right to enter such an order if the record so warranted. It stated (complaint, p. 16):

> If * * * the Commission should conclude from record facts developed in any adjudicative proceeding in this matter that the proposed order provisions may be inadequate to protect the consuming public and respondents' competitors, the Commis-

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* Notice order not reported herein.

> sion may order such other relief as it finds necessary or appropriate, including, but not limited to, an order of restitution for the losses suffered by past and present participants.

Moreover, Count IV of the complaint alleged as follows:

> * * * [R]espondents' multi-level-merchandising program is organized and operated in a manner that results in the recruitment of many participants who have virtually no chance to recover their investments of substantial sums of money in respondents' program and who have been induced to participate by misrepresentations as to potential earnings. Respondents have received the said sums and have failed to offer to refund and refused to refund such money to participants that were unable to recover their investment.
>
> The use by the respondents of the aforesaid program and their continued retention of the said sums, as aforesaid, is an unfair act and practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

On the basis of this record, and the *Holiday Magic* decision, *supra*, the undersigned has concluded that the allegations of Count IV have been established and that an order of restitution should be issued. The facts here meet the standards for restitution established in *Holiday Magic* and the other cases cited *supra*.

As to the substantiality of the evidence supporting the findings, respondents contend that the testimony of 28 "victim" witnesses[26] "should have the impact of a fly in a hurricane when one considers that 30,000 people invested in Koscot" (RB, pp. 14-15). This contention must be discounted in light of the fact that the number of so-called victim witnesses was limited by the administrative law judge in response to respondents' motion urging that additional witnesses would be merely cumulative (Tr. 2918-52). In a battle of metaphors, complaint counsel argue that the consumer testimony should be regarded "as the tip of an iceberg rather than as 'a fly in a hurricane' " (CRB, p. 39).

Relying on a dictum in the *Heater* case suggesting that salaries and loans from a corporation were not properly subject to a restitutionary order, respondents argue that restitution is inappropriate here as to the three individual respondents (Turner, Wilder, and Bunting) because the evidence indicates that they received nothing other than salaries and loans from the corporate respondents.

The undersigned agrees with complaint counsel that on the basis of the evidence now in this record, and in light of the refusal of Turner, Wilder, and Bunting to testify, the burden has shifted to the individual respondents to show that they did not receive or that they do not now retain funds or other assets from the corporate respondents.

As the record stands, it has been proved that the corporate respondents received funds from the victims of an illegal and fraudulent scheme; that a significant portion of such funds are no longer in the possession of the corporate respondents; and that the individual respondents were in such a position of control as to permit them to withdraw funds or other assets from the corporate respondents. In this state of the record, the burden of proof is properly shifted to the individual respondents to show that they did not obtain or do not now possess any fruits of the illegal activities engaged in by the corporate and individual respondents. The facts with regard to this issue lie peculiarly within the knowledge of each individual respondent, and it is well established that in these circumstances, the burden of proof may be properly shifted.

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[26] Counsel for both sides have overstated the number of consumer witnesses. Complaint counsel referred to 39 distributors or former distributors of Koscot (CPF, p. 2), and respondents' counsel rounded this figure to 40 (RB, p. 14). Actually, there were 28 such witnesses.

The evidence shows that from August 1967 until July 1972, Koscot retained more than $44 million from the initial fees paid by distributors who enrolled in its marketing program, over and above any recruiting fees remitted to the participants (p. 31, *supra*, n. 14a [p. 1142, herein]); that as of July 1972, Koscot's total assets were only $22.5 million and by July 1973 had been further diminished to only $11.7 million (¶ 6[27]); that Turner Enterprises received millions of dollars directly from Koscot during this period (¶¶ 4-5); and that Turner, Bunting, and Wilder were each in control of those corporate respondents and in a position to withdraw funds from them during a significant portion of this period (¶¶ 7-16).

On June 28, 1974, respondents filed a series of motions designed to settle this case on the basis of a consent order as to all issues except that of restitution; and, as to the question of restitution, to provide a factual record on the question of the existence of assets in the hands of respondents available for any restitution that might be ordered (motion to recess proceedings, etc., and motion for an order withdrawing this case from the adjudication process).

Thereafter, in a conference on July 8, 1974, defense counsel proffered to produce as witnesses on the question of assets respondents Turner, Wilder, Bunting, and others (Tr. 4252, 4280-81).

The administrative law judge then entered an order on July 10, 1974 providing, among other things, that "following the completion of the case-in-chief in support of the complaint, defense hearings shall be held for the purpose of determining respondents' assets available for restitution * * *." See also notice of hearing filed on Aug. 1, 1974.

However, on Aug. 21, 1974, in Orlando, Fla., defense counsel announced that, with the exception of Delaney, none of the respondents or other individuals previously listed would testify on the subject matter of respondents' assets (Tr. 4818-27). At that time, defense counsel made the following statement:

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[27] Paragraph numbers refer to the findings of fact, *supra*.

> * * * [W]e recognize that since we were the ones that initiated having these hearings, if we don't come forward now, then that rests the matter on assets. We don't have another day to try to prove it. We recognize that, and I've explained it to the Respondents and they understand. And so, it's now or never. We understand that. (Tr. 4825-26; see also Tr. 4525-38 and Tr. 5062-65)

As to respondents' affirmative defenses, their brief summarizes them this way:

> There has been no substantial public harm done by these respondents since the filing of the FTC complaint and any public harm which may have [preceded] the instant complaint has been provided for [by] the class action stipulated settlement and the Chapter 11 proceedings (RB, p. 12).

However, this defense will not withstand scrutiny.

The fact that the record contains no evidence that these respondents have engaged since mid-1972 in any of the practices challenged by the complaint (RPF 1-6) does not negate the need for an order to cease and desist or for an order of restitution. It is well settled that discontinuance of an unlawful practice does not preclude the entry of an order against its resumption, particularly when, as here, the discontinuance was after issuance of the complaint. In any event, the burden was on respondents to show affirmative discontinuance, and this burden they have not met. Respondents have cited no record evidence in support of their claim that they discontinued the challenged practices about June 1972 or shortly thereafter, and the undersigned is aware of none.

For example, respondents state that "no distributorship has been sold by Koscot since mid-1972" (RPF 8), but the sole record citation (Delaney Tr. 880) fails to support this claim. Moreover, it was not until August 1974 that the referee in bankruptcy specifically prohibited Koscot from selling any franchises or distributorships (RB, Appendix II). As to the contention that there is no evidence that Turner Enterprises is even in existence (RPF 8; see also RPF 2), Turner Enterprises was a signatory to a stipulation of settlement in a class action suit (RB, Appendix I). And, although Turner resigned from Turner Enterprises in March 1972 (RPF 3; CX 292), he stayed on as a consultant. Moreover, Turner signed the stipulation as president of Turner Enterprises and also on behalf of Koscot.

Having established that violations occurred, complaint counsel is not required to show them continuing after the issuance of the complaint. Moreover, it is fairly apparent that any such discontinuance that may have occurred was not necessarily voluntary. Whatever the facts may be as to discontinuance, this record demonstrates the necessity for an order designed to prevent as fully as possible any likelihood that respondents will resume the activities complained of.

The collateral litigation that, according to respondents, obviates the need for a restitutionary order in this case is as follows:

1. Proceedings for an arrangement under Chapter XI of the Federal Bankruptcy Act filed by Koscot on June 3, 1973, in the United States District Court for the Middle District of Florida (No. 73-179-Orl-P). See RXs 12 and 13.
2. A Stipulation of Settlement proffered on Oct. 7, 1974, in the consolidated class action proceeding *Glenn W. Turner Enterprises Litigation*, MDL Docket No. 109, in the United States District Court for Pennsylvania (No. Misc. 5670) (see Appendix I attached to respondents' brief).
3. A criminal proceeding against Koscot and others, pending in the United States District Court for the Middle District of Florida (Criminal No. 73-71), which resulted in a mistrial (jury unable to agree on a verdict) on May 30, 1974, and which is now scheduled for a new trial.

The reference to the criminal proceeding may be summarily dismissed as irrelevant to the issue of restitution.

As for the stipulation of settlement and the bankruptcy proceeding, both are still in a pending status and thus offer no assurance that they will achieve to any degree the purpose of the proposed restitution order.

Moreover, neither proceeding appears to satisfy the Commission's standards for omission of a restitution order in a case of this kind. In rejecting a pretrial offer of settlement that would have involved the entry of the notice order in the complaint but that would have precluded any provision for restitution, the Commission, in language still applicable to respondents' present arguments, stated:

> The proposed settlements in the pending litigation do not purport to require all of the respondents to disburse to their customers all funds retained by them as a result of alleged violations of Section 5 of the Federal Trade Commission Act. Until there is a clear showing that respondents have accomplished disbursement of all such funds, it is premature at this time to determine that no provision for restitution should be included in any Commission order. (82 F.T.C. 1464, 1466 (1973))

Additional language in that same opinion also effectively refutes respondents' present contentions. The Commission pointed out:

> The violation for which restitution in some instances is an appropriate corrective action occurs when the seller's retention of its customers' money or property is an unfair trade practice, in and of itself, in violation of the Federal Trade Commission Act. [citations omitted] If the private parties involved agree to an approved settlement, they will be bound by its terms, but this does not bar a restitution provision in a cease and

> desist order by the Commission if one is issued. An effective remedy may require complete disbursement of such funds to the victims of the unlawful practices up to the amount of their actual payments, and the possibility that this may result in some parties receiving funds in addition to amounts they have received in settlement of their claims does not prevent such restitution. The public policy expressed in the Federal Trade Commission Act is, of course, paramount. (*id.*, at 1466-67)

Thus, there "is no conflict between the Court litigation and the proceeding before the Commission. The Court action is to vindicate private individual rights; the Commission proceeding is to enforce the Federal Trade Commission Act." (*id.*, at 1466).

So here, once the class action suit is disposed of the Commission will have an opportunity to determine whether such disposition would provide for "effective disgorgement" by the respondents of "all unlawfully retained monies" (*Holiday Magic*, *supra*, at 26 [p. 1048]).

As matters now stand, neither the class action suit nor the bankruptcy proceeding provides for complete disbursement. Moreover, neither proceeding appears to contemplate any definitive determination as to assets held by the respondents proposed to be covered by a restitution order. The proposal is for a maximum payment of $3 million to distributor-claimants (RX 17 A; RB, Appendix I, pp. 8-9). This amount is to be contrasted with some $44 million in enrollment fees unlawfully received and retained by respondents (p. 31, *supra*, n. 14a).

The pending plan of settlement in the bankruptcy proceeding does not make moot the question of restitution in this proceeding. First, the plan of arrangement may or may not be approved, and, second, the Commission's restitution claim may be excepted from discharge even if the plan of arrangement is confirmed.[28] Until these two questions are resolved, it cannot be said that the bankruptcy proceeding is a barrier to any order of restitution by the Commission.

Complaint counsel have advanced other arguments designed to refute respondents' contention, but these need not be explored at this time.

The principal question relating to restitution is whether there remain reachable funds in the hands of the respondents to whom the restitution order is proposed to be directed. Among other things, the Internal Revenue Service has tax liens of $5.7 million against Turner Enterprises and Koscot and $928,980 against Turner (RB p. 12, n. 2; Appendix I, p. 4). These, of course, are priority claims. Nevertheless, further inquiry appears to be appropriate before any determination is made as to the availability of funds for restitution.

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[28] Acting on a motion by complaint counsel that was certified by the administrative law judge, the Commission, on Jan. 7, 1975, entered an order to its General Counsel to "take such action as is necessary and appropriate for the protection of the public interest in any restitutionary claim or any other claim for consumer redress which may arise" out of this proceeding. In entering the order, the Commission noted the report in complaint counsel's motion that respondent Koscot "is in bankruptcy proceedings wherein a settlement is pending which could foreclose any claim in restitution which might arise out of this action" and held that such a foreclosure "would be contrary to the public interest."

Respecting the restitution provisions of the order (Section V), the administrative law judge has adopted the proposals of complaint counsel, even though he has some reservations regarding the practicability of administering such proposals. However, he has not undertaken to tailor an alternative procedure for the following reasons: (1) the plan proposed by complaint counsel, as representatives of the Bureau of Consumer Protection, which presumably will be involved in enforcing the order, is entitled to due deference in what is almost a matter of first impression; and (2) the mechanics of the refund plan may be academic because (a) the order may be subject to review in the United States Court of Appeals for the Ninth Circuit, a circumstance that led the Commission to withdraw the restitution order in *Holiday Magic*, *supra*, in view of that court's ruling that the Commission lacked power to order restitution, and because (b) the Commission may elect, in the light of such circumstance, or for other reasons, to avail itself of the provisions of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. Law 93-637, approved Jan. 4, 1975, § 206(a)(b), 88 Stat. 2201-02, 15 U.S.C. § 57 b. Moreover, developments in collateral litigation described *supra* may inject factors requiring alteration of the refund plan.

In view of the somewhat nebulous status of restitution as applied to this proceeding, the undersigned gave consideration to omitting any detailed provisions with respect thereto while making findings and conclusions dealing with the subject matter. However, he concluded that, whatever deficiencies there may be in the present restitution provisions, they at least provide a basis for appeal by the respondents and for appropriate consideration by the Commission.

On the basis of the foregoing findings and conclusions, the following order is entered:

ORDER

Definitions: For the purposes of this order, the following definitions shall apply:

(a) The term "distributorship" means any continuing commercial relationship created by written agreement or understanding where: (1) the participant is granted the right or is permitted to offer, sell, or distribute goods or commodities manufactured, processed, or distributed by the respondents; or (2) the participant is granted the right or is permitted to offer or sell services established, organized, approved, or directed by the respondents.

(b) "Participant" means any person to whom a distributorship is granted.

(c) "Person" means any individual, group, association, limited or general partnership, corporation, or any other business entity.

(d) "Business day" means any day other than Saturday, Sunday, or the following holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving, and Christmas.

(e) "Koscot" means Koscot Interplanetary, Inc., and its successors or assigns.

(f) The term "distributor," as used in Section V of this order shall mean any person who paid Koscot $500 or more in exchange for which such person received, *inter alia*, the right to resell Koscot products.

I

It is ordered, That respondents Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., corporations, their officers, agents, representatives, employees, successors, and assigns, and Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann, individually, their agents, representatives, and employees, directly or indirectly, through any corporate or other device, in connection with the advertising, offering for sale, or sale of products, services, franchises, or distributorships, or in connection with the seeking to induce or inducing the participation of persons, firms, or corporations therein, or in connection with any merchandising, marketing, or sales promotion program, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein the financial gains to participants during their first year in the plan or program are, or are represented to be, based in any manner or to any degree upon their recruiting of other participants into the plan or program whereby such participants obtain the right to recruit yet other participants.

2. Offering, operating, or participating in, any marketing or sales plan or program wherein a participant gives or agrees to give a valuable consideration in return (1) for the opportunity to receive compensation in return for inducing other persons to become participants in the plan or program, or (2) for the opportunity to receive something of value when a person induced by the participant induces a new participant to give such valuable consideration, *Provided*, That the term "compensation," as used in this paragraph only, does not mean any payment based on actually consummated sales of goods or services to

persons who are not participants in the plan or program and who do not purchase such goods or services in order to participate in the plan or program.

3. Requiring or suggesting that a prospective participant or a participant in any merchandising, marketing, or sales promotion program purchase any product or services or pay any other consideration, either to respondents or to any other person, in order to participate in said program, other than payment for the actual cost to respondents, as determined by generally accepted accounting principles, of those items respondents deem to be reasonably necessary sales materials in order to participate in any manner therein; *Provided*, That necessary sales material shall not include any product inventory.

II

It is further ordered, That respondents Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., corporations, their officers, agents, representatives, employees, successors, and assigns, and Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann, individually, their agents, representatives, and employees, directly or indirectly, through any corporate or other device, in connection with the advertising, offering for sale, or sale of products, franchises, or distributorships, or in connection with the seeking to induce or inducing the participation of persons, firms, or corporations in any merchandising, marketing, or sales promotion program, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, including the use of hypothetical examples, that participants in any merchandising, marketing, or sales promotion program, will earn or receive, or have the potential or reasonable expectancy of earning or receiving, any stated or gross or net amount, or representing in any manner the past earnings of participants, unless in fact the earnings represented are those of a substantial number of participants in the community or geographic area in which such representations are made, and the representation clearly indicates the amount of time required by such past participants to achieve the earnings represented, and failing to maintain adequate records which disclose the facts upon which any claims of the type referred to in this paragraph of the order [II(1)] are based; and from which the validity of any such claim can be determined.

2. Misrepresenting the ease of recruiting or retaining participants in any merchandising, marketing, or sales promotion programs, as distributors or as sales personnel.

3. Representing, directly or by implication, that any participant in

any merchandising, marketing, or sales promotion program can attain financial success.

4. Misrepresenting the supply or availability of potential participants or customers in any merchandising, marketing, or sales promotion program in any given community or geographical area.

5. Misrepresenting that participants can expect to remain active in business for any length of time, or misrepresenting in any manner the longevity or tenure of past or current participants, as, for example, by using a hypothetical illustration of how a marketing program operates, which has the tendency or capacity to imply that participants remain active for a given period, when in fact such period is more than the average length of time for which such participants do remain active.

6. Misrepresenting the reasonably necessary and anticipated costs of doing business for prospective distributors, dealers, sales personnel, or franchisees.

7. Representing, directly or by implication, that products will be or have been advertised, either locally or nationally, or in the geographic area in which such representations are made, without clearly and truthfully representing the manner, mode, extent, and amount of the advertising.

8. Representing that a training program will be or is being offered without clearly and truthfully representing the specific type and nature of the training, the number of hours or days of instruction, and the cost to the participant, if any.

9. Misrepresenting the availability of product in any manner, including, but not limited to, misrepresenting the amount of inventory available, the extent to which an order can be filled at a given time, the length of time necessary to replenish items out of stock, and the length of time necessary to deliver an order to a participant.

10. Misrepresenting, directly or by implication, the extent of respondents' sales of products and services, the nature of such sales, including what proportion were derived from the sale of franchises or distributorships, or the market position of respondents in any market.

III

It is further ordered, That respondents Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., corporations, their successors or assigns, and respondents Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann incident to selling any franchise or distributorship, shall:

1. Inform orally all persons to whom solicitations are made, and provide in writing in all applications and contracts, in at least ten-point bold type, that the application or contract may be cancelled for any

reason by notification to respondents in writing within at least seven (7) business days from the date of execution.

2. Refund immediately all monies to participants who:

(a) Cancel their contracts in accordance with paragraph 1 of this Section III; or

(b) show that respondents' contract solicitations or performance were attended by or involved violation of any of the provisions of this order.

3. Provide to a prospective franchisee or distributor at least fifteen (15) business days prior to the execution by the prospective franchisee or distributor of any franchise or distributorship agreement or any other binding obligation, or the payment by the prospective franchisee or distributor of any consideration in connection with the sale or proposed sale of a franchise:

(a) A certified balance sheet for the most recent year; a certified profit and loss statement for the most recent three-year period; and a statement of any material changes in the financial soundness of the franchisor since the date of such financial statements.

(b) A copy of Federal Trade Commission Consumer Bulletin No. 4, "ADVICE FOR PERSONS WHO ARE CONSIDERING AN INVESTMENT IN A FRANCHISE BUSINESS."

(c) A statement disclosing (a) the number of franchises or distributorships, whether active or inactive, already sold at the end of the last calendar year, and (b) the number of franchises or distributorships, whether active or inactive, already present in the market area in which the prospective franchisee or distributor plans to operate.

IV

It is further ordered, That respondents Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., corporations, their officers, agents, representatives, employees, successors, and assigns, and Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann, individually, their agents, representatives, and employees, directly or indirectly through any corporate or other device, in connection with the offering for sale, or distribution of goods or commodities in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act, shall forthwith cease and desist from:

1. Entering into, maintaining, promoting, or enforcing any contract, agreement, understanding, marketing system, or course of conduct with any dealer or distributor of such goods or commodities to do or perform or attempt to do or perform any of the following acts, practices, or things:

(a) Fix, establish, or maintain the prices, discounts, rebates, overrides, commissions, fees, or other terms or conditions of sale relating to pricing upon which goods or commodities may be resold; *Provided*, That in those States having Fair Trade laws, products may be marketed pursuant to the provisions of such laws.

(b) Require or coerce any person to enter into a contract, agreement, understanding, marketing system, or course of conduct which fixes, establishes, or maintains the prices, discounts, rebates, overrides, commissions, fees, or other terms or conditions of sale relating to pricing upon which goods or commodities may be resold; *Provided*, That in those States having Fair Trade laws, products may be marketed pursuant to the provisions of such laws.

(c) Require or coerce any person to enter into a contract, agreement, understanding, marketing system, or course of conduct requiring, inducing, or coercing any distributor to refrain from selling any merchandise in any quantity to or through any specified person, class of persons, business, or class of businesses.

(d) Require or coerce any person to enter into a contract, agreement, understanding, marketing system, or course of conduct which discriminates, directly or indirectly, in the net price of any merchandise of like grade and quality by selling to any purchaser at net prices higher than the net prices charged to any other purchaser who in fact competes in the resale or distribution of such merchandise with the purchaser paying the higher price.

2. Discriminating, directly or indirectly, in the net price, or terms or conditions of sale of any merchandise of like grade and quality by selling to any purchaser at net prices, or upon terms or conditions of sale, less favorable than the net prices or terms or conditions of sale upon which such products are sold to any other purchaser to the extent such other purchaser competes in the resale of any such products with the purchaser who is afforded less favorable net price or terms or conditions of sale, or with a customer of the purchaser afforded the less favorable net price or terms or conditions of sale.

3. Preventing distributors from entering into consignment agreements or selling their business to another individual.

4. Engaging, either as part of any contract, agreement, understanding, or course of conduct with any distributor or dealer of any goods or commodities, or individually and unilaterally, in the practice of:

(a) Publishing or distributing, directly or indirectly, any resale price, product price list, order form, report form, or promotional material which employs resale prices for goods or commodities without stating clearly and visibly in conjunction therewith the following statement:

> **The prices quoted herein are suggested prices only. Distributors are free to determine for themselves their own resale prices.**

(b) Publishing or distributing, directly or indirectly, any schedule of discounts, rebates, commissions, overrides, or other bonuses to be paid by one distributor or class of distributors to any other distributors or class of distributors, without stating clearly and visibly in conjunction therewith the following:

> The discounts [rebates, commissions, etc.] quoted herein are suggested only. Distributors are free to determine for themselves any amounts to be paid.

Provided, That in those States having Fair Trade laws, products may be marketed pursuant to the provisions of such laws.

5. Requiring any distributor or dealer or other participant in any merchandising program to obtain the prior approval of respondents for any product advertising or promotion, or proposed product advertising or promotion, unless any selling prices and names of any selling outlets are required to be deleted from such proposed advertising or promotion prior to submission for prior approval.

V

It is further ordered, That the corporate respondents, Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., their successors or assigns, and the individual respondents, Glenn W. Turner, Ben Bunting, and Hobart Wilder shall jointly and severally be obligated and required to refund all sums of money paid by any distributor to Koscot; *Provided*, That such refund shall be reduced by:

(a) Any amount of money paid by the corporate respondents to each such distributor, including any refund made either voluntarily or pursuant to settlement or court order; and

(b) the difference between the wholesale value of initial inventory purchased and the wholesale value of inventory presently due to any distributor as reflected by the books and records of Koscot. Such wholesale value shall be calculated at thirty-five percent (35%) of the retail value as shown by the retail prices of Koscot that were in effect on Mar. 24, 1972.

It is further ordered, That such refunds shall be accomplished in the following manner:

1. Within thirty (30) days from the effective date of this order, respondents Koscot Interplanetary, Inc., Glenn W. Turner Enterprises, Inc., Glenn W. Turner, Ben Bunting, and Hobart Wilder shall each prepare and shall deliver to the Federal Trade Commission and to each of the other respondents named in this Section V a certified statement designating all sums of money and other assets they retain as of the effective date of this order and such other assets which they expect to subsequently receive that are directly or indirectly attributable to their

association with Koscot, Glenn W. Turner Enterprises, Inc., Glenn W. Turner, or their agents, successors, subsidiaries, or assigns and shall specify with regard to each asset designated:

(a) The present form of the asset, *i.e.*, cash, stocks, real property, etc.;

(b) the date the asset was received or is expected to be received, the person from whom the asset was received, or is expected to be received, and the form of the asset on the date it was received or is expected to be received;

(c) the current market value of each asset and the market value of the asset on the date it was received; and

(d) any judgment, court orders, or other legal encumbrance on such assets.

2. Within thirty (30) days from the effective date of this order, respondent Koscot shall compile from its books and records a list of all distributors entitled to a refund pursuant to the provisions of this order and shall specify, with regard to each such distributor:

(a) The full name and last known address of each distributor;

(b) the full amount paid by each distributor;

(c) any set-offs which respondents are entitled to deduct from the amount paid by each distributor pursuant to the terms of this order; and

(d) the net amount that respondents would thereby be obligated to refund to each distributor.

A copy of the foregoing statement shall be filed with the secretary of the Federal Trade Commission within thirty (30) days after the effective date of this order, with copies thereof also delivered to respondents Glenn W. Turner Enterprises, Inc., Glenn W. Turner, Ben Bunting, and Hobart Wilder.

3. Simultaneously with the filing of the statement described in ¶ 2, above, Koscot shall mail the notice set out below which includes in such notice the calculations provided for therein to each distributor identified in such statement. A copy of such notice, together with a copy of this order, an acceptance card, and a preaddressed envelope as described below, shall be mailed in an envelope which together with the name and address of the distributor shall contain the following legend in 16-point, boldface type "IMPORTANT REFUND NOTICE." The notice itself shall be confined to the following language which shall appear in 12-point, boldface type:

IMPORTANT NOTICE

Pursuant to the Order of the Federal Trade Commission which is attached to this notice, you are entitled to a refund of all sums of money paid to Koscot Interplanetary, Inc., in exchange for the right to participate in the Koscot marketing program less (1) all amounts paid to you by Koscot or by Glenn W. Turner Enterprises, Inc., including any

refund made either voluntarily or pursuant to a private settlement or court judgment, and (2) the wholesale value of any product that you actually received from your initial inventory. According to the books and records of Koscot Interplanetary, Inc., the net refund to which you are entitled is as follows:

[Supply name of participant]

[To be calculated from Koscot's books and records]

Total Investment: ____________

Set-offs for:

(1) All money payments: ____________

(2) Wholesale value of initial inventory that you actually received: ____________

Total amount of set-offs:

Refund (total investment less set-offs) ____________

If you accept this offer, you will receive the amount of refund listed above *unless the total amount of funds available for the purpose of making refunds is insufficient to satisfy the claims of all participants entitled to a refund who accept this offer.* If the total amount of funds is insufficient, then each claim will be reduced on a pro-rata basis.

If you accept this offer, then sign the enclosed acceptance card and return it to Koscot Interplanetary, Inc., within sixty (60) days of the date of this letter. If such card is not returned or is postmarked within sixty (60) days after the date of this letter, you will forfeit all rights to any refund under the provisions of this proffer.

If you believe there are any material discrepancies between the amounts listed above and the amount to which you are entitled under the formula set forth in the attached order, then indicate the reasons for this on the card or on an attached statement to the card.

IMPORTANT NOTICE

In order to have your claim included, it must be postmarked and returned within sixty (60) days of the date of this Notice.

Dated: [to be inserted]

____

Koscot Interplanetary, Inc.
4805 Sand Lake Road
Orlando, Florida 32809

The acceptance cards shall be approximately 5 x 7 inches in area and contain the following language:

> I hereby accept the offer of refund which Koscot Interplanetary, Inc., has proffered to me pursuant to the Order of the Federal Trade Commission.

____

(Signature)

____

(Address)

4. Within one hundred twenty (120) days after the date of the filing

of the notice provided for in ¶ 3, *supra*, Koscot shall submit a report to Glenn W. Turner Enterprises, Inc., Glenn W. Turner, Ben Bunting, and Hobart Wilder and to the Federal Trade Commission which sets forth a list of the distributors who have indicated their agreement to participate in the arrangement for refunds provided for in this order. Such reports shall identify the claimants by their names and addresses, shall reflect the amounts to which each such claimant is entitled under the provisions of this order and shall reflect the aggregate amounts of such claims. In determining the amounts of such claims, respondent Koscot shall make a good-faith effort to correct any errors which may exist in their books and records which were brought to its attention by such claimants.

5. Within fifteen (15) days of the submission of the report to the Federal Trade Commission provided for in ¶ 4, *supra*, Koscot, Glenn W. Turner Enterprises, Inc., Glenn W. Turner, Ben Bunting, and Hobart Wilder shall submit to the Federal Trade Commission for its approval a plan for the disbursement of funds required by this order. Such plan shall contain at least:

(a) The total amount of assets available for payment of the amount due under this order;

(b) the proportionate contribution from each respondent subject to the provision of Part V of this order if their aggregate assets available for payment exceed the amount due under this order;

(c) the procedures to be used to liquidate immediately the assets required to provide for payment of the amount due under this order;

(d) the procedures to be used in the disposition of funds required by this order.

6. Upon approval of such plan as provided for in ¶5, *supra*, Koscot, Glenn W. Turner Enterprises, Inc., Glenn W. Turner, Ben Bunting, and Hobart Wilder shall within thirty (30) days thereafter implement all provisions of such plan, including the refund to claimants of the amounts provided for in this order.

VI

It is further ordered, That respondents Koscot Interplanetary, Inc., Glenn W. Turner Enterprises, Inc., Glenn W. Turner, Ben Bunting, Hobart Wilder, their successors and assigns shall forthwith deliver a copy of Section II of this order to cease and desist to all present and future salespeople, franchisees, distributors, participants, or other persons engaged in the sale of franchises, distributorships, products, or services on behalf of respondents, and secure from each such person a signed statement acknowledging receipt thereof.

VII

It is further ordered, That the corporate respondents and their successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporations which may affect compliance obligations arising out of this order.

VIII

It is further ordered, That respondents Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann shall each promptly notify the Commission of his present business address and a statement as to the nature of his business or employment and shall each promptly notify the Commission of the discontinuance of his present business or employment, including in such notice his new business address and a statement of the nature of his new business or employment and a description of his duties and responsibilities therewith.

IX

It is further ordered, That each of the respondents herein and their successors and assigns shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the provisions of this order. Thereafter, within two hundred and ten (210) days after service upon them of this order and every one hundred twenty (120) days thereafter until the provisions of Section V of this order have been satisfied, respondents Koscot Interplanetary, Inc., Glenn W. Turner Enterprises, Inc., Glenn W. Turner, Ben Bunting, and Hobart Wilder shall file with the Commission a further report in writing, setting forth in detail the manner and form in which they have complied with Section V of this order.

X

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to Michael Delaney and Terrell Jones; *Provided, however*, That the dismissal as to Terrell Jones is without prejudice to the right of the Commission to institute further proceedings against him if the public interest so warrants.

OPINION OF THE COMMISSION BY DIXON, *Commissioner*

Complaint in this matter was issued on May 24, 1972, charging respondents with numerous violations of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) and Section 2(a) of the Clayton Act (15 U.S.C. § 13(a)) in connection with their operation of a multilevel marketing program involving the sale of cosmetics and cosmetics distributorships. Hearings were held, not without interruption, before Administrative Law Judge Donald Moore, who issued his initial decision on Mar. 20, 1975. The law judge recommended entry of a lengthy order prohibiting numerous unfair and deceptive practices and requiring Koscot and individual respondents Turner, Wilder, and Bunting to make restitution to purchasers of distributorships.

Both sides have appealed. There appears to be little disagreement among them as to the form which the Commission's final order should take, although much disagreement as to the reasons for this result. Respondents have not disputed the findings of fact of the administrative law judge, except in conclusory terms, and we shall adopt them as those of the Commission. Respondents have also raised no objections to those parts of the order which enjoin future conduct,[1] reserving their attack for the requirement of restitution. Complaint counsel have suggested that the Commission withdraw order provisions relating to restitution, and reserve the option to consider use of the provisions of Section 19 of the Federal Trade Commission Act (15 U.S.C. § 57b) to obtain consumer redress at a later date. Complaint counsel also suggest certain minor modifications in the order, and urge the Commission to elaborate on the rationale of the administrative law judge in holding respondents' use of a multilevel pyramid type marketing plan to be inherently deceptive and unfair.

Background

Respondents operated a multilevel marketing plan which individuals might enter at one of several levels. At the lowest level, that of "beauty advisor," one could purchase cosmetics at a 40 percent discount for resale to consumers. "Supervisors" received a 55 percent discount and appointed and supplied beauty advisors, while "distributors" received a 65 percent discount and sold to those below them (I.D. 36).[2] The big money, however, derived not from the sale of cosmetics to consumers, but from the act of recruiting other participants into the marketing program. Distributors were required to pay Koscot an amount ranging up to $5000 for initial inventory and the right to recruit others. A distributor who recruited another would receive $2650 of the recruit's $5000 payment. Supervisors paid $2000 for their position, of which a distributor who recruited the supervisor received $700. If one supervisor recruited another, $500 of the $700 commission would go to the recruiting supervisor, and $200 to the distributor who had recruited the recruiting supervisor (I.D. 37). Variations on this scheme are set forth in the initial decision and incorporated findings (I.D. 38). In general, respondents' plan extracted large sums of money from individual participants by offering the promise that they could recoup these sums and more by inducing others to make similar payments (I.D. 40).

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[1] In briefing the question of relief before the administrative law judge, respondents raised no objections to the non-restitutionary relief proposed by complaint counsel, which the law judge adopted. In their appeal brief before the Commission respondents indicated certain objections to the order language. At oral argument, however, counsel for respondents indicated that his reservations about the order language had been resolved (Transcript of Oral Argument, pp. 3-4, Oct. 2, 1975).

To some degree, and particularly at the lowest level, individuals were also induced to participate by the prospect of making money via the sale of cosmetics to consumers. The record indicates, however, that respondents' devotion to this facet of their business frequently fell short of what one would expect from an organization seriously committed to the retailing of cosmetics (I.D. 76-98). Implementation of the Koscot marketing plan was attended by a wide variety of specific misrepresentations and high pressure sales tactics, chronicled by the law judge at I.D. 54-119. The record also reveals a staggering human toll—money borrowed, jobs quit, homes mortgaged, and even personal bankruptcy for some who dared to be great (Tr. 2249, 2343, 2345-46, 2460, 2491, 2483-84, 2491, 2564, 2737, 2769, 3027-28, 3286-87, 3312, 3352-53, 3373, 3480-81, 3485, 3503-04, 3555-57, 3571, 3626-27, 3668-69, 3754-55, 3759-60, 3872, 3893, 3896, 4065).

Illegality of Entrepreneurial Chain Marketing System

Awash amidst evidence of deception and overreaching, the administrative law judge had no difficulty concluding that respondents' practices violated Section 5. He based his conclusions on the actual deception which was proven to have occurred, and on the inherent capacity of respondents' multilevel marketing plan to deceive (I.D. p. 51 [p. 1157, herein]). On appeal, complaint counsel urge that the

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[2] The following abbreviations are used herein:
I.D.—Initial Decision (Finding No.)
I.D. p.—Initial Decision (Page No.)
Tr.—Transcript of Testimony (Page No.)

Commission enlarge the reasoning upon which the administrative law judge based his finding that respondents' plan was inherently unlawful. Complaint counsel proposed adoption of an alternative finding of law to the effect that:

> Respondents' marketing plan contemplates upon the payment of consideration, participants would thereby acquire the right to engage in two income-producing activities, one of which contemplated the sale of similar rights to others for which substantial compensation would be paid, while the other contemplated the sale of products or services. Since implicit in the holding out of such rights is the representation that substantial rewards would be gained therefrom, and since the operation of such plan due to its very structure precludes the realization of such rewards to most of those who invest therein, such plan is inherently deceptive. Furthermore, such plan is contrary to established public policy in that it is generally considered to be unfair and unlawful and is by its very nature immoral, unethical, oppressive, unscrupulous, and exploitative. Therefore, such plan was and is inherently unfair and the operation of the Koscot marketing plan by respondents, having caused substantial injury to the participants therein as well as to other members of the public, constitutes an unfair and deceptive act and practice and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

The Commission has previously condemned so-called "entrepreneurial chains" as possessing an intolerable capacity to mislead. *Holiday Magic, Inc.*, Docket No. 8834, slip op. pp. 11-14 [84 F.T.C. 748 at pp. 1036-1039] (Oct. 15, 1974); *Ger-Ro-Mar, Inc.*, Docket No. 8872, slip op. pp. 8-12 [84 F.T.C. 95, at pp. 145-149] (July 23, 1974), *rev'd in part* 518 F.2d 33(2d Cir. 1975). Such schemes are characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product *and* (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users. In general such recruitment is facilitated by promising all participants the same "lucrative" rights to recruit.

As is apparent, the presence of this second element, recruitment with rewards unrelated to product sales, is nothing more than an elaborate chain letter device in which individuals who pay a valuable consideration with the expectation of recouping it to some degree via recruitment are bound to be disappointed. Cf. *Twentieth Century Co.* v. *Quilling*, 130 Wis. 318, 110 N.W. 173, 176 (1907). Indeed, even where rewards are based upon sales to consumers, a scheme which represents indiscriminately to all comers that they can recoup their investments by virtue of the product sales of their *recruits* must end up disappointing those at the bottom who can find no recruits capable of making retail sales.[3]

Complaint counsel argue, in a keen analysis, that the right to sell product in an entrepreneurial chain is also likely to prove worthless for many participants, by virtue of the very nature of the plan as opposed to any particular dishonest machinations of its perpetrators. That is so, argue counsel, because the mere presence of a lucrative right to sell franchises will encourage both a company and its distributors to pursue that side of the business, to the neglect or exclusion of retail selling. The short-term result may be high recruiting profits for the company and select distributors, but the ultimate outcome will be neglect of market development, earnings misrepresentations, and insufficient sales for the insupportably large number of distributors whose recruitment the system encourages. Certainly the facts of this case and of *Holiday Magic*, *supra*, as well as expert testimony in the record (Tr. 1195 ff 1691 ff), bear out complaint counsel's contentions. At the very least we would conclude that a company which offers its distributors substantial rewards for recruiting other distributors, and charges them substantial amounts for this right, creates overwhelming barriers to the development of a sound retail distribution network and resultant meaningful retail sales opportunities for participants.

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[3] The presence of a quota for distributors is not likely to eliminate the inherently deceptive nature of an

(*Continued*)

What compels the categorical condemnation of entrepreneurial chains under Section 5 is, however, the inevitably deceptive representation (conveyed by their mere existence) that any individual can recoup his or her investment by means of inducing others to invest. That these schemes so often do not allow recovery of investments by means of retail sales either merely points up that there is very little positive value to be lost by not allowing such schemes to get started in the first place.

A discussion of "inherent" illegality and capacity to deceive may seem pointless given the more than 4000 pages of transcript detailing the actual deception and injury in which the Koscot plan resulted. Nothing could be further from the truth. It is regrettably clear that responsible authorities, including this Commission, have acted far too slowly to protect consumers from the manipulations of respondents and others like them. As this is written the corporate respondent, Koscot, is in Chapter XI reorganization proceedings, while the individual respondents plead poverty. The administrative law judge estimated that $44 million was taken from consumers (I.D. p. 59 [p. 1163, herein]), and no more than a fraction of that is presently accounted for. Whether

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entrepreneurial chain, unless realistic quotas are imposed by *market area* rather than by arbitrary geographical unit. In this case, for example, it appears that while statewide quotas were announced and occasionally enforced, this did not prevent saturation of local markets within States (with most of the State's quota being exhausted within an area too small to accommodate so many distributors). In addition, there are strong disincentives for recruiters to disclose honestly the existence of a quota and the extent to which it is being approached, since this will alert prospective recruits to the imminent disappearance of further opportunities for profiting by recruitment and render them less likely to participate.

more than a small fraction of the consumer loss will ever be recovered is open to serious doubt. These particular individual respondents may not, under the watchful eyes of federal authorities, repeat their misdeeds, but once has clearly been too much.

We think that failure to act more promptly can be traced to the previous inability of relevant authorities to obtain *summary* relief against the practices involved. The necessity to prove that a marketing plan, manifestly deceptive on its face, has in fact resulted in injury to numerous consumers, is a lengthy process. Only where the law condemns the mere institution of such a plan, without the necessity to demonstrate its consequences, is meaningful relief likely to be obtained. In the years since Koscot's heyday, many States have enacted laws which categorically proscribe entrepreneurial chain methods of selling. Similarly, the Commission has held that the Federal Trade Commission Act forbids such tactics, and has announced that it will henceforth not hesitate to seek recently-authorized injunctive relief should it seem warranted, *Holiday Magic, Inc., supra,* page 14 [84 F.T.C. 748, at 1038]. The viability of a Federal remedy, however, will depend, if not upon congressional enactment, then upon the willingness of courts to recognize the serious potential hazards of entrepreneurial chains and to permit summary excision of their inherently deceptive elements, without the time-consuming necessity to show occurrence of the very injury which justice should prevent. To require too large an evidentiary burden to condemn these schemes can only ensure that future generations of self-made commercial messiahs will dare to be great and dare anyone to stop them.

Restitution and Consumer Redress

Both sides have recommended that the Commission delete those portions of the administrative law judge's order requiring respondents to make restitution. Counsel for respondents argues that the Commission lacks authority to include a provision requiring restitution in an order to cease and desist. Complaint counsel argue that while the Commission does have such authority, it should rely instead upon its power to obtain redress for consumers pursuant to §206 of the Magnuson-Moss-Warranty—Federal Trade Commission Improvements Act of 1975 (adding Section 19 of the Federal Trade Commission Act).

We agree with complaint counsel that under the circumstances of this case any further efforts by the Commission to obtain compensation for consumers should be made pursuant to the provisions of Section 19 of the Federal Trade Commission Act. We have no doubt that the statutory prerequisites for consumer redress have been made out here. Respondents were apprised in the notice order of the complaint that recompense for consumers would be sought. And succeeding adjudication has revealed that practices which respondents knew or should have known to be fraudulent or dishonest led to consumers' loss of substantial amounts of money.

As matters now stand, the respondent Koscot is in an arrangement proceeding, pursuant to Chapter XI of the Bankruptcy Act. Whether any further restitutionary action by the Commission as to Koscot will be possible or desirable remains in doubt. Vacation of the administrative law judge's proposed order regarding restitution will remove that as a source of contention in the arrangement proceedings. The Commission's action is, however, taken without prejudice to the institution of such action against corporate respondents as may in the future seem appropriate pursuant to Section 19 of the Federal Trade Commission Act.

With respect to individual respondents Turner, Wilder, and Bunting, there have been intimations from their counsel at various points in these proceedings that pursuit of restitution is a futile gesture because they are in dire financial straits. Respondents have, however, previously refused to provide a verified accounting of their assets, claiming that to do so would abridge their Fifth Amendment rights because of simultaneously pending criminal proceedings. It appears, however, that these proceedings have now ended as to respondents. Therefore, upon the conclusion of this adjudication, the Commission will endeavor to ascertain the financial status of these individuals in order to determine whether Section 19 proceedings as to them would serve a purpose. We can hardly quarrel with respondents' claim that the Commission should not beat a dead horse, but in view of the enormity of the abuses in this case, the Commission has a solemn duty to assure itself that the analogy is a valid one.

Miscellaneous

Complaint counsel urge that Paragraph I(2) of the law judge's proposed order be reformulated so as to prevent in all cases the use of bounty-seeking "headhunters," individuals who would receive compensation based upon the number of others they could induce to participate in respondents' sales program. As now formulated, the law judge's order would permit respondents to enlist certain individuals as headhunters, provided they were not required to pay a valuable consideration for that right. The revised order would still permit payment of compensation to headhunters provided it was based upon actually consummated retail sales by recruits.

Respondents have not objected to this change and we believe it is warranted under the circumstances. As complaint counsel point out, while the order prevents respondents from requiring an initial payment for participation in a plan, it does not prevent participants from making initial inventory purchases if they so desire. Thus there remain incentives for indiscriminate recruitment by headhunters, and incentives for headhunters in any program to ignore other requirements of the order designed to ensure that recruitment is undertaken honestly. By requiring that compensation for recruitment be based in all cases upon retail sales by those recruited, the order provides a readily monitored means to ensure that recruitment of distributors is based on market demand, which is the goal of any legitimate business enterprise.[4]

Complaint counsel have also urged the Commission to supplement the administrative law judge's conclusions of law with respect to the Robinson-Patman charges in the complaint. Counsel's proposals are hereby adopted.[5]

On its own motion the Commission has broadened those portions of the order relating to Section 5 violations to proscribe covered conduct "affecting" commerce, inasmuch as the Commission's authority has been broadened in that respect. We have placed the Robinson-Patman prohibitions of the law judge's order in a separate section (V) applicable only to activities "in commerce." Provisions of the law judge's Section V concerning restitution have been deleted, along with corresponding provisions in the definitions section and compliance paragraph (IX). Finally the Commission has modified the wording of paragraph I(1) to conform to the language used in *Holiday Magic*.

An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals of complaint counsel and respondents' counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having granted the appeals in part:

It is ordered, That pages 1-65 [p. 1117-1167, herein] of the initial decision of the administrative law judge be, and they hereby are, adopted as the findings of fact and conclusions of law of the

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[4] Of course we do not construe the order as modified to prevent respondents from paying an individual a fixed salary in return for performing recruitment functions.

[5] "10. Koscot Interplanetary, Inc., a Florida corporation, whose principal office and place of business is located at 4805 Sand Lake Road, Orlando, Florida, sells and distributes in commerce, as commerce is defined in the Clayton Act, as amended, a line of cosmetics, toiletries, and associated items, sold under the trade name of Koscot.

11. Koscot Interplanetary, Inc., in the sale and distribution of its line of cosmetics, toiletries, and associated items was and is in substantial competition with other distributors and sellers of identical or similar cosmetics and toiletries.

12. Many of the distributors to whom Koscot Interplanetary, Inc., sold or sells one or some or all of the items in its product line are in substantial competition with each other in the resale of Koscot products to their customers."

Commission, with the following exceptions: conclusion of law 12, page 53 [p. 1159, herein]; those portions of pages 53-65 [p. 1159-1167, herein] ("Rationale of the Order") which are inconsistent with the opinion of the Commission herein.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

Definitions: For the purposes of this order, the following definitions shall apply:

(a) The term "distributorship" means any continuing commercial relationship created by written agreement or by understanding in which:

(1) The participant is granted the right or is permitted to offer, sell, or distribute goods or commodities manufactured, processed, or distributed by the respondents; or (2) the participant is granted the right or is permitted to offer or sell services established, organized, approved, or directed by the respondents.

(b) "Participant" means any person to whom a distributorship is granted.

(c) "Person" means any individual, group, association, limited or general partnership, corporation, or any other business entity.

(d) "Koscot" means Koscot Interplanetary, Inc., and its successors or assigns.

I

It is ordered, That respondents Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., corporations, their officers, agents, representatives, employees, successors, and assigns, and Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann, individually, their agents, representatives, and employees, directly or indirectly, through any corporate or other device, in connection with the advertising, offering for sale, or sale of products, services, franchises, or distributorships, or in connection with the seeking to induce or inducing the participation of persons, firms, or corporations therein, or in connection with any merchandising, marketing, or sales promotion program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering, operating, or participating in, directly or indirectly, any

marketing or sales plan or program wherein the financial gains to participants are or are represented to be based in any manner or to any degree upon their recruiting of other participants who obtain the right under the plan or program to recruit yet other participants whose function in the program includes during their first year of participation the recruitment of participants.

2. Offering, operating, or participating in, any marketing or sales plan or program wherein a participant is given or promised compensation (1) for inducing another person to become a participant in the plan or program, or (2) when a person induced by the participant induces another person to become a participant in the plan or program; *Provided*, That the term "compensation," as used in this paragraph only, does not mean any payment based on actually consummated sales of goods or services to persons who are not participants in the plan or program and who do not purchase such goods or services in order to resell them.

3. Requiring or suggesting that a prospective participant or a participant in any merchandising, marketing, or sales promotion program purchase any product or services or pay any other consideration, either to respondents or to any person, in order to participate in said program, other than payment for the actual cost to respondents, as determined by generally accepted accounting principles, of those items respondents deem to be reasonably necessary sales materials in order to participate in any manner therein; *Provided*, That necessary sales material shall not include any product inventory.

II

It is further ordered, That respondents Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., corporations, their officers, agents, representatives, employees, successors, and assigns, and Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann, individually, their agents, representatives, and employees, directly or indirectly, through any corporate or other device, in connection with the advertising, offering for sale, or sale of products, franchises, or distributorships, or in connection with the seeking to induce or inducing the participation of persons, firms, or corporations in any merchandising, marketing, or sales promotion program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, including the use of hypothetical examples, that participants in any merchandising, marketing, or sales promotion program, will earn or receive, or have the potential or reasonable expectancy of earning or receiving, any stated

or gross or net amount, or representing in any manner the past earnings of participants, unless in fact the earnings represented are those of a substantial number of participants in the community or geographic area in which such representations are made, and the representation clearly indicates the amount of time required by such past participants to achieve the earnings represented, and failing to maintain adequate records which disclose the facts upon which any claims of the type referred to in this paragraph of the order [II(1)] are based; and from which the validity of any such claim can be determined.

2. Misrepresenting the ease of recruiting or retaining participants in any merchandising, marketing, or sales promotion programs, as distributors or as sales personnel.

3. Representing, directly or by implication, that any participant in any merchandising, marketing, or sales promotion program can attain financial success.

4. Misrepresenting the supply or availability of potential participants or customers in any merchandising, marketing, or sales promotion program in any given community or geographical area.

5. Misrepresenting that participants can expect to remain active in business for any length of time, or misrepresenting in any manner the longevity or tenure of past or current participants, as, for example, by using a hypothetical illustration of how a marketing program operates, which has the tendency or capacity to imply that participants remain active for a given period, when in fact such period is more than the average length of time for which such participants do remain active.

6. Misrepresenting the reasonably necessary and anticipated costs of doing business for prospective distributors, dealers, sales personnel, or franchisees.

7. Representing, directly or by implication, that products will be or have been advertised, either locally or nationally, or in the geographic area in which such representations are made, without clearly and truthfully representing the manner, mode, extent, and amount of the advertising.

8. Representing that a training program will be or is being offered without clearly and truthfully representing the specific type and nature of the training, the number of hours or days of instruction, and the cost to the participant, if any.

9. Misrepresenting the availability of product, in any manner, including, but not limited to, misrepresenting the amount of inventory available, the extent to which an order can be filled at a given time, the length of time necessary to replenish items out of stock, and the length of time necessary to deliver an order to a participant.

10. Misrepresenting, directly or by implication, the extent of

respondents' sales of products and services, the nature of such sales, including what proportion were derived from the sale of franchises or distributorships, or the market position of respondents in any market.

III

It is further ordered, That respondents Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., corporations, their successors or assigns, and respondents Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann incident to selling any franchise or distributorship, shall:

1. Inform orally all persons to whom solicitations are made, and provide in writing in all applications and contracts, in at least ten-point bold type, that the application or contract may be cancelled for any reason by notification to respondents in writing within at least seven (7) business days from the date of execution.

2. Refund immediately all monies to participants who:

(a) Cancel their contracts in accordance with paragraph 1 of this Section III; or

(b) show that respondents' contract solicitations or performance were attended by or involved violation of any of the provisions of this order.

3. Provide to a prospective franchisee or distributor at least fifteen (15) business days prior to the execution by the prospective franchisee or distributor of any franchise or distributorship agreement or any other binding obligation, or the payment by the prospective franchisee or distributor of any consideration in connection with the sale or proposed sale of a franchise:

(a) A certified balance sheet for the most recent year; a certified profit and loss statement for the most recent three-year period; and a statement of any material changes in the financial soundness of the franchisor since the date of such financial statements.

(b) A copy of Federal Trade Commission Consumer Bulletin No. 4, "ADVICE FOR PERSONS WHO ARE CONSIDERING AN INVESTMENT IN A FRANCHISE BUSINESS."

(c) A statement disclosing (a) the number of franchises or distributorships, whether active or inactive, already sold at the end of the last calendar year, and (b) the number of franchises or distributorships, whether active or inactive, already present in the market area in which the prospective franchisee or distributor plans to operate.

IV

It is further ordered, That respondents Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., corporations, their officers, agents, representatives, employees, successors, and assigns, and Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann, individually, their agents, representatives, and employees, directly or indirectly through any corporate or other device, in connection with the offering for sale, or distribution of goods or commodities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into, maintaining, promoting, or enforcing any contract, agreement, understanding, marketing system, or course of conduct with any dealer or distributor of such goods or commodities to do or perform or attempt to do or perform any of the following acts, practices, or things:

(a) Fix, establish, or maintain the prices, discounts, rebates, overrides, commissions, fees, or other terms or conditions of sale relating to pricing upon which goods or commodities may be resold; *Provided*, That in those States having Fair Trade laws, products may be marketed pursuant to the provisions of such laws.

(b) Require or coerce any person to enter into a contract, agreement, understanding, marketing system, or course of conduct which fixes, establishes, or maintains the prices, discounts, rebates, overrides, commissions, fees, or other terms or conditions of sale relating to pricing upon which goods or commodities may be marketed pursuant to the provisions of such laws.

(c) Require or coerce any person to enter into a contract, agreement, understanding, marketing system, or course of conduct requiring, inducing, or coercing any distributor to refrain from selling any merchandise in any quantity to or through any specified person, class of persons, business, or class of businesses.

2. Preventing distributors from entering into consignment agreements or selling their business to another individual.

3. Engaging, either as part of any contract, agreement, understanding, or course of conduct with any distributor or dealer of any goods or commodities, or individually and unilaterally, in the practice of:

(a) Publishing or distributing, directly or indirectly, any resale price, product pricelist, order form, report form, or promotional material which employs resale prices for goods or commodities without stating clearly and visibly in conjunction therewith the following statement:

> The prices quoted herein are suggested prices only. Distributors are free to determine for themselves their own resale prices.

(b) Publishing or distributing, directly or indirectly, any schedule of discounts, rebates, commissions, overrides, or other bonuses to be paid by one distributor or class of distributors to any other distributors or class of distributors, without stating clearly and visibly in conjunction therewith the following:

> The discounts [rebates, commissions, etc.] quoted herein are suggested only. Distributors are free to determine for themselves any amounts to be paid.

Provided, That in those States having Fair Trade laws, products may be marketed pursuant to the provisions of such laws.

4. Requiring any distributor or dealer or other participant in any merchandising program to obtain the prior approval of respondents for any product advertising or promotion, unless any selling prices and names of any selling outlets are required to be deleted from such proposed advertising or promotion prior to submission for prior approval.

V

It is further ordered, That respondents Koscot Interplanetary, Inc., and Glenn W. Turner Enterprises, Inc., corporations, their officers, agents, representatives, employees, successors, and assigns, and Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann, individually, their agents, representatives, and employees, directly or indirectly through any corporate or other device, in connection with the offering for sale, or distribution of goods or commodities in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act, shall forthwith cease and desist from:

1. Entering into, maintaining, promoting, or enforcing any contract, agreement, understanding, marketing system, or course of conduct with any dealer or distributor of such goods or commodities to require or coerce any person to enter into a contract, agreement, understanding, marketing system, or course of conduct which discriminates, directly, or indirectly, in the net price of any merchandise of like grade and quality by selling to any purchaser at net prices higher than the net prices charged to any other purchaser who in fact competes in the resale or distribution of such merchandise with the purchaser paying the higher price.

2. Discriminating, directly or indirectly, in the net price, or terms or conditions of sale of any merchandise of like grade and quality by selling to any purchaser at net prices, or upon terms or conditions of sale, less favorable than the net prices or terms or conditions of sale upon which such products are sold to any other purchaser to the extent such other purchaser competes in the resale of any such products with the purchaser who is afforded less favorable net price or terms or

conditions of sale, or with a customer of the purchaser afforded the less favorable net price or terms or conditions of sale.

VI

It is further ordered, That respondents Koscot Interplanetary, Inc., Glenn W. Turner Enterprises, Inc., Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann, their successors and assigns shall forthwith deliver a copy of Section II of this order to cease and desist to all present and future salespeople, franchisees, distributors, participants, or other persons engaged in the sale of franchises, distributorships, products, or services on behalf of respondents, and secure from each such person a signed statement acknowledging receipt thereof.

VII

It is further ordered, That the corporate respondents and their successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporations which may affect compliance obligations arising out of this order.

VIII

It is further ordered, That each individual respondent (Glenn W. Turner, Ben Bunting, Hobart Wilder, Malcolm Julian, and Raleigh P. Mann) shall promptly notify the Commission of each change in his business or employment status, including discontinuance of his present business or employment, and each affiliation with a new business or employment following the effective date of this order. Such notice shall include the address of the business or employment with which respondent is newly affiliated and a description of the business or employment as well as a description of the respondent's duties and responsibilities in that business or employment.

IX

It is further ordered, That each of the respondents herein and their successors and assigns shall, within sixty (60) days after the effective date of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the provisions of this order.

X

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to Michael Delaney and Terrell Jones; *Provided, however*, That the dismissal as to Terrell Jones is without prejudice to the right of the Commission to institute further proceedings against him if the public interest so warrants.

IN THE MATTER OF

CAVANAGH COMMUNITIES CORPORATION, ET AL.

Docket 9055. Order, Nov. 18, 1975

Denial of petition for extraordinary review and application for stay of time to answer.

Appearances

For the Commission: *Jeffrey Tureck, David Keehn* and *Pamela B. Stuart.*

For the respondents: *Philip F. Zeidman, Brownstein, Zeidman, Schomer & Chase,* Wash., D.C.

ORDER DENYING PETITION FOR EXTRAORDINARY REVIEW AND APPLICATION FOR STAY OF TIME TO ANSWER

Respondents have petitioned for "extraordinary review" of the administrative law judge's Oct. 24, 1975, order denying respondents' motion for a more definite statement of those allegations in the complaint with respect to which the Commission may subsequently bring an action for consumer redress pursuant to Section 19 of the Federal Trade Commission Act. Following denial of the motion for a more definite statement, respondents filed an application for a determination by the administrative law judge allowing an interlocutory appeal, which the law judge denied on Nov. 3, 1975.

We have considered respondents' petition and have found nothing therein which would warrant departing from the procedural requirements of Section 3.23 of the Commission's Rules of Practice or directing a certification of the matter pursuant to Section 3.22(a). Accordingly,

It is ordered, That the aforesaid petition for extraordinary review be, and it hereby is, denied.

It is further ordered, That respondents' application for a stay of the time to answer the complaint be, and it hereby is, denied.

IN THE MATTER OF

HARBOR BANANA DISTRIBUTORS, INC.

Docket 8795. Order, Nov. 24, 1975

Time for complying with divestiture order extended until Jan. 28, 1976.

Appearances

For the Commission: *Owen N. Johnson, Jr.*

For the respondents: *Bernard Marcus, Deutsch, Kerrigan & Stiles,* New Orleans, La.

ORDER EXTENDING TIME FOR COMPLIANCE WITH COMMISSION ORDER

On Oct. 6, 1975, respondent Harbor Banana Distributors, Inc., (hereinafter "Harbor") filed with the Secretary of the Commission a document entitled: "Harbor's Petition To Reopen the Order of the Federal Trade Commission Served on January 28, 1975." This petition sought a six-month extension of time from July 28, 1975, to Jan. 28, 1976, within which to comply with the order of the Commission that Harbor divest the acquired assets of Charles C. McCann Co. and Tradewinds Produce, Inc. Harbor was required to divest the subject assets by July 28, 1975, pursuant to Paragraph II of the Commission's modified order, which issued on Jan. 3, 1975 [85 F.T.C. 7].

A petition for reopening and modification pursuant to Section 3.72(b)(2) of the Commission's rules is not an appropriate procedure to apply to the Commission for an extension of time within which to comply with a Commission order. Rather, respondent should have sought an extension of time pursuant to Section 4.3(b), and should have made application prior to June 28, 1975, when the time previously granted expired. The Commission notes, however, that respondent's application for an extension of time is supported by a substantial showing of good faith efforts to comply with the Commission's order and is endorsed by the Bureau of Competition. In these circumstances, the Commission has determined to grant the requested extension. Therefore,

It is ordered, That respondent, Harbor Banana Distributors, Inc., may have until Jan. 28, 1976, to comply with the order of the Commission entered on Jan. 3, 1975, requiring that said respondent divest the acquired assets of Charles C. McCann Co. and Tradewinds Produce, Inc., and other relief.

IN THE MATTER OF

ILLINOIS CENTRAL INDUSTRIES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-2370. Decision, Mar. 26, 1973-Modifying Order, Nov. 24, 1975

Order modifying an earlier order dated Mar. 26, 1973, 82 F.T.C. 1097, 38 F. R. 10707, by changing the compliance reporting requirements for Paragraphs IIE and IIF from 30-day intervals to semi-annual reports on Dec. 15, 1975, and on June 15, 1976, after which only annual reports will be required in lieu of monthly reports with respect to the divestiture order.

Appearances

For the Commission: *K. Keith Thurman, James C. Egan, Jr.* and *James C. Hamill, Jr.*

For the respondents: *Robert Mitten*, Chicago, Ill., *Lloyd N. Cutler, Wilmer, Cutler & Pickering*, Wash., D.C. and *Bertrom M. Kantor, Wachtell, Lipton, Rosen & Katz*, New York City.

ORDER REOPENING AND MODIFYING ORDER TO CEASE AND DESIST

Respondent, by letter dated Sept. 12, 1975, which will be treated as a petition to reopen this proceeding, has requested that the requirement that it file compliance reports at 30-day intervals for Paragraphs II E and II F, contained in the order to cease and desist issued Mar. 26, 1973 [82 F.T.C. 1097], be modified so as to require semiannual reports on Dec. 15, 1975, and on June 15, 1976, and each calendar year thereafter.

The Commission has duly considered respondent's request and has determined that it should be granted.

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by requiring that the compliance reporting for Paragraphs II E and II F of the order be changed to a semiannual basis by submitting such reports on Dec. 15, 1975, and on June 15, 1976, and thereafter for each calendar year in lieu of the monthly reports heretofore required with respect to the divestiture provisions of the order.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Order, Nov. 25, 1975

Denial of (1) complaint counsel's application for review of administrative law judge's order setting a schedule for pretrial briefing and trial in this matter, and (2) administrative law judge's order denying motion for reconsideration.

Dismissing as moot complaint counsel's petition for stay of action by Commission on administrative law judge's report and orders of Oct. 14, 1975.

*Appearances**

For the Commission: *Robert B. Greenbaum* and *Steven A. Newborn.*

ORDER DENYING APPLICATION BY COMPLAINT COUNSEL FOR REVIEW OF THE SUBSTITUTE ADMINISTRATIVE LAW JUDGE'S ORDERS AND DISMISSING PETITION FOR STAY

This matter is before the Commission upon an uncertified application for review.

On Oct. 22, 1975, Administrative Law Judge Joseph P. Dufresne[1] denied complaint counsel's motion that he reconsider and amend his order of Oct. 14, 1975, setting a schedule for pretrial briefing and trial in this matter. The law judge's order, setting Jan. 26, 1976 as the date for the commencement of hearings on complaint counsel's case, was issued pursuant to the Commission's orders of Sept. 16, 1975, and Sept. 23, 1975, requiring that the law judge, after consultation with the parties, promptly establish a schedule for trial and certify to the Commission a status report on this matter.

The law judge has also declined to make a determination that his rulings are appropriate for interlocutory review under Section 3.23(b) of the rules of practice.

Complaint counsel have now applied for review of the law judge's orders of Oct. 14, 1975, and Oct. 22, 1975. They contend that the judge's failure to determine that this matter is appropriate for review under Section 3.23(b) was a clear abuse of discretion and that the rulings setting a briefing and trial schedule were likewise abuses of discretion.

Complaint counsel ask that the scheduling of this matter be "returned to the discretion of Judge Hinkes to set a schedule consistent with the record, the needs of the parties, and the interests of the public in a proper resolution of this important matter. If the Commission decides that it will itself set the schedule, complaint counsel recommend a trial date of Apr. 5, 1976, as originally proposed by the substitute judge and accepted by all parties."

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* For additional appearances see p. 650, herein.

[1] Judge Dufresne was designated to substitute for Harry R. Hinkes, the law judge to whom this matter was assigned, who was required to be absent from the Commission for personal reasons.

We cannot conclude, from the record before us, that Judge Dufresne abused his discretion in making any of the determinations challenged by complaint counsel. However, the law judge retains discretion to modify the trial schedule for good cause. Accordingly,

It is ordered, That the aforesaid application for review be, and it hereby is, denied;

It is further ordered, That the petition by complaint counsel for stay of any action by the Commission on Judge Dufresne's report and orders of Oct. 14, 1975, be, and it hereby is, dismissed as moot.

IN THE MATTER OF

LUSTINE CHEVROLET, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8974. Complaint, July 1, 1974-Decision, Nov. 25, 1975

Consent order requiring a Hyattsville, Md. new and used car dealer, among other things to cease misrepresenting that any vehicle is new when it has been used in any manner other than the limited use necessary in moving or road testing prior to delivery; and to disclose, orally and in writing, specific information with respect to used motor vehicles.

Appearances

For the Commission: *Jerry W. Boykin, Michael E.K. Mpras, Michael Dershowitz, Frank H. Addonizio* and *Robert G. Day.*

For the respondents: *Jacob Stein, Stein, Mitchell* [*Mezines,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Lustine Chevrolet, Inc., a corporation, and Phillip Lustine and Burton Lustine, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Lustine Chevrolet, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 5710 Baltimore Ave., in Hyattsville, Md.

Respondents Phillip Lustine and Burton Lustine are individuals and officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including those hereinafter set forth. Their business address is the same as that of the corporate respondent.

The respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, and sale to the public of new and used motor vehicles and in the servicing and repair thereof.

PAR. 3. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused, their said motor vehicles to be sold to purchasers thereof located in various States of the United States and the District of Columbia, including the State of Maryland, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said motor vehicles in commerce, as "commerce" is defined in the Federal Trade Commission Act. Also in the course and conduct of their business, respondents have caused, and now cause, customers' notes, contracts, payments, checks, credit reports, title registrations, correspondence and other documents relating to payment of the purchase price for respondents' motor vehicles to be transmitted by various means, including but not limited to, the United States mails, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their motor vehicles, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Typical and illustrative of the statements and representations in said advertisements, published in November of 1970, disseminated as aforesaid, but not all inclusive thereof, are the following:

SAVE $400 to $1200 ON EVERY CAR IN OUR INVENTORY OF UNSOLD '70 MODELS!

SPECIAL PURCHASE LAST OF THE 5-YEAR WARRANTY CARS AT 400 BELOW ORIGINAL COST

1970 MALIBU 2-DOOR HARDTOP AIR COND. AUTO. PWR. ST. & DISC. BR., RADIO, WWT, WHEEL COVERS, TINTED GLASS, VINYL TOP, GREEN AMERICA'S LARGEST SPECIAL PURCHASE DEALER * * *.

PAR. 5. By and through the use of the above-quoted statements and others of similar import and meaning but not expressly set out herein, the respondents have represented, and are now representing, directly or by implication:

1. That the motor vehicles described or referred to in said advertisements are new;

2. That Lustine Chevrolet, Inc. is America's largest special purchase dealer.

PAR. 6. In truth and in fact:

1. The motor vehicles described or referred to in said advertisements, in many instances, are not new. To the contrary, they have been driven substantially in excess of the limited use necessary in moving or road testing a new vehicle prior to its delivery to the ultimate purchaser.

2. Lustine Chevrolet, Inc. is not America's largest special purchase dealer.

Therefore, the statements and representations as set forth in Paragraphs Four and Five, hereof, were, and are, unfair, false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their said motor vehicles, respondents, directly or through their representatives and employees, have engaged in the deceptive act and practice of representing to customers that lease buy-back motor vehicles purchased from various metropolitan Washington, D.C. area motor vehicle leasing operations were demonstrator motor vehicles; by such representations, respondents misled and deceived purchasers as to the actual prior use of said lease buy-back motor vehicles.

Therefore, respondents' statements and representations, and their failure to reveal in their advertisements and during their sales representations, the material facts as to the nature and extent of such previous use of said motor vehicles, are unfair, false, misleading and deceptive.

PAR. 8. In the further course and conduct of their aforesaid business, respondents have engaged in the following acts and practices in connection with the sale of their said motor vehicles:

1. A $35 dealer handling and service charge is added to the price of respondents' used motor vehicles, the first indication that such a charge is being made, in many instances, occurs at the time the buyer receives a copy of the sales invoice and the conditional sales contract. The purchaser, in many said instances, believes that the motor vehicle will

be delivered in satisfactory condition and appearance without the imposition of additional charges. The dealer handling and service charge becomes an undisclosed cost that should have been made known prior to the consummation of the sale.

2. Respondents have repaired or repainted, or have caused to be repaired or repainted, damaged cars, said repairs or repainting hide damage that may adversely affect a vehicle's performance and life expectancy. Respondents have failed to disclose to prospective purchasers and purchasers of respondents' motor vehicles that said damage has been hidden by repairs or repainting.

Therefore, respondents' failure to disclose such material facts, prior to the time of sale was, and is, unfair, false, misleading and deceptive.

PAR. 9. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals in the sale, service and repair of new and used motor vehicles of the same general kind and nature as that sold, serviced and repaired by respondents.

PAR. 10. The use by the respondents of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices and the failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete and into the purchase of substantial quantities of respondents' motor vehicles and services by reason of said erroneous and mistaken belief. Respondents' aforesaid acts and practices unfairly cause the purchasing public to assume debts and obligations and to make payments of money which they might otherwise not have incurred.

PAR. 11. The acts and practices of the respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act; and

The Commission having duly determined upon motion submitted by complaint counsel and respondents that, in the circumstances presented, the public interest would be served by a withdrawal of the matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order; and

The respondents and counsel for the Commission having executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedures described in Section 2.34 of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Lustine Chevrolet, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 5710 Baltimore Ave., Hyattsville, Md.

Respondents Phillip Lustine and Burton Lustine are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Lustine Chevrolet, Inc., a corporation, its successors and assigns and its officers, and Phillip Lustine and Burton Lustine, individually and as officers of said corporation, and respondents' agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution, service and repair of new and used motor vehicles, or any other products or services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, orally or in writing, directly or by implication, that any vehicle is new when it has been used in any manner other than the limited use necessary in moving or road testing a new vehicle prior to delivery of such vehicle to the customer.

2. Offering for sale or selling any vehicles of the current or

previous model year, which has been used in any manner, other than the limited use referred to in Paragraph 1., above, without orally disclosing, prior to any sales presentation, the nature and extent of such previous use of said vehicle.

3. Advertising any vehicle of the current or the previous model year which has been used in any manner, other than the limited use referred to in Paragraph 1., above, without clearly and conspicuously disclosing in any and all advertising thereof the nature of such previous use of said vehicle.

4. Displaying, offering for sale or selling any vehicle of the current or the previous model year which has been used in any manner, other than the limited use referred to in Paragraph 1., above, without clearly and conspicuously disclosing by decal or sticker affixed to the inside of the side window containing the manufacturer's suggested retail price or "Monroney sticker," or if space is not available thereon, in close proximity thereto, so as to be clearly visible, the nature of such previous use of said vehicle. Said decal or sticker shall also contain the following statement: "FOR EXACT MILEAGE, SEE ODOMETER."

5. Offering for sale or selling any motor vehicle of the current or the previous model year which has been used and which respondents have reason to believe has been damaged to the extent that it may adversely affect said motor vehicle's performance and life expectancy and the repair and repainting of said motor vehicle may hide said damage, without:

(a) Disclosing, both orally and in writing, the manner in which the motor vehicle has been damaged and the nature of the damage sustained by the vehicle; and

(b) clearly and conspicuously disclosing by decal or sticker attached thereto, as required by Paragraph 4., above, that the motor vehicle has been damaged.

6. Misrepresenting, orally or in writing, directly or by implication, the nature or extent of previous use or condition of any vehicle displayed, offered for sale or sold.

7. Failing to disclose, both orally and in writing, prior to the signing of the completed retail order for a used motor vehicle, and in any and all advertising of such vehicles, the precise amount of handling and service charges which will be added to the cost of respondents' used motor vehicles.

8. Representing, orally or in writing, directly or by implication, that respondent Lustine Chevrolet, Inc. is America's largest special purchase dealer, or using words of similar import, unless it does occupy such purchasing position, at the time aforesaid representation is made;

misrepresenting, in any manner, the size, status, sales or purchasing position of respondents' dealership.

It is further ordered:

(a) That respondents shall forthwith distribute a copy of this order to each of their operating divisions;

(b) That respondents deliver a copy of this order to cease and desist to all present and future personnel engaged in the offering for sale, or sale, of any motor vehicle, and in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person;

(c) That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order;

(d) That respondents post in a prominent place in each salesroom or other area wherein respondents sell motor vehicles or other products or services, a copy of this cease and desist order, with the notice that any customer or prospective customer may receive a copy on demand;

(e) That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities; and

(f) That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

In the Matter of

NATIONAL TALENT ASSOCIATES, INC., ET AL.

Docket 8960. Complaint, Apr. 3, 1974-Decision, Nov. 26, 1975

Consent order requiring a New York City talent and modeling agency and three closely held corporations in New Jersey, Illinois and California, among other things to cease misrepresenting their ability to place customers into modeling and entertainment positions; using unethical and exploitative high pressure sales tactics and failing to disclose relevant facts. Further, respondents are required to give consumers a three-day cooling-off period within which they may cancel their contracts and receive full refund of all monies paid.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Appearances

For the Commission: *Harriet G. Mulhern.*

For the respondents: *Donald J. Williamson, Burgoyne, Michels, Rose & Williamson,* New York City. *John T. Dolan, Crummy, DelDeo, Dolan & Purcell,* Newark, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that National Talent Associates, Inc., a New Jersey corporation, National Talent Associates, Inc., an Illinois corporation, and National Talent Associates, Inc., a California corporation, and Sanford Storm and Jerome P. Ashfield, individually and as officers of said corporations, and William Schuller Agency, Inc., a corporation and Monica Stuart, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents National Talent Associates, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the States of New Jersey, Illinois and California. They maintain offices at 280 Park Ave., Rutherford, N.J., 110 Jericho Turnpike, Floral Park, N.Y., 3525 W. Peterson Ave., Chicago, Ill., and 1900 N. Highland Ave., Hollywood, Calif., respectively.

Respondents Sanford Storm and Jerome P. Ashfield are individuals and officers of all of the corporate respondents. They formulate, direct and control the policies, acts and practices hereinafter set forth. Their address is 280 Park Ave., Rutherford, N.J.

Respondent William Schuller Agency, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its principal place of business is located at 667 Madison Ave., New York, N.Y. and it also maintains an office at 9110 Sunset Blvd., Hollywood, Calif.

Respondent Monica Stuart is a principal owner and officer of William

Schuller Agency, Inc., and as such formulates, directs and controls the policies, acts and practices of the corporate respondent.

PAR. 2. Respondents are now, and for some time in the past have been engaged in the advertising, solicitation, offering for sale and sale of photographs or services used in connection with the selection, placement and employment of persons in the commercial advertising, talent, modeling or entertainment industries as models, actors, actresses or entertainers.

In the course and conduct of their business respondents, their employees, agents or representatives have contracted to sell and have sold their photographs or services to purchasers located in the States of New Jersey, New York, Illinois, California and various other States, and have disseminated flyers, brochures, contracts and other printed materials to such purchasers and to prospective purchasers by means of the United States mails. Respondents maintain and have maintained a course of trade in said photographs or services in commerce as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of business in the sale of photographs or services is and has been substantial.

PAR. 3. Respondents are now and at all times mentioned herein have been in substantial competition in commerce with other corporations, firms and individuals engaged in the sale of photographs or services in connection with the selection, placement and employment of persons in the commercial advertising, talent, modeling or entertainment industries, as models, actors, actresses or entertainers.

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their photographs or services, respondents have made, and are now making, numerous statements and representations in letters of solicitation which are addressed and mailed to parents of children throughout the United States, in brochures and pamphlets, advertisements in telephone directories, on their written contract, and in other promotional materials which are distributed to prospective purchasers of their photographs or services by means of the United States mails, in oral solicitations, and by other means, which have the tendency and capacity of exaggerating and misrepresenting respondents' ability, effectiveness and success in placing persons as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries, of which the following are typical but not all inclusive:

In their sales solicitation letters, respondents represent as follows:

> Your child has recently been brought to our attention. Information comes to us from many sources including referrals from the parents of our children who feel some other

child may have the necessary qualifications for the commercial advertising field, and other available sources.

Your child has recently been brought to our attention. Information and referrals come to us from the parents of our children who feel some other child may have the necessary qualifications for the commercial advertising field, and other available sources * * *. Although a great deal of our information may be inaccurate and incomplete, it is possible we could be quite interested in your child. If you would please call our Rutherford office before 2:30 at (201) 935-0330, we will try to fill in the details.

We have received information indicating that your child may have the necessary qualifications for the commercial advertising media * * *. If the information we have is correct, we could be very interested in your child. It may be to your advantage if you would call our Floral Park office at 212-343-6730 before 2:30 P.M.

We have been informed about your child, however, in order to determine any youngster's potential for the advertising field, all vital statistics are necessary (height, weight, age, coloring, etc.). This information was not included * * *. Although our continued success depends on the children selected, time is also limited. Therefore, we ask you do not bring children in or send photographs. Due to the fact that very few children possess the necessary qualifications, a phone call will generally give us all the information necessary.

2. In their brochures mailed to parents, respondents represent as follows:

NTA WORLD'S LARGEST PERSONAL MANAGERS DEVOTED EXCLUSIVELY TO CHILDREN * * *. N.T.A. was formed to supply to the agencies the most qualified new faces for the advertising industry * * *. Opportunity is what N.T.A. can offer. Children are accepted only on the basis that they may have the necessary qualifications * * *.

Our children are handled by the leading agencies in the country * * *

In New York on MADISON AVENUE * * * the William Schuller—East.

This agency has been supplying models for over 25 years * * * numbers among its clients the leading advertising agencies in the country.

Monica Stuart:

Chief consultant for T.V. and modeling for the William Schuller Agency, New York City. Miss Stuart has been a specialist in placing talent in print advertising and television commercials for the past fifteen years * * *. Miss Stuart personally places hundreds of children in print and T.V. advertisements every year.

N.T.A. will arrange for Baratta Professional Service to do a series of photographs in natural color of the children accepted by their agency.

In their contract forms, and other similar forms, respondents represent as follows:

National Talent Associates, Inc. agrees to render the following services:

We will arrange for a professional photographer to do a series of poses in natural color. These will be submitted to Monica Stuart, chief television and modeling consultant for the William Schuller Agency, Inc., New York for her consideration for placement in the field of print advertising and television commercials. This agreement in no way guarantees placement will be made.

The client will receive one black and white 8 x 10 portrait of their choice from the series. You are under no obligation to obtain additional portraits, but additional poses may, if you wish, be purchased through your photographer.

National Talent Associates, Inc., reserves the right to submit to Monica Stuart photographs of any other child in the family who, in their opinion may have a potential ability. We will continue this service for a period of five years or until the child herein enrolled is accepted by the William Schuller Agency, whichever occurs first.

The complete cost of this service is $65 plus state tax, for the entire five year period. The photographer's service charge is $5 per year.

No photographs may be used by N.T.A. without a written release. This agreement is binding upon both parties and is not subject to change or cancellation.

National Talent Associates, Inc. agrees to render the following services:

We will arrange for a professional photographer to do a series of poses of natural color. These will be submitted to Monica Stuart, chief television and modeling consultant for the largest children's modeling agency in New York City for her consideration for placement in the field of print advertising and television commercials. This agreement in no way guarantees placement will be made.

We will continue this service for a period of five years or until the child herein enrolled is accepted by the agency, whichever occurs first. Should the enrolled child or any other child of said family be accepted and booked, the legal commission of 10% of the child's earnings will be paid to said Agency.

All children signed will be under our personal management contract for an additional 10%. After the first $1,000 in earnings, the commission shall increase to 15%.

The complete cost of this service is $135 for the entire five year period. The photographer's service charge is $5 per year.

The client will receive one black and white 8 x 10 photograph of their choice from the series. There is no obligation to obtain additional photographs, but additional poses may, if desired, be purchased through the photographer.

No photographs may be used by N.T.A. without a release. This agreement is binding upon both parties and is not subject to change or cancellation.

PAR. 5. By and through the use of the aforesaid written statements and representations quoted in Paragraph Four, respondents have represented, and are now representing, directly or by implication, that:

1. National Talent Associates, Inc. has received information that a person may possess the necessary personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries.

2. Referrals from past purchasers of National Talent Associates' photographs and services are a significant source of information about persons who may possess the necessary personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries.

3. Respondents, when requested, provide persons who contact them with the source from which the information referred to in National Talent Associates' sales solicitation letters was obtained or the nature of such information.

4. National Talent Associates, Inc. has the business experience, knowledge or expertise needed to select the most qualified persons to be used as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries.

5. National Talent Associates' salesmen, agents or representatives are qualified by training or experience to select and judge the

suitability of persons as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries.

6. Persons who have been contacted by National Talent Associates, Inc. have been specially selected on the basis that they may have the necessary personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries.

7. A major portion of National Talent Associates' income is derived from its personal management contracts and its ability to place persons under contract with the leading advertising, modeling, talent or entertainment agencies.

8. Persons are selected and offered contracts by National Talent Associates, Inc. solely on the basis that they may possess the personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries.

9. A person's chances for selection by Monica Stuart or the William Schuller Agency, Inc. will be greatly increased by entering into a contract with National Talent Associates, Inc.

10. Access to Monica Stuart or to the William Schuller Agency, Inc. is available solely to persons who contract with National Talent Associates, Inc.

11. Monica Stuart or the William Schuller Agency, Inc. review photographs of only those persons who have contracted with National Talent Associates, Inc.

12. National Talent Associates, Inc. arranges for professional photographs to be taken of each person placed under its contract by an independent photographic studio.

13. Persons who contract with National Talent Associates, Inc. receive one black and white 8 x 10 inch photograph of their choice, annually for a five-year period, without any obligation to purchase additional photographs at an added cost.

14. Natural color photographs of persons who contract with National Talent Associates, Inc. are submitted annually, for a five-year period, to Monica Stuart of the William Schuller Agency, Inc. for her consideration and review.

15. National Talent Associates, Inc. photographs other persons in a family, in addition to the person whose name appears on its contract, solely for the purpose of submitting said photographs to Monica Stuart of the William Schuller Agency, Inc. for her evaluation of their potential for the commercial advertising, modeling, talent or entertainment industries.

16. The remuneration received by Monica Stuart of the William

Schuller Agency, Inc., in connection with her consideration and review of photographs submitted to her by National Talent Associates, Inc., is derived solely from a percentage of the earnings of persons selected by her and placed under contract by the William Schuller Agency, Inc.

PAR. 6. In truth and in fact:

1. In the vast majority of instances, National Talent Associates, Inc. has not received information that a person may possess the necessary personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries. In the vast majority of instances, respondents' information consists solely of a person's birth date, the name and address of the person's parents, or other similar information obtained from commercial mailing lists, newspaper birth announcements, hospital birth records, or other sources.

2. Referrals from past purchasers of National Talent Associates' photographs and services are not a significant source of information about persons who may possess the necessary personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries. Any such referrals from past purchasers are rare and, when made, are actively solicited by representatives of respondent National Talent Associates, Inc.

3. Respondents, when requested, do not provide persons who contact them with the source from which the information referred to in National Talent Associates' sales solicitation letters was obtained or the nature of such information. Persons who request the source from which information about them was obtained, or the nature of such information, are routinely told that such information is confidential and cannot be divulged.

4. National Talent Associates, Inc. does not have the business experience, knowledge or expertise needed to select the most qualified persons to be employed as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries. Approximately 98 percent to 99 percent, (*i.e.*, 98 to 99) out of 100 persons, selected and placed under contract by National Talent Associates, Inc., are thereafter rejected by Monica Stuart of the William Schuller Agency, Inc. and are not signed to any agency contract.

5. National Talent Associates' salesmen, agents or representatives are not qualified by training or experience to select and judge the suitability of persons as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries. Such salesmen, agents or representatives are recruited from all walks

of life and are not experienced, trained or qualified talent scouts in the selection of models, actors, actresses or entertainers but are sales employees who earn a commission for each contract they sell.

6. Persons who have been contacted by National Talent Associates, Inc. have not been specially selected on the basis that they may have the necessary personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries. Persons who are contacted by National Talent Associates, Inc. have been arbitrarily selected from commercial mailing lists, newspaper birth announcements, hospital birth records or from other similar sources and have not been observed by any talent scout, theatrical agency, advertising or modeling agency. The vast majority of persons placed under contracts by National Talent Associates, Inc. have little or no chance for obtaining paid employment as models, actors, actresses or entertainers in the commercial advertising, modeling, talent or entertainment industries.

7. A major portion of National Talent Associates' income is not derived from its personal management contracts and its ability to place persons under contract with the leading advertising, modeling, talent or entertainment agencies. Its income is derived primarily from the monies it receives from persons with whom contracts are signed as set forth under Paragraph Four of the complaint.

8. Persons are not selected and offered contracts by National Talent Associates, Inc. only on the basis that they may possess the personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries. The ability and willingness of parents to pay the initial contract fee plus a photographer's service charge each year for the five-year period, to National Talent Associates, Inc., as set forth on their standard contract form, appearing under Paragraph Four of this complaint, is a crucial and central element in the acceptance of any person.

9. A person's chances for selection by Monica Stuart or the William Schuller Agency, Inc. will not be greatly increased by entering into a contract with National Talent Associates, Inc. Approximately 98 percent to 99 percent (*i.e.*, 98 to 99) out of 100 persons whose photographs are submitted to Monica Stuart of the William Schuller Agency, Inc. by National Talent Associates, Inc., after payment of monies to National Talent Associates, Inc. under the terms of its contract, are rejected by Miss Stuart by means of a standard form letter of rejection in which no specified reason for such rejection is provided.

10. Access to Monica Stuart or to the William Schuller Agency, Inc.

is not available solely to persons who contract with National Talent Associates, Inc. Any person may gain access to Monica Stuart or to the William Schuller Agency, Inc., through other sources.

11. Monica Stuart or the William Schuller Agency, Inc. do not review photographs of only those persons who have contracted with National Talent Associates, Inc. Any person may mail either a snapshot or a professional portrait to Monica Stuart or to the William Schuller Agency, Inc. for her or their consideration and evaluation of the person's potential for the commercial advertising, talent, modeling or entertainment industries without entering into a contract with National Talent Associates, Inc. for this purpose.

12. National Talent Associates, Inc. does not arrange for professional photographs to be taken of each person placed under its contract by an independent photographic studio. Individual respondents Sanford Storm and Jerome P. Ashfield each own approximately a one-third interest in Baratta Photo Studios to which persons are routinely sent by National Talent Associates, Inc. to have their photographs taken.

13. Persons who contract with National Talent Associates, Inc. do not receive one black and white 8 x 10 inch photograph of their choice, annually for a five-year period, without any obligation to purchase additional photographs at an added cost. Persons are required to travel to Baratta Photo Studios to select the 8 x 10 inch black and white photograph referred to on National Talent Associates' contract, or are solicited at their homes by salesmen from Baratta Photo Studios whose main interest is in selling additional photographs to persons at an added cost.

14. Natural color photographs of persons who contract with National Talent Associates, Inc. are not submitted annually, for a five-year period, to Monica Stuart of the William Schuller Agency, Inc. for her consideration and review.

15. National Talent Associates, Inc. does not photograph other persons in a family, in addition to the person whose name appears on its contract, solely for the purpose of submitting said photographs to Monica Stuart of the William Schuller Agency, Inc. for her evaluation of their potential for the commercial advertising, modeling, talent or entertainment industries.

16. The remuneration received by Monica Stuart of the William Schuller Agency, Inc., in connection with her consideration and review of photographs submitted to her by National Talent Associates, Inc., is not derived solely from a percentage of the earnings of persons selected by her and placed under contract by the William Schuller Agency, Inc. Miss Stuart receives a monetary fee from National Talent

Associates, Inc. for each series of photographs she reviews prior to the signing of any contract with the William Schuller Agency, Inc.

PAR. 7. In the further course and conduct of their business as aforesaid, respondents and their representatives have made oral representations for the purpose of inducing persons to enter into written contracts with them. Such oral representations are made on the telephone to persons responding to respondents' initial sales solicitation letter and in personal interviews conducted by respondents' salesmen and representatives in the homes of prospective purchasers. Through such oral statements and representations, made by respondents or their representatives, agents or salesmen, respondents have, directly or indirectly, stated or implied that:

1. Persons placed under contract by National Talent Associates, Inc. can reasonably anticipate significant or substantial earnings from paid employment in the commercial advertising, talent, modeling or entertainment industries as models, actors, actresses or entertainers.

2. In a significant number of instances, money sufficient to provide for a college education has been earned by persons placed under contract by National Talent Associates, Inc.

3. The chances or opportunities of persons for selection by Monica Stuart of the William Schuller Agency, or of being placed under contract by said agency, are appreciably enhanced by their placement under a contract by National Talent Associates, Inc.

4. A person's chances for selection as a model, actor, actress or entertainer in the commercial advertising, modeling, talent or entertainment industries, are greatly enhanced because he or she is Black, Oriental, has red hair, freckles, or because of his or her size, age, or some other specific racial or personal characteristic.

5. Respondents have received confidential information about the person or persons being interviewed by representatives of National Talent Associates, Inc. which cannot be divulged.

6. Access to Monica Stuart or to the William Schuller Agency, Inc. can be obtained only by entering into a contract with National Talent Associates, Inc.

PAR. 8. In truth and in fact:

1. Persons placed under contract by National Talent Associates, Inc. cannot reasonably anticipate significant or substantial earnings from paid employment in the commercial advertising, talent, modeling or entertainment industries, as models, actors, actresses or entertainers. In the vast majority of instances, persons placed under contract by National Talent Associates, Inc. are thereafter rejected as unsuitable for employment as models, actors, actresses or entertainers of Monica

Stuart of the William Schuller Agency, and thus have no opportunity of earning any money.

2. In no significant number of instances has money sufficient to provide for a college education been earned by persons placed under contract by National Talent Associates, Inc. Few if any, persons discovered and placed under a contract by National Talent Associates, Inc. have earned money sufficient to provide for a college education.

3. The chances or opportunities of persons for selection by Monica Stuart of the William Schuller Agency, or of being placed under contract by said agency, are not appreciably enhanced by their placement under a contract by National Talent Associates, Inc. In the vast majority of instances, persons placed under a contract by National Talent Associates, Inc. are not offered a contract by either Monica Stuart or by the William Schuller Agency, Inc.

4. A person's chances for selection as a model, actor, actress or entertainer in the commercial advertising, modeling, talent or entertainment industries are not greatly enhanced because he or she is Black, Oriental, has red hair, freckles or because of his or her size, age or some other specific racial or personal characteristic. The importance of such racial or personal characteristics are exaggerated by representatives, agents or salesmen of National Talent Associates, Inc. in an effort to obtain the signatures of persons on its contract and collect the contract fee.

5. In the vast majority of instances, respondents have not received confidential information about the person or persons being interviewed by representatives of National Talent Associates, Inc. which cannot be divulged.

6. Access to Monica Stuart or to the William Schuller Agency, Inc. can be obtained, not only by entering into a contract with National Talent Associates, Inc. Such access is available to persons through other sources.

PAR. 9. In the further course and conduct of their business, as aforesaid, the representatives, agents or salesmen of National Talent Associates, Inc., during their sales solicitations at the homes of potential purchasers, have made and are now making numerous false, misleading and deceptive statements concerning the qualifications of persons being interviewed and their chances for success as models, actors, actresses or entertainers in the commercial advertising, modeling, talent or entertainment industries, in an effort to induce such persons to enter into contracts with National Talent Associates, Inc.

During the course of said solicitations, said representatives, agents or salesmen insist that persons being interviewed sign National Talent Associates' contract, set forth herein under Paragraph Four, at the time of the solicitation and write a check in payment therefor, or else forfeit their opportunity for consideration and possible selection by Monica Stuart of the William Schuller Agency, Inc.

No time is permitted for thought, consideration, evaluation or discussion of said contract and, in numerous instances, persons signing said contract under such sales pressure have changed their minds immediately after the termination of said visit or on the following day. Respondents, in numerous such instances, have failed or refused to cancel the contract or refund the money.

Such sales techniques, based upon false, misleading, deceptive, unethical, oppressive and exploitative high pressure tactics, take advantage of the desire of persons to achieve personal and financial success, cause substantial injury to consumers and constituted, and now constitute, unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 10. In the further course and conduct of their business, respondents have failed to disclose to potential purchasers of their photographs or services the following material facts:

a) That any person may submit his or her photograph directly to Monica Stuart, or to any other consultant of the William Schuller Agency, Inc., without entering into any contract or agreement with National Talent Associates, Inc.

b) That, in addition to the agency fee of 10 percent of the client's earnings paid to the William Schuller Agency, Inc., as stated on National Talent Associates' standard contract form, set forth herein under Paragraph Four, Monica Stuart personally receives an additional monetary fee from National Talent Associate, Inc.

c) That the principals of National Talent Associates, Inc. own a financial interest in the photographic studios to which persons are routinely referred by respondents to have their photographs taken.

d) The recent number and percentage of persons under contract to National Talent Associates, Inc. who were able to obtain contracts with the William Schuller Agency, Inc. and paid employment in the commercial advertising, modeling, talent or entertainment industries.

e) The gross annual earnings from employment as a model, actor, actress or entertainer of all persons placed under the contract set forth in Paragraph Four by respondent National Talent Associates, Inc.

Knowledge of such facts would be of extreme importance to potential purchasers in their evaluation of the nature and value of the photographs or services offered by respondent National Talent Associates, Inc. under its contract. Thus, respondents have failed to disclose material facts, which if known to potential purchasers, would be likely to affect their consideration of whether or not to enter into a contract to purchase said photographs or services. Therefore, the aforesaid acts and practices of respondents, as herein alleged were, and are, false, misleading, deceptive, unethical, oppressive and exploitative, cause substantial injury to consumers, and constituted and now constitute unfair or deceptive acts or practices in commerce in violation of the Federal Trade Commission Act.

PAR. 11. Respondents have cooperated and acted together in the false, misleading, deceptive or unfair acts or practices set forth under Paragraphs Four through Ten of this complaint. Such joint or concerted activities constitute a scheme designed to obtain the signatures of persons to a contract with National Talent Associates, Inc. for the mutual financial benefit of the respondents.

The use by respondents separately or collectively, whether directly or indirectly, or by permission or acquiescence, of the false, misleading, deceptive or unfair sales solicitation methods, both written and oral, and their failure to disclose relevant and material facts to potential purchasers of their photographs or services, has had, and now has the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that such written and oral statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' photographs or services.

PAR. 12. The aforesaid acts and practices of respondents as herein alleged are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on Apr. 3, 1974, charging respondents named in the caption hereof with violation of the Federal Trade Commission Act, and respondents having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication for the purpose of negotiating a settlement by entry of a consent order; and

Respondents and counsel for the complaint having thereafter executed an agreement containing a consent order, an admission by respondents of all jurisdictional facts set forth in the complaint, a statement that the signing of the agreement by respondents is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having thereupon placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter, now, in further conformity with the procedure prescribed in its rules, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent National Talent Associates, Inc. a New Jersey corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 280 Park Ave., Rutherford, N.J. It also maintains an office at 110 Jericho Turnpike, Floral Park, N.Y.

2. Respondent National Talent Associates, Inc., an Illinois corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 3525 W. Peterson Ave., Chicago, Ill.

3. Respondent National Talent Associates, Inc., a California corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1800 N. Highland Ave., Hollywood, Calif.

4. Respondents Sanford Storm and Jerome P. Ashfield are officers of the three National Talent Associates corporate respondents named above. They formulate, direct and control the policies, acts and practices of said corporations, and their address is 280 Park Ave., Rutherford, N.J.

5. Respondent William Schuller Agency, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 667 Madison Ave., New York, N.Y.

6. Respondent Monica Stuart is an officer of corporate respondent William Schuller Agency, Inc. She formulates, directs and controls the policies, acts and practices of said corporation and her address is the same as that of said corporation.

7. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That National Talent Associates, Inc., New Jersey, Illinois, and California corporations, their successors and assigns, and Sanford Storm and Jerome P. Ashfield, individually and as officers of said corporations, and said respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale and distribution of products or services in connection with the placement and employment of persons as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly, orally or in writing, that:

1. Respondents have received information that a person may possess the necessary personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries.
2. Referrals from past purchasers of their products or services are a significant source from which the names of potential purchasers have been obtained.
3. Respondents have obtained the names of potential purchasers from a source which cannot be divulged.
4. Respondents, when requested, will provide persons with the source from which the information referred to in their solicitation letters, solicitation phone calls, or in any other means of solicitation was obtained and the nature of such information, unless respondents provide such information when requested.
5. National Talent Associates, Inc. has the expertise essential for the judging and selection of the most qualified persons to be used as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries.
6. National Talent Associates' salesmen, agents or representatives have the expertise essential to select and judge the suitability of persons as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries.
7. Persons who prior to an in-person interview have been solicited by National Talent Associates, Inc. have been selected on the basis that they may have the necessary personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries.

8. The majority of National Talent Associates' income is derived from its personal management contracts and its ability to place persons under contract with the leading advertising, modeling, talent or entertainment agencies.

9. Persons are selected and offered contracts by National Talent Associates, Inc. only on the basis that they may possess the personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries.

10. A person's chances for selection by Monica Stuart, the William Schuller Agency, Inc., or by any person or agency, will be aided, increased or enhanced, by entering into a contract with National Talent Associates, Inc.

11. Access to Monica Stuart or to the William Schuller Agency, Inc. is available only to persons who contract with National Talent Associates, Inc.

12. Monica Stuart or the William Schuller Agency, Inc. review photographs of only those persons who have contracted with National Talent Associates, Inc.

13. National Talent Associates, Inc., a New Jersey corporation, arranges for professional photographs to be taken of each person placed under its contract by an independent photographic studio.

14. Persons who contract with National Talent Associates, Inc. will receive annually one black and white, 8 x 10 inch, photograph of children in the family not under contract, for a five-year period, or for any period in excess of the period in which said photograph is received without any obligation to purchase additional photographs at an added cost.

15. Natural color photographs of persons who contract with National Talent Associates, Inc. are submitted annually, for a five-year period, or for any period in excess of the period in which said photographs are submitted to Monica Stuart or to the William Schuller Agency, Inc., for her or their consideration and review, without disclosing that, unless the person comes back for rephotographing annually for a five-year period, such person's photographs will not be resubmitted to Monica Stuart or to the William Schuller Agency, Inc.

16. National Talent Associates, Inc. photographs other persons in a family in addition to the person whose name appears on its contract, solely for the purpose of submitting said photographs to Monica Stuart of the William Schuller Agency, Inc. for her evaluation of their potential for the commercial advertising, modeling, talent or entertainment industries.

17. The remuneration received by Monica Stuart of the William

Schuller Agency, Inc., in connection with her consideration and review of photographs submitted to her by National Talent Associates, Inc., is derived solely from a percentage of the earnings of persons selected by her and placed under contract by the William Schuller Agency, Inc.

18. Persons placed under contract by National Talent Associates, Inc. can reasonably anticipate significant or substantial earnings from paid employment in the commercial advertising, talent, modeling or entertainment industries as models, actors, actresses or entertainers.

19. Persons who contract with National Talent Associates, Inc. may reasonably anticipate earning sums of money sufficient to provide for a college education or for any other such formal education.

20. A person's chances for selection as a model, actor, actress or entertainer by the commercial advertising, modeling, talent or entertainment industries is, in any way, enhanced solely because he or she is Black, Oriental, has red hair, freckles or because of his or her size, age or any other specific racial or personal characteristics.

It is further ordered, That respondents shall disclose the following information, in writing, in a clear and conspicuous manner to each person who is a prospective purchaser of any of their products or services, prior to entering into any agreement for the furnishing of such products or services, including the photographing of, or assistance to, any such persons in seeking or obtaining employment opportunities as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries.

a. The number of persons who contracted with respondents for the purchase of photographs or services to be used in connection with the selection, placement or employment of persons in the commercial advertising, talent, modeling or entertainment industries, as models, actors, actresses or entertainers, within the two calendar years immediately preceding the year in which the prospective purchaser was contacted, the number and percentage of such persons who obtained paid employment through the auspices of respondents, as well as the number of paid jobs and agency contracts obtained by such persons.

b. The total number of persons placed under contract by respondents in each of the following categories of gross annual earnings, derived from paid employment in the commercial advertising, talent, modeling or entertainment industries, as models, actors, actresses or entertainers, during the two calendar years immediately preceding the year in which the prospective purchaser was contacted by respondents: Under $100, $100—$250, $250—$500, $500—$1,000, $1,000—$2,000, $2,000—$4,000, $4,000—$6,000, $6,000—$8,000, $8,000, $8,000—$10,000, $10,000 and above.

c. Whether any financial agreement, arrangement or connection, exists between respondents and any photographic studio to which they may refer prospective purchasers of their photographs or services.

d. Whether any financial agreement, arrangement or connection, exists between respondents and any person, firm or agency to whom photographs, or any other information, concerning the prospective purchaser of their products or services may be sent by respondents.

e. The source or sources from which the names, addresses, or any other information about prospective purchasers, or about any other members of their immediate family, was obtained by respondents.

At the time when the foregoing disclosures are made, respondents shall furnish the prospective purchaser of any of their products or services with a retainable duplicate copy of the disclosure document, and secure from such prospective purchaser a signed acknowledgment of the receipt thereof on the properly dated original copy. The document containing the disclosures shall be headed "*Important Information,*" and shall not contain information or representations other than those set forth above.

It is further ordered, That respondents maintain, for a five-year period following the execution thereof, the originals of the signed acknowledgments of receipt of the disclosures described in the preceding paragraphs and make them available for examination and copying, if necessary, by a duly authorized representative of the Federal Trade Commission, upon reasonable notice, during normal business hours.

It is further ordered, That, if any representations are made by the respondents, their salesmen, representatives or agents, either expressly or impliedly, orally or in writing, pertaining to any standards, qualifications or characteristics which a person must meet or possess before respondents will agree to place such a person under contract, photograph them or otherwise assist or render services to said person, respondents shall maintain complete and detailed records as to such persons who have failed to meet or possess such standards, qualifications or characteristics, including their names, addresses, date of rejection, and the reason or reasons for their rejection by respondents. Such records shall be made available for examination and copying if necessary, by a duly authorized representative of the Federal Trade Commission, upon reasonable notice, during normal business hours.

It is further ordered, That the respondents named in Part I of this order shall submit to respondents Monica Stuart and the William Schuller Agency, Inc., for their inspection and evaluation, copies of all written promotional or sales materials, including but not limited to sales solicitation letters, contract forms, brochures, flyers, and sales presentation scripts. Said respondents will submit said materials to Monica Stuart and the William Schuller Agency, Inc., on a continuing basis whenever there is a change, revision or modification of any of the materials.

It is further ordered, That respondents shall cease and desist from:

a. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of 10 points, a statement in substantially the following form: **YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.**

b. Failing to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point boldface type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

(enter date of transaction)

____

(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE: OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT

PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT. (AMENDED NOV. 1, 1973).

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO ______ (*Name of seller*), AT ________________ (*address of seller's place of business*) ________________ NOT LATER THAN MIDNIGHT OF ______ (*Date*).

I HEREBY CANCEL THIS TRANSACTION.

____

(DATE)

____

(BUYER'S SIGNATURE)

c. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

d. Including in any door-to-door contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this rule including sale in accordance with the provisions specifically his right to cancel the of this rule.

e. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

f. Misrepresenting in any manner the buyer's right to cancel.

g. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

h. Negotiating, transferring, selling or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

i. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

Provided, however, That nothing contained in this order shall relieve respondents of any additional obligations respecting contracts required by Federal law or the law of the State in which the contract is made.

When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the State in which such different obligations are required. The Commission, upon a showing of inconsistency, shall make such modifications as may be warranted in the premises.

II

It is ordered, That William Schuller Agency, Inc., a corporation, its successors and assigns, and Monica Stuart, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale and distribution of products or services in connection with the placement and employment of persons as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing to consumers, directly or indirectly, orally or in writing, that:

1. A person's chances for selection by Monica Stuart, the William Schuller Agency, Inc. or by any person or agency, will be aided, increased or enhanced by entering into a contract with National Talent Associates, Inc.
2. Access to Monica Stuart or to the William Schuller Agency, Inc. is available only to persons who contract with National Talent Associates, Inc.
3. Monica Stuart or the William Schuller Agency, Inc., review photographs of only those persons who have contracted with National Talent Associates, Inc.
4. National Talent Associates, Inc. photographs other persons in a family in addition to the person whose name appears on its contract, solely for the purpose of submitting said photographs to Monica Stuart of the William Schuller Agency, Inc. for her evaluation of their potential for the commercial advertising, modeling, talent or entertainment industries.
5. The remuneration received by Monica Stuart of the William Schuller Agency, Inc., in connection with her consideration and review of photographs submitted to her by National Talent Associates, Inc., is derived solely from a percentage of the earnings of persons selected by her and placed under contract by the William Schuller Agency, Inc.
6. Natural color photographs of persons who contract with National Talent Associates, Inc. are submitted annually, for a five-year period, or for any period in excess of the period in which said photographs are

submitted to Monica Stuart or to the William Schuller Agency, Inc. for her or their consideration and review without disclosing that, unless the person comes back for rephotographing annually for a five-year period, such person's photographs will not be resubmitted to Monica Stuart or to the William Schuller Agency, Inc.

It is further ordered, That respondents Monica Stuart and William Schuller Agency, Inc. shall maintain complete and detailed records as to the number of persons whose photographs were submitted to them by any of the respondents set forth under Part I of the order herein, and the number of such persons who have failed to meet or possess the standards, qualifications or characteristics which a person must meet or possess before respondents herein will agree to place such a person under contract, or otherwise assist or render services to said person, including their names, place of residence, and month and year of rejection. Such records shall be made available for examination and copying if necessary by a duly authorized representative of the Federal Trade Commission, upon reasonable notice, during normal business hours.

It is further ordered, That respondents Monica Stuart and William Schuller Agency, Inc. shall inspect and evaluate the written promotional and sales material submitted to them by respondents named in Part I of this order. Within 30 days of their receipt of said materials, respondents Monica Stuart and William Schuller Agency, Inc. shall notify said other respondents, in writing as to any comments, complaints they might have, or any corrections they might require, concerning any representations relating to them contained in the materials submitted. Monica Stuart and William Schuller Agency, Inc. shall simultaneously submit to the New York Regional Office a copy of such notification to the respondents named in Part I of this order.

It is further ordered, That respondents Monica Stuart and William Schuller Agency, Inc. shall notify the Federal Trade Commission, in writing, of any consumer complaints received by them concerning any of the respondents named in Part I of this order. Such notification shall be made to the New York Regional Office within 30 days after receipt of the consumer complaint. This provision shall apply only to those complaints about representations by or practices of the respondents named in Part I which relate to respondents Monica Stuart and William Schuller Agency, Inc.

III

For the purposes of the following provisions of this order, unless otherwise specified, the term "respondents" shall include each of the respondents named heretofore in this order.

It is further ordered, That respondents William Schuller Agency, Inc. and Monica Stuart shall forthwith deliver a copy of this order or a memorandum incorporating its provisions to all present and future employees engaged in the sale of said respondents' products or services and shall secure from each such person a signed statement acknowledging receipt of a copy of this order or the memorandum.

It is further ordered, That corporate respondents National Talent Associates, Inc. and individual respondents Sanford Storm and Jerome P. Ashfield shall forthwith deliver a copy of this order or a memorandum incorporating its provisions to all present and future salesmen or other employees engaged in the sale of said respondents' products or services and shall secure from each such salesman or employee a signed statement acknowledging receipt of a copy of this order or the memorandum.

It is further ordered, That respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That each individual respondent shall promptly notify the Commission of any discontinuance of his or her present business or employment and of his or her affiliation with any new business or employment. Such notice shall include such respondent's current business address and a statement as to the nature of the business or employment in which he or she is engaged as well as a description of his or her duties and responsibilities.

It is further ordered, That corporate respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other changes in the corporations which may affect compliance obligations arising out of this order.

It is further ordered, That the respondents shall within sixty days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

BOISE CASCADE CORPORATION, ET AL.

Docket 8958. Order, Dec. 2, 1975

Denial of complaint counsel's application for review of administrative law judge's order requiring disclosure of certain interview reports to respondents as "Jencks statements."

Appearances

For the Commission: *Amy R. Richter, James C. Egan, Jr., John R. Hoagland* and *Robert W. Doyle, Jr.*

For the respondents: *Robert T. Johnson, Bell, Boyd, Lloyd, Haddah & Burns*, Chicago, Ill., for Boise Cascade Corp. *John K. Mallory, Jr., Cleary, Gottlieb, Steen & Hamilton*, Wash., D.C., for Champion International Corp. *Frank Brewer*, Portland, Oreg., *George J. Wade, Shearman & Sterling*, New York City for Georgia-Pacific Corp. *Edwin S. Rockefeller, Bierbower & Rockefeller*, Wash., D.C. and *Francis A. Kareken*, Tacoma, Wash. for Weyerhaeuser Co. *Norman J. Wiener, Miller, Anderson, Nash, Yerke & Wiener*, Portland, Oreg., *Edward T. Tait, Reed, Smith, Shaw & Mc Clay*, Wash., D.C., and *Hammond E. Chaffetz, Kirkland & Ellis*, Chicago, Ill. for Willamette Industries, Inc.

ORDER DENYING INTERLOCUTORY APPEAL

This matter is before us upon complaint counsel's application under Section 3.23(a)(1) of the rules of practice for review of an order by the administrative law judge which requires that certain interview reports be disclosed to respondents as "Jencks statements."

Complaint counsel do not argue on this appeal that the interview reports are not, in fact, "Jencks statements" but, instead, contend that the law judge made no finding that the materials to be disclosed were "substantially verbatim" accounts of oral statements made by prospective witnesses. See *L.G. Balfour Co.*, 69 F.T.C. 1118, 1123 (1966).

The Commission has ruled that respondents are "entitled to inspect * * * any written report or portions thereof which reflect in substantially verbatim form any oral statement given by the witness to [the] attorney or investigator but any summaries of such statements made by the attorney or investigator should not be produced." *Inter-State Builders, Inc.*, 69 F.T.C. 1152, 1165 (1966).[1] Variances such as "grammatical and syntactical changes, rearrangement into chronological order, or omissions or additions of information immaterial for impeachment purposes will not prevent a transcription from being substantially verbatim." *Id.* at 1156.

After reviewing the documents *in camera*, the administrative law judge ruled that "in most instances the interviewers were trying to report as accurately and as completely as possible the conversation with each prospective witness, even though inconsequential stylistic or punctuation changes may have been made in the actual transcription." The law judge further ruled that "minor sections" of some reports which contain analytical comment or the subjective impressions of the interviewer need not be produced. Memorandum and Order Respecting Jencks Statements, Nov. 12, 1975, p.2. We read this as a determination that the portions of the reports to be produced are "substantially verbatim." However, in the event that our interpretation of the law judge's order is incorrect, we would expect that he would modify the order to limit production to "substantially verbatim" transcriptions. Accordingly,

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[1] Production need only be made after the witness has testified on direct examination. In the present case, however, the parties have agreed that, if production is ordered, the reports are to be disclosed forthwith.

It is ordered, That the aforesaid appeal be, and it hereby is, denied.

Chairman Engman, with Commissioner Nye joining, stated "Whatever verbal formula the Administrative Law Judge used in determining that interview reports should be turned over to opposing counsel is not of sufficient importance to warrant Commission review. I dissent insofar as the above order suggests we should review his ruling."

IN THE MATTER OF

CARGILL, INCORPORATED

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9005. Complaint, Jan. 21, 1975—Order, Dec. 2, 1975

Order dismissing complaint issued against a Minneapolis, Minn., well-diversified, closely-held corporation challenging its acquisition of stock in Missouri Portland Cement Company Inc. Respondent divested its interest in Missouri Portland, Aug. 28, 1975.

Appearances

For the Commission: *Joseph S. Brownman, Theodore M. Jones, Jr.* and *Laurence O. Masson.*

For the respondent: *Gordon Spivack, Lord, Day & Lord,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. §41, *et seq.*) and the Clayton Act (15 U.S.C. §12, *et seq.*) and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Cargill, Incorporated, a corporation, more particularly described and referred to herein as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45) and Section 7 of the Clayton Act, as amended (15 U.S.C. §18) and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I

DEFINITIONS

PARAGRAPH 1. For the purposes of this complaint the following definitions shall apply:

a. "Portland cement" includes Type I through V as specified by the American Society for Testing Materials. Neither masonary nor white cement is included.

b. The St. Louis marketing area consists of the counties of Franklin, Jefferson, St. Charles and St. Louis in the State of Missouri; and the counties of Madison, St. Clair, Clinton and Monroe in the State of Illinois.

c. The Kansas City marketing area consists of the counties of Cass, Clay, Jackson, Platte and Ray in the State of Missouri; and the counties of Johnson and Wyandotte in the State of Kansas.

d. The Memphis marketing area consists of the counties of Shelby and Tipton in the State of Tennessee; the county of Crittenden in the State of Arkansas; and the county of De Soto in the State of Mississippi.

e. The Omaha marketing area consists of the counties of Douglas and Sarpy in the State of Nebraska; and the county of Pottawattamie in the State of Iowa.

f. The Mississippi Valley area consists of those areas capable of being serviced by cement plants or distribution terminals located on the Mississippi River and its navigable tributaries.

II

CARGILL, INCORPORATED

PAR. 2. Respondent Cargill, Incorporated is a closely held corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its home office and principal place of business located at the Cargill Building, Minneapolis, Minn.

PAR. 3. For the fiscal year ending May 31, 1973, respondent had net sales of approximately $5.3 billion and a net income of approximately

$107.8 million. Respondent's net worth as of May 31, 1973, was approximately $352.4 million.

PAR. 4. Among other activities, respondent engages in grain trading, vegetable oil processing, animal feeds production, corn wet-milling, rock salt mining, copra and flax trading, chemical production, poultry processing, ore and metal trading, insurance underwriting; and the international trading of salt, flour and molasses.

PAR. 5. In 1932 respondent formed Cargo Carriers, Inc., a subsidiary corporation, to operate river barges and tow boats for the transportation of bulk commodities on inland waterways. At the present time Cargo Carriers, Inc., owns and operates numerous barges capable of transporting bulk commodities on inland waterways. Respondent also owns several ocean-going ships capable of transporting bulk commodities across sea trading routes. With little or no modification to existing vessels, respondent's barges and ocean-going ships are capable of being used to transport portland cement and materials necessary for the manufacture of portland cement.

PAR. 6. In carrying out its grain trading business, respondent owns and/or operates an extensive network of grain elevators throughout the United States. Many of respondent's elevators are located adjacent to navigable inland waterways, thereby providing respondent with the capability of receiving bulk goods and commodities from barges and loading bulk goods and commodities onto barges for shipment through inland waterways. With some modification to existing facilities, respondent's grain elevators are capable of serving as storage and/or sales points for portland cement.

PAR. 7. At all times relevant herein, respondent has been a corporation engaged in the purchase or sale of products in interstate commerce and is engaged in substantial "commerce" as that term is defined in the Clayton Act, as amended, and the Federal Trade Commission Act, as amended.

III

MISSOURI PORTLAND CEMENT COMPANY, INC.

PAR. 8. The Missouri Portland Cement Company (hereinafter referred to as "Missouri Portland") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its home office and principal place of business located in St. Louis, Mo.

PAR. 9. Missouri Portland is now and for many years has been engaged in the production and sale of portland cement. For the year ending Dec. 31, 1973, Missouri Portland's total sales were approximately $51,000,000 of which sales of portland cement were approximately $44,000,000. As of Dec. 31, 1973, the book value of Missouri Portland's stock was approximately $45,532,611; and total assets were approximately $64,521,272. Missouri Portland presently has over 1,450,000 shares of outstanding common stock, traded on the New York Stock Exchange.

PAR. 10. Missouri Portland produces portland cement at each of three plants located in Independence, Mo.; St. Louis, Mo. and Joppa, Ill. The company distributes and sells portland cement from eight warehouse terminal points located in Memphis, Tenn.; Decatur, Ala.; Nashville, Tenn.; Owensboro, Ky.; Louisville, Ky.; Omaha, Neb.; Peoria, Ill. and Chicago, Ill. Each of the eight warehouse terminals is located at a navigable river in order that cement may be shipped in bulk form by barge carrier. The portland cement is stored at each of the warehouse terminals in silos, or storage elevators, for future delivery to customers in these and other areas.

PAR. 11. The production and sale of portland cement in the metropolitan marketing areas of St. Louis, Kansas City, Memphis and Omaha is highly concentrated, and Missouri Portland enjoys a substantial or dominant share of portland cement sales in each of these areas.

PAR. 12. At all times relevant herein, Missouri Portland has been engaged in the purchase or sale of products in interstate commerce and is engaged in substantial "commerce" and the Federal Trade Commission Act, as amended.

IV

THE ACQUISITION

PAR. 13. On or about Dec. 19, 1973, respondent filed an "Invitation for Tenders" with the U.S. Securities and Exchange Commission and publicly advertised its offer to buy all of the outstanding shares of Missouri Portland common stock at a price of $30 per share. At the time, Missouri Portland stock was selling for approximately $24 per share on the New York Stock Exchange.

PAR. 14. The cash required of respondent to purchase all of the outstanding common stock of Missouri Portland is estimated to be about $43,500,000. As of approximately Apr. 30, 1974, respondent had acquired about 18 percent of the outstanding common stock of Missouri Portland.

V

NATURE OF TRADE AND COMMERCE

PAR. 15. Portland cement is a material which in the presence of water binds "coarse aggregate," such as crushed stone or gravel, and "fine aggregate," such as sand, into concrete, Portland cement is essential for the manufacture of ready mix concrete, prestressed concrete products and concrete block.

PAR. 16. The portland cement industry in the United States overall is substantial. In 1972, approximately 50 companies operating 170 plants shipped approximately 83 million tons to consumers. This cement is valued at approximately $1.6 billion.

PAR. 17. Portland cement manufacturers sell their portland cement to consumers such as ready mixed concrete companies, prestressed concrete products manufacturers, concrete block producers, contractors and building materials dealers. Approximately 60 percent of all portland cement is shipped to firms engaged in the production and sale of ready mixed concrete, although in heavily populated areas, the percentage is often higher.

PAR. 18. In a substantial number of significant marketing areas, the production and sale of portland cement is highly concentrated. In the St. Louis, Kansas City, Memphis, and Omaha areas, in each of which Missouri Portland does business, the four largest firms account for approximately 80 percent or more of portland cement sales.

PAR. 19. More than 50 percent of the portland cement industry's plant capacity is owned by multi-plant companies, and the 10 largest producers of portland cement account for approximately 50 percent of the total cement production in the United States.

PAR. 20. Since 1950, approximately 34 portland cement manufacturing companies have been acquired. These acquisitions involved approximately 45 individual portland cement plants with a total capacity of nearly 100 million barrels, or approximately 20 million tons. This amount equalled 30 percent of the total industry capacity in 1950 and 20 percent of the total industry capacity by 1965. The various acquisitions have caused the number of portland cement companies in the U.S. to decline, thereby contributing to increased concentration. Since 1950, the 20 largest portland cement companies' share of portland cement manufacturing capacity in the United States increased from approximately 73 percent to 83 percent.

VI

EFFECTS OF THE ACQUISITION

PAR. 21. The effect of respondent's acquisition of a substantial amount of the stock of Missouri Portland, may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of portland cement in the St. Louis, Kansas City, Memphis and Omaha areas; in the Mississippi Valley area, and in the Nation as a whole, for each of the following reasons, among others:

a. Respondent will have been eliminated as a substantial potential entrant in the business of the manufacture, sale and distribution of portland cement.

b. The entry of any other potential competitors in the business of the manufacture, sale and distribution of portland cement will or may be prevented, delayed or inhibited.

PAR. 22. The acquisition by respondent corporation of Missouri Portland stock constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18) and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45).

ORDER GRANTING MOTION TO DISMISS COMPLAINT

This matter is before us upon the administrative law judge's certification of respondent's motion to dismiss the complaint in view of respondent's divestiture of its interest in the Missouri Portland Cement Company, Inc. (Missouri Portland), on Aug. 28, 1975.

Upon consideration of the matter, the Commission has determined that further proceedings challenging respondent's acquisition of stock in Missouri Portland would not be in the public interest. Accordingly,

It is ordered, That the complaint in this matter be, and it hereby is, dismissed.

Commissioner Dixon not participating, and Commissioner Hanford dissenting.

IN THE MATTER OF

UNION CARBIDE CORPORATION

MODIFIED ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2557. Decision, Oct. 4, 1974—Modifying Order, Dec. 2, 1975

Order modifying an earlier order dated Oct. 4, 1974, 84 F.T.C. 591, 40 F.R. 6477, by

eliminating order Paragraphs I.B., II.B., II.C., VII, VIII, IX, and XIII, and including a proviso that primarily institutional advertising will not require the "STOP" clause. This is to provide for a uniformity of treatment among competitors against whom the F.T.C. proceeded simultaneously issuing complaints involving the same practices. The modified order affords respondent the benefits of the terms of the consent order afforded to FMC Corporation in Docket 8961, 86 F.T.C. 897, 40 F.R. 53552, but which leaves intact those provisions which are peculiar to the facts of the Union Carbide complaint.

Appearances

For the Commission: *Joan Z. Bernstein.*

For the respondent: *Kirkland, Ellis & Rowe,* Wash., D.C. and *Richard H. Gregory, Jr.,* New York City.

ORDER REOPENING AND MODIFYING CEASE AND DESIST ORDER

Upon consideration of respondent's petition to reopen and modify the cease and desist order entered by consent against respondent in this matter on Oct. 4, 1974 [84 F.T.C. 591], to afford respondent the benefits of the terms of the consent order afforded to FMC Corporation in Dkt. 8961 [86 F.T.C. 897], and the Acting Director of the Bureau of Consumer Protection having recommended that the requested modifications be granted, and the Commission having concluded on the basis of the foregoing that the petition should be granted.

It is ordered, That this matter be reopened and the following modified final order be substituted and issued in lieu of the order entered herein on Oct. 4, 1974:

MODIFIED FINAL ORDER

I

It is ordered, That respondent, Union Carbide Corporation, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of any insecticide product with precautionary labeling which contains any active insecticidal ingredient(s) presently marketed by respondent or currently being field tested by respondent and which is intended for use by custom applicators and commercial growers to protect animals or food, forage, field or fiber crops by virtue of the capacity of its active ingredient(s) to kill insects (sometimes referred to hereinafter as "such products"), do forthwith cease and desist from:

A. Representing, directly or by implication, by print or broadcast advertising, by other promotional material, or by sales representatives' oral statements, that such products are absolutely or unqualifiedly safe, nontoxic or free of hazard for any use registered under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (hereinafter FIFRA) or any other approved use based upon evidence filed in connection with registration under FIFRA.

II

With respect to representations not covered by the provisions of Section I of this order; *It is ordered*, That Union Carbide Corporation, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of such products, do forthwith cease and desist from:

A. Representing, directly or by implication, by print or broadcast advertising, by other promotional material, or by sales representatives' oral statements, that such products are absolutely safe, nontoxic or free of hazard to human beings, warmblooded animals, birds, fish, beneficial insects, or the environment.

III

It is further ordered, That respondent, Union Carbide Corporation, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of such products do forthwith cease and desist from making any representations, directly or by implication, or omitting any representations, by print or broadcast advertising or by other promotional material, which contradict, are inconsistent with, or detract from the effectiveness of any warning, caution or direction for use required to be set forth on the label of such product. *Provided*, That if any representations, directly or by implication, made by respondent, or the omission of representations by respondent, are in accord with the provisions of sections I, II and IV of this order, they shall be considered as being in compliance with this section of the order.

IV

It is further ordered, That respondent, Union Carbide Corporation, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of such products do forthwith cease and desist from disseminating or causing the dissemination of:

A. Any print advertising or print promotional material which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes in such print advertising or print promotional material the following statement:

STOP! ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.

B. Any broadcast advertisement more than 30 seconds in length which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes the following statement:

ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.

C. Any broadcast advertisement of 30 seconds or less in length which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes the following statement:

ALL PESTICIDES CAN BE HARMFUL. READ THE LABEL. USE AS DIRECTED.

Provided, That in television advertisements not more than 10 seconds in length which contain no direct representations concerning product safety, the requirements of the term "clearly and conspicuously" shall in all cases be met by including the above statement in the video portion of the advertisement.

V

Nothing in this order shall be construed to apply to scientific articles published in recognized scientific or agricultural journals or government publications, or reprints thereof, or representations (other than print advertising or other promotional material) before public or governmental forums such as public hearings, scientific meetings, or to governmental agencies, agents, or employees responsible for the regulation or dissemination of information concerning insecticide products covered by this order.

VI

It is further ordered, That nothing in this order shall prohibit the dissemination of product labels (as defined by Section 2(p)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended), or reproductions thereof.

VII

It is further ordered, That should the Federal Trade Commission promulgate a trade regulation rule or industry guide governing the advertising or promotion of products subject to this order, then any pertinent less comprehensive or less restrictive provisions of such rule or guide shall automatically replace any comparable provisions set forth herein which are effective on the date that such rule or guide becomes effective.

VIII

It is further ordered, That the respondent forthwith distribute a copy of this order to each of its operating divisions engaged in the manufacture, sale, advertising, promotion or distribution of products subject to this order, and to all present and future employees of respondent responsible for the advertising, promotion, distribution or sale of such products.

IX

It is further ordered, That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other changes in the corporation which may affect compliance obligations arising out of this order.

X

It is further ordered, That the compliance report heretofore filed by respondent shall be considered by the Commission as if it had been filed under this order.

XI

It is further ordered, That this order shall become effective upon service.

IN THE MATTER OF

HERCULES INCORPORATED

MODIFIED ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2558. Decision, Oct. 4, 1974—Modifying Order, Dec. 2, 1975

Order modifying an earlier order dated Oct. 4, 1974, 40 F.R. 3974, 84 F.T.C. 605, by eliminating order Paragraphs I.B., I.C., II.B., II.C. and III and including two provisos: (1) that simple efficacy claims will not be considered absolute safety claims under Paragraph I.A., and (2) that primarily institutional advertising will not require the "STOP" clause. This is to provide for a uniformity of treatment among competitors against whom the F.T.C. proceeded simultaneously issuing complaints involving the same practices. The modified order affords respondent the benefits of the terms of the consent order afforded to FMC Corporation in Docket No. 8961, 40 F.R. 53552, 86 F.T.C. 897, but leaves intact those provisions which are peculiar to the facts of the Hercules complaint.

Appearances

For the Commission: *Joan Z. Bernstein.*

For the respondent: *Charles S. Maddock*, Wilmington, Del., *Burton Caine, Wolff, Block, Schorr & Solis-Cohen*, Philadelphia, Pa.

ORDER REOPENING AND MODIFYING CEASE AND DESIST ORDER

Upon consideration of respondent's petition to reopen and modify the cease and desist order entered by consent against respondent in this matter on Oct. 4, 1974 [84 F.T.C. 605], to afford respondent the benefits of the terms of the consent order afforded to FMC Corporation in Dkt. 8961 [86 F.T.C. 897], but leaving intact those provisions which are peculiar to the facts of the Hercules complaint, and the Acting Director of the Bureau of Consumer Protection having recommended that the requested modifications be granted, and the Commission having concluded on the basis of the foregoing that the petition should be granted,

It is ordered, That this matter be reopened and the following modified final order be substituted and issued in lieu of the order entered herein on Oct. 4, 1974:

MODIFIED FINAL ORDER

I

It is ordered, That respondent, Hercules Incorporated, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or distribution of any insecticide product with precautionary labeling which contains any active insecticidal ingredient(s) presently marketed by respondent or currently being field tested by respondent and which is intended for use by custom applicators and commercial growers to protect animals or food, forage, field or fiber crops by virtue of the capacity of its active ingredient(s) to kill insects (sometimes referred to hereinafter as "such products"), do forthwith cease and desist from:

A. Representing, directly or by implication, by print or broadcast advertising, by other promotional material, or by sales representatives' oral statements, that such products are absolutely or unqualifiedly safe, nontoxic or free of hazard for any use registered under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (hereinafter FIFRA) or any other approved use based upon evidence filed in connection with registration under FIFRA.

Provided however, That for purposes of enforcing Paragraph I.A. of this order any advertisement, statement, claim or representation that such products may be employed for a crop or plant use registered under FIFRA or any other approved use based upon evidence filed in connection with registration under FIFRA shall not be deemed a violation of this order; *Provided, further*, That this exception shall be effective only until such time as a trade regulation rule covering the advertising and promotion of such products subject to this order and containing terms at least as onerous as Paragraph I.A. of this order becomes final and effective.

II

With respect to representations not covered by the provisions of Section I. of this order; *It is ordered*, That Hercules Incorporated, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of such products, do forthwith cease and desist from:

A. Representing, directly or by implication, by print or broadcast advertising, by other promotional material, or by sales representatives' oral statements, that such products are absolutely safe, nontoxic or free of hazard to human beings, warm-blooded animals, birds, fish, beneficial insects, or the environment.

B. Representing, directly or by implication, by print or broadcast advertising or by other promotional material, that Toxaphene insecticide, or any product containing Toxaphene insecticide:

(1) is "soft;" or

(2) is "nonpersistent," "nonmobile" and/or will "not magnify biologically;" *Provided, however*, That the use of such terms shall not be prohibited if:

(a) accompanied by statements, which clearly and conspicuously and in close conjunction with such terms, fully and accurately explain such terms and the specific context within which such terms are used, and that context reflects normal circumstances or conditions in which the product could be expected to be used; and

(b) accompanied by statements which set forth all relevant and material adverse effects on the environment known to result from the uses of such product which are suggested claims for the product; and

(c) statements concerning such terms are substantiated by competent scientific tests or other objective material which provide a reasonable basis for the representations made, and the substantiation materials are either (i) available for public inspection, or (ii) otherwise available to the Federal Trade Commission to determine compliance with this order; and

(d) statements concerning such terms include no conclusory representations, either directly or indirectly or by implication, suggesting that the product is unqualifiedly safe, nontoxic or free of hazard.

III

It is further ordered, That respondent, Hercules Incorporated, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of such products do forthwith cease and desist from disseminating or causing the dissemination of:

A. Any print advertising or print promotional material which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes in such print advertisement or print promotional material the following statement:

STOP! ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.

B. Any broadcast advertisement more than 30 seconds in length which contains for any such products any use or efficacy claim or any environmental or safety claim unless it clearly and conspicuously includes the following statement:

ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.

C. Any broadcast advertisement not more than 30 seconds in length which contains for any such products any use or efficacy claim or any environmental or safety claim unless it clearly and conspicuously includes the following statement:

ALL PESTICIDES CAN BE HARMFUL. READ THE LABEL. USE AS DIRECTED.

Provided, That in television advertisements not more than 10 seconds in length for any such products which contain no direct representations concerning product safety, the requirements of the term "clearly and conspicuously" shall in all cases be met by including the above statement in the video portion of the advertisement.

Provided however, That for purposes of enforcing Paragraph III of this order any advertisement, statement, claim or representation that such products may be employed for a crop or plant use registered under FIFRA, or any other approved use based upon evidence filed in connection with registration under FIFRA shall not be deemed sufficient to require the disclosure of any statement otherwise required under the provisions of Paragraph III; *Provided further*, That this exception shall be limited to advertisements which promote the respondent's corporate image and which only incidentally promote the sale or distribution of such products.

IV

It is further ordered, That the provisions of this order shall apply to all advertising (or advertising claims) prepared by respondent, whether or not such advertising is placed or paid for by respondent alone, or by respondent in conjunction with another under a cooperative advertising plan, or otherwise; *Provided*, *however*, That Sections I, II, and III of this order shall not apply to any advertising prepared by the customers of respondent, whether or not respondent makes payment in whole or in part for such advertising under any cooperative advertising plan, or otherwise. Nothing in this Section IV shall be construed to extend any provision of this order beyond the specific terms thereof.

Respondent shall, *nevertheless*, condition all future payments to customers of insecticide products covered by this order, made in connection with any cooperative advertising plan in which respondent participates, upon said customer's certification to respondent that they have complied with the standards set forth in Section III of this order.

V

Nothing in this order shall be construed to apply to scientific articles published in recognized scientific or agricultural journals or government publications, or reprints thereof, or representations (other than print advertising or other promotional material) before public or governmental forums such as public hearings, scientific meetings, or to governmental agencies, agents, or employees responsible for the regulation, testing, or dissemination of information concerning pesticide products covered by this order.

VI

It is further ordered, That nothing in this order shall prohibit the dissemination of product labels (as defined by Section 2(p)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended), or reproductions thereof.

VII

It is further ordered, That should the Federal Trade Commission promulgate a trade regulation rule or industry guide governing the advertising or promotion of products subject to this order, then any pertinent less comprehensive or less restrictive provisions of such rule or guide shall automatically replace any comparable provisions set forth herein which are effective on the date that such rule or guide becomes final and effective.

VIII

It is further ordered, That the respondent forthwith distribute a copy of this order to each of its operating divisions engaged in the manufacture, sale, advertising, promotion or distribution of products subject to this order, and to all present and future employees of respondent responsible for the advertising, promotion, distribution or sale of such products, and to all parties participating in respondent's cooperative advertising programs for such products; *Provided however*, That distribution by respondent of the order issued in this matter on Oct. 4, 1974 shall be considered as if such distribution had been made under this Section VIII and respondent shall not be required to make distribution of this order to persons to whom such previous order has been distributed.

IX

It is further ordered, That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other changes in the corporation which may affect compliance obligations arising out of this order.

X

It is further ordered, That the compliance report heretofore filed by respondent shall be considered by the Commission as if it had been filed under this order.

XI

It is further ordered, That this order shall become effective upon service.

IN THE MATTER OF

BRITISH OXYGEN COMPANY LIMITED, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8955. Complaint, Feb. 26, 1974—Final Order, Dec. 8, 1975

Order requiring a London, England, manufacturer of industrial gases, among other things to divest itself of all the stocks and assets of Airco, Inc., a Montvale, N.J., producer of industrial gases and medical products, within one (1) year of the issuance of the order. Respondent is further prohibited from acquiring any corporate stocks or assets in any field related to production of industrial gases or medical products for a period of 10 years without prior F.T.C. approval. British Oxygen and Airco, Inc. must also cease any representation on each other's respective boards of directors.

COMPLAINT

The Federal Trade Commission, having reason to believe that British Oxygen Company Ltd. (hereinafter "BOC"), BOC Financial Corporation (hereinafter "BOC Financial"), BOC Holdings Ltd. (hereinafter "BOC Holdings"), and British Oxygen Investments Ltd. (hereinafter "BO Investments"), respondents herein, have violated the provisions of Section 7 of the Clayton Act, as amended (15 U.S.C. §18), and that the above named respondents and Airco, Inc. (hereinafter "Airco"), respondent herein, have further violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), through the acquisition by BOC Financial of four million shares of stock of Airco, and that a proceeding in respect thereof would be in the public interest, issues the complaint, stating its charges as follows:

I

Definitions

1. For the purpose of this complaint, the following definitions shall apply:

(a) "Industrial gases" are gases in compressed, liquid and solid form including acetylene, carbon dioxide, carbon monoxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other medical gases, rare gases, and mixtures and combinations thereof.

(b) "Inhalation anesthetic equipment" is equipment and accessories used in the administration of gas for anesthetic purposes.

(c) "Inhalation therapy equipment" is equipment and accessories used in the administration of gas for therapeutic purposes.

(d) "Medical pipeline systems" are networks of equipment used to transport medical gas from hospital storage facilities to patient and operating rooms.

II

British Oxygen Company Limited

2. Respondent, BOC is a United Kingdom Company with principal executive offices at Hammersmith House, London W6, England.

3. BOC is engaged in the manufacture and sale of industrial gases, including rare gases and medical gases; welding equipment; special metals; air separation equipment; medical equipment, including inhalation anesthetic equipment, inhalation therapy equipment and medical pipeline equipment; aircraft breathing equipment; vacuum equipment and instrumentation; and food products. In 1972 BOC group sales totalled 252.6 million pounds sterling, or $606 million at an exchange rate of $2.40 to the pound.

4. Since 1968, BOC has actively attempted to enter the United States market and has contacted several smaller U.S. firms in the industrial gases, inhalation therapy equipment, inhalation anesthetic equipment, and medical pipeline system markets regarding possible acquisition by BOC. It is considered to be one of the very few companies with the expertise, capital, incentive, and interest to enter the U.S. markets described above.

5. In October 1973, BOC established Medishield, Inc., a Delaware corporation, to act as a holding company in consolidating BOC medical

product activities in the United States and Canada and in attempting to become a major factor in the United States markets.

6. BOC competes directly with Airco in the United States markets in inhalation anesthetic equipment and inhalation therapy equipment. It is the largest manufacturer and distributor of inhalation anesthetic equipment in the United Kingdom and is a significant competitor in this market in the European Economic Community.

7. BOC is a substantial competitor in the United States market in inhalation anesthetic equipment. It manufactures and distributes inhalation anesthetic equipment in the United States through its subsidiaries, Harris Lake and Fraser Sweatman.

8. BOC is the largest manufacturer and distributor of inhalation therapy equipment in the United Kingdom and is a significant competitor in this market in the European Economic Community. BOC markets inhalation therapy equipment in the United States through its subsidiary, Harris Lake.

9. BOC produces and distributes medical pipeline systems in the United Kingdom and is a significant competitor in this market in the European Economic Community.

10. In 1972, BOC was the second largest producer of industrial gas in the world. In each of the nineteen countries in which it produces industrial gas, BOC is a significant competitor, and in most of these countries BOC is the dominant competitor.

11. At all times relevant herein, BOC, through its subsidiaries, sold and shipped its products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act and the Federal Trade Commission Act.

III

BOC Financial Corporation

12. Respondent, BOC Financial is a corporation organized and existing under the laws of the State of Delaware, with a business address of 306 So. State St., Dover, Del. BOC Financial was organized solely for the purpose of acquiring shares of Airco, Inc. through a tender offer announced on Dec. 10, 1973. All BOC Financial's common stock is owned by BOC Holdings Limited.

IV

BOC Holdings Limited

13. Respondent, BOC Holdings is a United Kingdom Company with a business address of Hammersmith House, W6, England. BOC

Holdings is engaged in holding various securities of direct and indirect subsidiaries of BOC. All outstanding ordinary shares of BOC Holdings are held by BO Investments.

V

British Oxygen Investments Limited

14. Respondent, BO Investments is a United Kingdom Company with a business address of Hammersmith House, London W6, England. BO Investments is engaged in holding various securities of direct and indirect subsidiaries of BOC. BO Investments is a wholly-owned subsidiary of BOC.

VI

BOC

15. For purposes of this complaint, BOC shall be read to include all subsidiary or related corporations and all successor corporations.

VII

Airco, Inc.

16. Respondent, Airco is a publicly owned corporation, organized and existing under the laws of the State of New York, with its principal place of business in Montvale, N.J.

17. Airco is engaged in the manufacture of industrial gases, including medical gases; ferroalloys and carbide; cryogenic equipment; welding and cutting equipment; carbon; graphite; electronics; metals; and medical equipment, including inhalation anesthetic equipment, inhalation therapy equipment, and medical pipeline equipment. Airco operations in the industrial gas market are conducted through three divisions: Airco Industrial Gases Division, Airco Welding Products Divisions, and Ohio Medical Products Division. Airco is the second largest producer of industrial gas in the United States.

18. Airco operations in the markets for inhalation anesthetic equipment, inhalation therapy equipment, and medical pipeline equipment are conducted through the Ohio Medical Products Division. Airco competes directly with BOC in the United States markets for inhalation anesthetic equipment and inhalation therapy equipment.

19. Airco, through its Ohio Medical Products Division is the leading company in the United States inhalation anesthetic equipment market.

20. Through its Ohio Medical Products Division, Airco is one of the three leading companies in the United States inhalation therapy

equipment market. Through its Ohio Medical Products Division, Airco is the leading company in the medical gas pipeline systems market in the United States.

21. At all times relevant herein, Airco sold and shipped its products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act and the Federal Trade Commission Act.

VIII

The Acquisition

22. On or about July 25, 1973, BOC and Airco entered into an agreement pursuant to which they agreed to exchange confidential data regarding their respective businesses. The agreement also provided that neither company would make any offer for a period of five years to acquire any securities of the other without the prior approval of the other company's board of directors. On or about Dec. 10, 1973, BOC and Airco entered into a further agreement in which Airco approved a tender offer by BOC for three to four million of Airco's common shares. The agreement also provided for reciprocal representation by BOC and Airco on each other's board of directors. On or about Dec. 10, 1973, BOC Financial made a tender offer on behalf of BOC to purchase three to four million common shares of Airco. BOC Financial subsequently accepted four million of the Airco's common shares which were tendered to it.

IX

Trade and Commerce

23. The value of industry shipments of industrial gas in the United States was approximately $700 million in 1972. Very high levels of concentration have prevailed in the industrial gas industry the last two decades. The four and eight largest firms during the year 1972 accounted for more than 70 percent and 90 percent respectively of the total industry shipment of industrial gases. Airco, the second largest producer, had sales of over $120 million in 1972. Entry barriers into the industrial gas industry are high. During the period from 1958 to date, several acquisitions were made in the industry, and the number of significant full-line producers diminished considerably. During the period from 1950 to 1972, sales of industrial gas more than tripled. The only significant entrant within the last ten years was the largest of the few large international industrial gas corporations.

24. Sales of inhalation anesthetic equipment in the United States were over $25 million in 1972. The four and eight largest firms during

the year 1972 accounted for more than 70 percent and 85 percent respectively of total sales. Airco was the largest producer with over 35 percent of the United States market. BOC, through its United States subsidiaries, Fraser Sweatman and Harris Lake, was the third largest producer with over 8 percent of the market. The barriers to entry are high. The number of significant manufacturers with a substantial line of equipment has diminished considerably over the past ten years. BOC, through its recent acquisitions of Fraser Sweatman and Harris Lake, is the only significant recent entry.

25. Sales of inhalation therapy equipment were over $75 million in 1972. The four and eight leading firms accounted for over 50 percent and 65 percent respectively of sales. Airco was the second largest factor in the market in 1972. BOC was an actual competitor through sales of its Harris Lake subsidiary. Barriers to entry in the industry are high. The number of significant manufacturers with a substantial line of equipment has diminished considerably in the last ten years. Airco sales in this market were approximately $10.5 million.

26. Sales of medical pipeline systems in the United States were approximately $13.5 million in 1972. There were only five companies in the market. Airco is the leading company in the market with 51.5 percent of national sales. Entry barriers into the industry are high. The number of significant manufacturers with a substantial line of equipment has diminished considerably over the past ten years. There has been no recent significant new entrant.

X

Effects of the Acquisition

27. The effect of the acquisition of Airco stock by BOC may be substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution or sale of industrial gases, inhalation anesthetic equipment, inhalation therapy equipment, and medical gas pipeline systems or any submarkets of the above markets throughout the United States, or sections thereof, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18); and the effect of the agreements by which Airco and BOC undertook to eliminate the potential and actual competition between BOC and Airco may be to unreasonably restrain trade, and to hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act, (15 U.S.C. §45). These effects may occur in the following among other ways:

(a) Substantial potential competition through internal expansion or toehold acquisition, and substantial actual competition between BOC and Airco may be eliminated;

(b) The restraining influence of BOC as an actual or potential competitor may be eliminated;

(c) The competitive benefits of internal expansion and innovation by BOC may be eliminated;

(d) Already high barriers to entry of new competition may be heightened and increased;

(e) Members of the purchasing public and the ultimate consumer may be denied the benefits of free and open competition;

(f) BOC, a leading international competitor in electrical welding equipment, and gas welding and cutting equipment may be eliminated as a potential entrant into the concentrated United States electrical welding and gas welding and cutting markets by virtue of the acquisition of a large industrial gas company with presently existing substantial lines of electrical welding and gas welding and cutting equipment;

(g) Substantial competition between BOC and other companies for sale of products to Airco may be eliminated;

(h) Airco, a leading competitor may become further enhanced;

(i) Competitors of Airco may become competitively disadvantaged; and

(j) The effect of the stock acquisition may be to entrench or increase already high levels of concentration by encouraging tendencies for combination and merger by actual and potential competitors.

XI

Violations

28. The acquisition of four million shares of Airco stock by BOC and appertaining agreements between Airco and BOC, as alleged above, constitute violations of Section 7 of the Clayton Act, as amended (15 U.S.C. §18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. §45).

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

OCTOBER 18, 1974

Appearances

For the Commission: *K. Keith Thurman, Gordon Youngwood,* *Donald E. Purcell, Daryl A. Nickel, Rhett R. Krulla* and *John R. Hoagland.*

For the respondents: *Jay H. Topkis, Lewis A. Kaplan*, and *Moses Silverman, Paul, Weiss, Rifkind, Wharton & Garrison*, New York City for The British Oxygen Company Limited. *George J. Wade, R. Bruce MacWhorter, Danforth Newcomb, Foster Wollen* and *J. R. Hawkins, II, Shearman & Sterling*, New York City for Airco, Incorporated.

PRELIMINARY STATEMENT

Respondents The British Oxygen Company Limited (hereinafter "BOC"), BOC Financial Corporation, BOC Holdings Limited, and British Oxygen Investments Limited (hereinafter collectively "BOC" or "BOC respondents") are charged with violation of Section 7 of the Clayton Act, as amended (15 U.S.C. § 18); and BOC respondents and respondent Airco, Incorporated (hereinafter "Airco") are further charged with violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) through the acquisition by BOC Financial Corporation of four million shares (35 percent) of the stock of Airco for $80 million by means of a public tender offer. The Federal Trade Commission issued its complaint on Feb. 26, 1974, approximately two months after the said acquisition occurred.

The complaint alleges that the effect of the acquisition of Airco stock by BOC respondents may be substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution or sale of industrial gases, inhalation anesthetic equipment, inhalation therapy equipment, and medical gas pipeline systems or any submarkets of the above markets throughout the United States, or sections thereof in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18); and the effect of the agreements by which Airco and BOC respondents undertook to eliminate the potential and actual competition between BOC and Airco may be to unreasonably restrain trade, and to hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act or practice in commerce, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). These effects may occur, the complaint alleges, in the following among other ways:

(a) Substantial potential competition through internal expansion or toehold acquisition, and substantial actual competition between BOC and Airco may be eliminated;

(b) The restraining influence of BOC as an actual or potential competitor may be eliminated;

(c) The competitive benefits of internal expansion and innovation by BOC may be eliminated;

(d) Already high barriers to entry of new competition may be heightened and increased;

(e) Members of the purchasing public and the ultimate consumer may be denied the benefits of free and open competition;

(f) BOC, a leading international competitor in electrical welding equipment, and gas welding and cutting equipment may be eliminated as a potential entrant into the concentrated United States electrical welding and gas welding and cutting markets by virtue of the acquisition of a large industrial gas company with presently existing substantial lines of electrical welding and gas welding and cutting equipment;

(g) Substantial competition between BOC and other companies for sale of products to Airco may be eliminated;

(h) Airco, a leading competitor may become further enhanced;

(i) Competitors or Airco may become competitively disadvantaged; and

(j) The effect of the stock acquisition may be to entrench or increase already high levels of concentration by encouraging tendencies for combination and merger by actual and potential competitors.

On the day this proceeding was commenced, the Federal Trade Commission applied to the United States District Court for the District of Delaware for a temporary restraining order and a preliminary injunction requiring BOC to maintain Airco as a separate company and restraining it from, among other things, voting its Airco stock, having BOC personnel serve on the Airco board of directors, increasing or decreasing its holdings of Airco stock, and exchanging trade secrets and similar material with Airco pending the disposition of the administrative complaint.

On Feb. 28, 1974, the Court issued a temporary restraining order and thereafter, on Mar. 8, 1974, a preliminary injunction requiring BOC to maintain Airco as a separate company and restraining it from, among other things, exchanging trade secrets with Airco on the condition that the Commission expedite the administrative proceeding and file a report at least every ninety (90) days with respect to the status of the matter. The District Court did allow, however, BOC to vote its Airco shares and four representatives from BOC to be seated on Airco's board of directors. *Federal Trade Commission* v. *British Oxygen Co.*, 1974 CCH Trade Cas. ¶ 75,003 (D. Del. 1974) [9 S&D 887].

Answers were filed by Airco on Mar. 12, 1974, and by BOC respondents on Mar. 14, 1974, admitting in part and denying in part the various allegations of the complaint. On May 24, 1974, BOC respondents filed an amended answer, admitting in part and denying in part the various allegations of the complaint.

On Mar. 12, 1974, BOC respondents moved for a fixed and expedited schedule for the administrative proceeding, which motion was certified to the Commission by the administrative law judge. By order of Apr. 2, 1974, the Commission denied the motion insofar as it sought a fixed schedule, but ordered that the proceeding be expedited (Order Denying Motion for Fixed Schedule, Apr. 2, 1974).

Prehearing conferences were held in Washington, D.C., on Mar. 12, Mar. 28, Apr. 17, and Apr. 25, 1974. At the prehearing conference held on Apr. 25, 1974, complaint counsel informed the administrative law judge and respondents that they would not offer any proof with respect to the violations alleged in the complaint relating to medical pipeline systems and electrical and gas welding and cutting equipment (PHC. Tr. 134-35).

Discovery motions were subsequently filed by complaint counsel and BOC respondents. Proposed exhibit lists, copies of proposed exhibits, and witness lists were exchanged by the parties before the hearings began. Complaint counsel, on Mar. 15, 1974, filed a statement of issues.

BOC respondents, on Mar. 19, 1974, moved for the issuance of a subpoena directed to the Commission calling for the production of certain documents obtained by the Commission staff during the course of an investigation of the industrial gases industry in the United States, for use in the preparation and defense of this matter. On Apr. 23, 1974, the administrative law judge granted this motion in part. Complaint counsel and several third parties sought interlocutory review of this order by the Commission. Following the conclusion of substantially all of complaint counsel's case-in-chief, the Commission granted the applications for review and upheld the administrative law judge's determination (Order Granting Applications for Review, May 29, 1974). Production of the documents ordered to be made available to respondents began on June 10, 1974, and was completed on June 18, 1974.

Presentation of the case-in-chief began in Washington, D.C., on May 6, 1974, and concluded on May 23, 1974, subject to the right of complaint counsel to offer certain documents into evidence. Presentation of BOC respondents' defense began in New York, N.Y., on June 5, 1974, and concluded in Washington, D.C., on June 18, 1974. Airco presented its defense in Washington, D.C., on June 18, 1974. Rebuttal was presented by complaint counsel in Washington, D.C., on June 27, 1974. The hearings were terminated on June 27, 1974, subject to the right of complaint counsel to offer into evidence certain documents subpoenaed from Stanford Research Institute.

At the hearing on June 27, 1974, the administrative law judge set July 26, 1974 for filing of proposed findings by the parties, and Aug. 5, 1974 for the filing of replies thereto. Pursuant to respondents' request, the administrative law judge issued an order on July 25, 1974, extending the time for filing proposed findings to and including Aug. 2, 1974, and for replies thereto to and including Aug. 12, 1974. Following the receipt of further documents in evidence, on Aug. 2, 1974, the administrative law judge closed the record for the reception of evidence. Proposed findings and *confidential* proposed findings were filed by complaint counsel on Aug. 2, 1974; proposed findings and proposed findings containing *in camera* material were filed by BOC respondents on Aug. 7, 1974. On Aug. 8, 1974, the administrative law judge extended the time for filing reply briefs to and including Aug. 22, 1974. On Aug. 22, 1974, complaint counsel filed a reply brief and *confidential* reply brief. On Aug. 22, 1974, BOC respondents filed their reply brief and a reply brief containing *in camera* material. Airco's proposed findings and brief were filed on Aug. 5, 1974.

Complaint counsel called a total of twenty (20) witnesses, and respondents eight (8) witnesses. Over five hundred (500) exhibits were received in evidence during the trial.

This proceeding is before the undersigned upon the complaint, answers, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by complaint counsel and by counsel for respondents. These submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding.

For the convenience of the Commission and the parties, the findings of fact made hereinafter include references to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are set forth in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CCPF—Proposed Findings of Fact, Conclusions of Law and Order submitted by complaint counsel, followed by the Proposed Finding being referenced.

BOC PF—Proposed Findings of Fact, Conclusions of Law and Order (*in camera* material deleted) submitted by BOC respondents, followed by Proposed Finding being referenced.

BOC PF*—Proposed Findings of Fact, Conclusions of Law and Order (*in camera* material deleted) submitted by BOC Respondents, followed by Proposed Finding page or pages being referenced.

CCRB—Reply Brief submitted by complaint counsel, followed by page or pages being referenced.

BOC RB—Reply Brief submitted by BOC respondents, followed by page or pages being referenced.

CX—Commission's exhibit, followed by number of exhibit being referenced.

BOC RX—BOC respondents' exhibit, followed by number of exhibit being referenced.

RAX—Respondent Airco's exhibit, followed by number of exhibit being referenced.

PHC Tr.—Official transcript of the prehearing conferences, followed by the page number being referenced. Reference to the official transcript of the formal hearings is by the page number being referenced preceded by the name of the witness whose testimony is being referenced.

FINDINGS OF FACT

I. *Identity and Business of Respondents*

A. BOC Respondents

1. Respondent The British Oxygen Company Limited ("BOC") is now, and was at the time of the acquisition, a publicly-held United Kingdom company with its principal executive offices at Hammersmith House, London W6, England (complaint and BOC Answer, Par. 2; Smith 1639, 1642, 1698-99).

2. BOC is engaged in the manufacture and sale of industrial gases, including rare gases and medical gases; welding equipment; special metals; air separation equipment; medical equipment, including inhalation anesthetic equipment; inhalation therapy equipment and medical pipeline equipment; aircraft breathing equipment; vacuum equipment and instrumentation; and food products. In the fiscal year ending Sept. 30, 1972, BOC sales totalled 252.6 millions pounds sterling, or $606.2 million at an exchange rate of $2.40 to the pound[1] (complaint and BOC Answer, Par. 3). In fiscal year ended Sept. 30, 1973, BOC had sales of approximately $766 million (CX 292C).

3. In 1972 and 1973, BOC was the leading manufacturer of industrial gases in the United Kingdom (BOC Admissions, Pars. 32, 33, filed Apr. 12, 1974), and produced and marketed industrial gases in a number of countries throughout the world including Ireland, Australia, New Zealand, South Africa, India, Pakistan, Singapore, Malaya, Hong Kong, Canada, East Africa, Rhodesia, Zambia, Indonesia, Thailand, Fiji,

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[1] Pounds sterling have been converted into dollars at the rate of $2.40 per pound throughout this initial decision.

New Guinea, the Philippines, Bangladesh, and Italy. BOC has also recently entered the industrial gases market in Brazil (complaint and BOC Answer, Par. 10; Smith 1644-45, 1790, 1801-1806).

4. In the United Kingdom, BOC manufactures and distributes both inhalation anesthetic equipment and inhalation therapy equipment (complaint and BOC Answer, Pars. 6, 8).

5. BOC and Airco engaged in a joint venture from 1967 to 1971 for the manufacture and sale of air separation plants in the United States (BOC and Airco Admissions, Pars. 87, 88, filed Apr. 10, 1974 and Apr. 12, 1974; Smith 1716-19, 1810; Giordano 1948-50; Laister 2535).

6. Respondent BOC Financial Corporation is a corporation organized and existing under the laws of the State of Delaware, with a business address of 306 So. State St., Dover, Del. All BOC Financial Corporation's common stock is owned by BOC Holdings Limited. BOC Financial Corporation was organized by BOC solely for the purpose of acquiring Airco common stock shares through a tender offer. It presently owns the Airco stock, which acquisition is challenged in this proceeding (complaint and BOC Answer, Par. 12; CX 125 B-D).

7. Respondent BOC Holdings Limited is a United Kingdom company with a business address of Hammersmith House, London W6, England. BOC Holdings Limited is engaged in holding various securities of subsidiaries (direct or indirect) of BOC. All outstanding ordinary shares of BOC Holdings Limited are held by British Oxygen Investments Limited (complaint and BOC Answer, Par. 13; CX 125 B-D).

8. Respondent British Oxygen Investments Limited is a United Kingdom company with a business address of Hammersmith House, London W6, England. British Oxygen Investments Limited is engaged in holding various securities of subsidiaries (direct or indirect) of BOC. British Oxygen Investments Limited is a wholly-owned subsidiary of BOC (complaint and BOC Answer, Par. 14; CX 125 B-D).

9. In 1973, BOC Holdings Limited acquired all of the capital stock of Harris Lake, Inc. (BOC Admission, Par. 61, filed Apr. 12, 1974). In 1972, Harris Lake, Inc. had net sales of $1,511,901, and sold in the United States, products it purchased from BOC (BOC Admissions, Pars. 54, 84, filed Apr. 12, 1974). At the time of the acquisition of Airco stock by BOC, Harris Lake, Inc. manufactured and sold inhalation anesthetic equipment in the United States (complaint and BOC Answer, Par. 7; BOC Admission, Par. 27, filed Apr. 12, 1974), and marketed inhalation therapy equipment in the United States (complaint and BOC Answer, Par. 8; BOC Admission, Par. 28, filed Apr. 12, 1974).

10. Prior to the acquisition of Airco stock by BOC, BOC acquired Cyprane, Ltd., a United Kingdom corporation of which Fraser

Sweatman, Inc., a United States corporation, was a subsidiary, and the related Canadian company, Fraser Sweatman, Ltd. (complaint and BOC Answer, Par. 7; BOC Admission, Par. 34, filed Apr. 12, 1974; CX 11L). Fraser Sweatman, Inc. manufactured inhalation anesthetic equipment in 1972, and had sales of such equipment in the United States for the fiscal years ending in 1972 and 1973 of $2,145,484 and $2,498,146, respectively (BOC Admissions, Pars. 51, 58, 59, filed Apr. 12, 1974). Sales of inhalation anesthetic equipment by Cyprane, Inc. in the United States for the fiscal year ending in 1972 were $258,499 (BOC Admission, Par. 60, filed Apr. 12, 1974).

11. In or about October 1973, BOC established Medishield, Inc., a Delaware corporation, which presently owns, and owned at the time of the Airco acquisition, all of the common stock of Harris Lake, Inc. and Fraser Sweatman, Inc., which are domestic corporations, and Fraser Sweatman (Canada) Limited, a Canadian corporation (complaint and BOC Answer, Par. 5).

12. BOC respondents are engaged, and at the time of the acquisition were engaged, in commerce within the meaning of the Clayton Act and the Federal Trade Commission Act (complaint and BOC Answer, Par. 11). BOC respondents have additionally consented to the jurisdiction of the Federal Trade Commission (Topkis 126-27).

B. Respondent Airco

13. Respondent Airco, Inc. (Airco) is a publicly-held corporation, organized and existing under the laws of the State of New York, with its principal place of business in Montvale, N.J. (complaint and Airco Answer, Par. 16).

14. Airco is engaged in the manufacture of industrial gases, including medical gases; ferroalloys and carbide; cryogenic equipment; welding and cutting equipment; carbon-graphite products; electronics; metals; high-vacuum equipment; calcium carbide; and medical equipment, including inhalation therapy equipment, inhalation anesthetic equipment, and medical pipeline equipment (complaint and Airco Answer, Par. 17; Giordano 1897-1906; Dillon 2583-84; RAX 7). In 1973, Airco had net sales of $583,811,000 and net income from continuing operations of $19,111,000 (RAX 7, p. 45). As of Apr. 1, 1973, Airco had 95 physical plant locations and 134 sales offices and warehouses (Airco Admissions, Pars. 1-2, filed Apr. 10, 1974).

15. Airco operations in the industrial gases market are conducted through three divisions: Airco Industrial Gases Division, Airco Welding Products Division, and Ohio Medical Products Division (complaint and Airco Answer, Par. 17). Airco operations involving inhalation anesthetic

equipment and inhalation therapy equipment are conducted through its Ohio Medical Products Division (complaint and Airco Answer, Par. 18).

16. At the time of the acquisition of Airco stock by BOC, Airco Industrial Gases Division operated plants at Albion, Mich.; Chester, W. Va.; Bethlehem, Pa.; Buffalo, N.Y.; Butler, Pa.; City of Industry, Calif.; Claymont, Del.; East Alton, Ill.; Fairfield, Ala.; Johnstown, Pa.; New Orleans, La.; Phoenix, Ariz.; South Acton, Mass.; Vancouver, Wash.; Warren, Ohio; Hopewell, Va.; Lawrence, Kan.; Pedricktown, N.J.; Riverton, N.J.; Decatur, Ala.; and Richmond, Calif., and also operated a gaseous hydrogen plant in the United States (Airco Admissions, Pars. 8, 9, filed Apr. 10, 1974).

17. At the time of the acquisition of Airco stock by BOC, Airco produced acetylene, argon, nitrogen, oxygen, nitrous oxide, medical gases, rare gases, carbon dioxide, hydrogen, and mixtures and combinations of gases (Airco Admission, Par. 7, filed Apr. 10, 1974).

18. At the time of the acquisition of Airco stock by BOC, Airco's subsidiary, Airco Cryoplants Corp., was engaged in the design and construction of air separation plants (Airco Admission, Par. 10, filed Apr. 10, 1974).

19. At the time of the acquisition of Airco stock by BOC, the Ohio Medical Products Division of Airco was engaged in the manufacture and sale of inhalation anesthetic equipment and inhalation therapy equipment in the United States (complaint and Airco Answer, Pars. 17-19; Airco Admission, Par. 37, filed Apr. 10, 1974). Airco sales of inhalation anesthetic equipment in the United States exceed those of any other company (complaint and Airco Answer, Par. 19). On Apr. 1, 1973, the Ohio Medical Products Division of Airco operated plants at Berkeley, Calif.; Cleveland, Ohio; Fort Myers, Fla.; Houston, Tex.; Madison, Wis.; and Richmond, Calif. (Airco Admission, Par. 5, filed Apr. 10, 1974).

20. At all times relevant herein, Airco sold and shipped its products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act and the Federal Trade Commission Act (complaint and Airco Answer, Par. 21).

II. *The Acquisition*

21. Airco's stock is traded on the New York Stock Exchange and, as of June 1973, was widely held. Airco had approximately 43,000 stockholders with 11.4 million shares outstanding in June 1973, with its largest shareholder holding approximately 345,000 shares, or approximately 3 percent of the outstanding common stock (Dillon 2585-86).

22. Over the years prior to 1973, BOC and Airco had had a number of commercial contacts, including the joint venture during 1967-1971 for

the manufacture and sale of air separation plants in the United States. As a result of these contacts, various members of the senior managements of BOC and Airco became acquainted with one another (Finding of Fact No. 5; Dillon 2585; Giordano 1933; Laister 2537; Smith 1721).

23. One of BOC's managing directors, Peter Laister, learned in June 1973 of rumors relating to an impending tender offer for Airco stock from a group of investment bankers who made a call on Mr. Laister (Laister 2541). Shortly thereafter, Mr. Laister discussed Airco's vulnerability to such a bid with a vice president of Airco during a social occasion (Smith 1721; Laister 2542-43). Mr. Laister also informed Mr. Leslie Smith, BOC's chairman, of the rumors concerning Airco. BOC immediately implemented a study of the possibility of BOC's acquiring Airco (Laister 2542, 2544-46; *in camera exhibits:* CX 72A-N, 73A-J, 74A-B, 75A-K, 76A-U, 77A-B, 78A-D).

24. The Airco vice president reported to Airco officials the conversation he had had with Mr. Laister of BOC wherein it was suggested by Mr. Laister that BOC and Airco have some closer association. Airco determined to "sort out what the real interest was" (Giordano 2033). Thereafter, on June 30, 1973, Richard Giordano, president of Airco, met with Mr. Smith, chairman of BOC, in London and proposed an amalgamation between BOC and Airco (Giordano 1995-97). At that time, Mr. Giordano was not aware that BOC was already considering making a bid for Airco (Giordano 1997).

25. As a result of the June 30, 1973 meeting, Mr. Giordano and Mr. Smith agreed to form a working party of senior executives of both companies to study the possibility of an amalgamation between BOC and Airco (Smith 1723-24; Giordano 1972; Laister 2546-47; CX 78-A, *in camera*). The parties also agreed for an exchange of confidential information between the two companies regarding their respective businesses, such as sales, profits and capital investments (Giordano 1972-73; Laister 2546-47; CX 88A-C, CX 301A-Q, *in camera;* RAX 83). Subsequently, on July 25, 1973, BOC and Airco entered into a written agreement which provided for an exchange of confidential information. The agreement also provided that neither company would make any offer for a period of 5 years to acquire any securities of the other without the prior approval of the other company's board of directors. It was also agreed that the information exchanged would not be disclosed to third parties (CX 99A-D; Giordano 1972-73).

26. Confidential information was exchanged by BOC and Airco representatives at a meeting in New York on July 26 and 27, 1973 (BOC and Airco Admissions, Par. 64, filed Apr. 10, 1974 and Apr. 12, 1974; Smith 1723-24; Giordano 1973-77; Laister 2546-47; *in camera exhibits:*

CX 93A-I; CX 96A-J; CX 301A-Q; RAX 83A-U). After the meeting, BOC and Airco continued to explore the possibility of an amalgamation between the two companies and held subsequent discussions in September and October (Laister 2549-50; *in camera exhibits:* CX 95A-E; CX 97A-D; CX 98A-C).

27. On Nov. 2, 1973, the chairman of Curtiss-Wright Corporation informed Airco's senior officers that his company was prepared to make a tender offer for 2 million Airco shares at a price 25 percent over the then market price, or approximately $16-$17 per share (Dillon 2588, 2611). Airco's executives responded that the Airco board of directors would have to consider the Curtiss-Wright proposal and consult their advisers before making a substantive response to the Curtiss-Wright statement (Dillon 2589). Airco also immediately contacted BOC about the Curtiss-Wright proposal and sent Mr. Giordano to London to confer with BOC officials (Dillon 2592).

28. Airco commenced a brief study of Curtiss-Wright (Dillon 2589-90), and invited Curtiss-Wright to make a presentation to the Airco board of directors about the proposed tender offer. At the time of the board meeting, it had been concluded that the Curtiss-Wright proposal would be opposed (Dillon 2592-94). Airco had also concluded that a successful Curtiss-Wright offer would effectively preclude any closer association with any other company, including BOC (Dillon 2599). Airco's chairman informed Curtiss-Wright's chairman of the decision by the Airco board and the latter responded that Curtiss-Wright would not make the offer under those circumstances (Dillon 2595; Laister 2551). Airco and BOC thereafter returned to a study of a closer association between the two companies (Smith 1725; Dillon 2595-96). Working parties were set up to examine the various forms of closer association (Dillon 2595-96), and it was anticipated that additional meetings would take place after the first of the year, 1974 (Dillon 2596).

29. On Dec. 3, 1973, Curtiss-Wright made a public tender offer for 2.4 million shares of Airco's common stock at $18 per share (Dillon 2594-98, 2601; CX 125Z-14). Airco notified BOC of the Curtiss-Wright offer (Laister 2551; Dillon 2597). Airco opposed the Curtiss-Wright tender offer (Dillon 2596-97) and recommended that Airco's shareholders not accept it (Dillon 2606; Giordano 2013-14). On Dec. 4, 1973, Airco sent a letter to its shareholders urging them to reject the Curtiss-Wright offer and asking them to wait to consider possible alternatives to that offer (CX 125Z-9).

30. BOC and Airco entered into a memorandum agreement dated Dec. 10, 1973, in which Airco consented to BOC making an offer for up to 4 million Airco shares. The agreement further provided for reciprocal representation by BOC and Airco on each other's board of

directors. Additionally, the agreement provided that Airco would have first right to purchase or to designate a purchaser for any Airco shares purchased by BOC should BOC subsequently decide to sell (CX 108A-C; Dillon 2599-2601). Also, on Dec. 10, 1973, BOC announced a tender offer through its subsidiary, BOC Financial Corporation, to purchase up to 4 million common shares of Airco at a price of $20 a share (CX 125A-Z-31). Airco consented to BOC's offer, provided BOC access to Airco's shareholder list, and had its transfer agent at BOC's expense mail BOC's offer to Airco's shareholders (Giordano 2014-15; Dillon 2601-02). Further, Airco's board of directors sent letters to Airco's shareholders informing them that Airco's board had consented to BOC's offer and that a closer association of Airco and BOC would be beneficial to both companies (CX 125Z-9).

31. At the expiration of BOC's tender offer on Dec. 21, 1973, over 6 million shares had been tendered, of which BOC Financial Corporation subsequently purchased 4 million on a pro rata basis (CX 125Z-10, CX 293C; complaint and BOC and Airco Answers, Par. 22; RAX 7, p. 2). The cost to BOC of purchasing 4 million shares of Airco was $80 million plus estimated expenses of $2.8 million (CX 293C). The 4 million Airco shares represented approximately 35.3 percent of Airco's outstanding common stock and gave BOC effective working control over Airco (CX 170B). Subsequently, Airco's board of directors was enlarged from 12 to 16 directors to provide for four representatives of BOC. In return, BOC invited Airco's chairman and its president to join BOC's board of directors (CX 293E; CX 171C-D; Giordano 2015-17; RAX 7, pp. 2-3). On Feb. 26, 1974, the Federal Trade Commission issued its complaint challenging this acquisition (complaint).

III. *Industrial Gases*

A. Relevant Product Market

32. The complaint alleges that one of the effects of the acquisition of Airco stock by BOC may be substantially to lessen competition or tend to create a monopoly in the manufacture, distribution or sale of industrial gases, or any submarkets thereof throughout the United States, or any section thereof (complaint, Par. 27). "Industrial gases" are defined in the complaint as "gases in compressed, liquid and solid form including acetylene, carbon dioxide, carbon monoxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other medical gases, rare gases, and mixtures and combinations thereof." (complaint, Par. 1(a)). "Rare gases" include xenon and krypton (Giordano 1910-11; Baker 364). "Medical gases" include nitrous oxide, cyclopropane and oxygen (Kimerling 854-56); Giordano 1900; Loveman 603-10).

33. The term "fuel gases," used by witnesses in this proceeding, refers to gases which are burned in order to provide heat (Kridl 2137, 2143; Flamm 286; Cunningham 934). "Fuel gases" include both gases that are specifically mentioned in the definition of industrial gases contained in the complaint and gases that are not. Among the fuel gases are acetylene (Flamm 286; Loveman 611-12; Smith 1997-98; Giordano 2003), propane (Flamm 286; Cunningham 934), propylene (Flamm 286; Giordano 1912-13; Perkins 780-81, 798), MAPP (Flamm 286; Cunningham 935; Giordano 2004; Loveman 497-99; Perkins 798), Oxy-MAPP (Giordano 1897), Apache (Heckel 740-41; Cunningham 935), acetogen (Heckel 740-41), and thermogen (*ibid.*).

34. "Atmospheric gases," a term used throughout this proceeding, are gases generated commercially by the liquifcation and fractional distillation of air: oxygen, nitrogen and argon, and the rare gases—xenon and krypton (Baker 364). Atmospheric gases are produced in air separation plants and constitute the most substantial segment of the industrial gases market; for example, such gases account for 75-80 percent of the dollar sales by Union Carbide (Linde) and Air Products, 70 percent of dollar sales by Liquid Air, Inc., 65 percent of value of shipments by Chemetron, and 50 percent of the value of shipments by Airco (Flamm 240; Baker 368-70; Dempster 515-16; Cunningham 923; Giordano 1981-82). The above companies are generally acknowledged to be among the largest firms in the industrial gases industry.

35. Complaint counsel have conceded that the various industrial gases are "not substitutable in most cases" (Thurman 278). Rather, each gas is almost invariably used for its unique chemical properties which make them highly desirable for specific purposes. Other products are not readily substitutable for industrial gases (Flamm 276, 279-85; 349-50; Baker 370-72; Kridl 2142). The principal use of oxygen is in the manufacture of steel (Flamm 279-80). Oxygen is used also in the manufacture of glass (Flamm 281), chemicals (CX 232W-Z; Baker 440; Kridl 2164), aluminum (Giordano 1909-10), in welding and cutting (*ibid.*), and for medical purposes (Flamm 276). The principal characteristics of nitrogen are its chemical inertness and its refrigeration capabilities (Flamm 274). A major use of nitrogen is in the manufacture of ammonia (Kridl 2162-63). Nitrogen is also used extensively for blanketing in order to exclude oxygen and thereby prevent explosions (Giordano 1910). Its principal purchasers are oil companies, chemical companies and electronics companies (Giordano 1910). Nitrogen is used also as a refrigerant for food freezing and in-transit preservation of food (Flamm 281-83). Argon is an inert chemical element; its principal use is in stainless steel welding (Giordano 1910; Kridl 2157). Xenon is an inert chemical element used in electronic applications and sold in very small

quantities (Giordano 1910-11). Krypton is an inert chemical element sold in very small quantities (*ibid.*). Helium is an inert chemical element. It is used in gas shielding processes to exclude the atmosphere, in leak detection, in research, and in balloons (Giordano 1911). Hydrogen is a combustible gas used in a variety of applications including annealing of steel, hydrogenation of foods, as a rocket propellant and in the manufacture of ammonia (Giordano 1911; Kridl 2133). Carbon dioxide is used primarily in the beverage industry for the carbonation of soft drinks. It is used also as a refrigerant in the food industry and as a shielding gas in certain welding applications (Giordano 1911-12). Carbon dioxide and nitrogen are not normally interchangeable in food freezing and refrigeration applications (Flamm 281-83). Acetylene is of unique utility in welding and cutting (Kridl 2168). Nitrous oxide is used by the medical and dental professions as an analgesic or anesthetic (Giordano 1900). Cyclopropane is a human anesthetic (Giordano 1900). MAPP is used primarily for cutting metal. The equipment used for that purpose differs from acetylene cutting equipment (Giordano 1912). Propylene is a fuel gas similar to MAPP. The cutting equipment used with propylene is the same or similar to equipment used with MAPP (Giordano 1913). Propane has two principal uses: heating, including cutting, and the synthesis of propylene (Giordano 1912-13; Kridl 2137). The principal use of butane is in the chemical industry (Kridl 2138). Apache, acetogen and thermogen are fuel gases used for their heating properties (Heckel 740-41).

36. The Bureau of the Census classifies the production and marketing of industrial gases as a separate and distinct line of commerce under Standard Industrial Classification (SIC) 2813 (CX 296A-F, CX 312A-K). The industrial gases industry has been classified by Census as a separate economic entity since at least 1945 (CX 340A-B, CX 341A-B). The United States industrial gases industry has been defined by Census from at least 1945 through the present as those establishments primarily engaged in manufacturing gases for sale in compressed, liquid and solid forms (CX 340A-B, CX 336A-B, CX 338A-B; CX 339A-B, CX 296A). The gases classified by Census as industrial gases are acetylene, carbon dioxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other elemental gases, and compressed and liquified gases (CX 299D, CX 300A-D, CX 312C-D). The same group of gases have been classified as industrial gases by Census since at least 1954 (CX 337A-C).

37. Firms engaged in the production and marketing of industrial gases recognize the industrial gases industry as a separate and distinct line of business (Flamm 210-11, 213-14; Baker 363-64; Dempster 513; Loveman 577; Muller 648, 650; Heckel 730; Perkins 780; Kimerling 854;

Cunningham 917). Industry executives who testified in this proceeding identified as their competitors companies who produce and distribute industrial gases and each invariably named the same companies as being engaged in this line of business (Flamm 223-24; Baker 364-65; Dempster 516-17; Loveman 578-79; Heckel 732-33; Kimerling 857; Cunningham 918).

38. The industrial gases industry is represented by two trade associations, the Compressed Gas Association (CGA) and the International Oxygen Manufacturers Association (IOMA) (Flamm 230-31; Baker 394-95; Loveman 581; Hines 757-58; 764; Perkins 789; Kimerling 858-59; Cunningham 924). The purpose of the associations is to provide for exchange of information and ideas and keep their members abreast of developments in the industrial gases industry (Flamm 230-31; Baker 395; Hines 758; Kimerling 860). Only producers of industrial gases qualify for membership in IOMA (Hines 758, 763-64).

39. There is common industry recognition that the atmospheric gases—oxygen, nitrogen, argon, xenon and krypton—are industrial gases and are marketed by industry members. Industry witnesses who testified in this proceeding also identified hydrogen, helium, carbon dioxide and acetylene as industrial gases and as being marketed by their companies (Flamm 213, 270; Baker 364, 427; Dempster 514-15; Loveman 577; Muller 648; Heckel 730; Perkins 780; Kimerling 854; Cunningham 917). There is no unanimity of view as to gases such as carbon monoxide, nitrous oxide, and the various fuel gases *other* than acetylene, which is clearly recognized by the industry as an industrial gas (Flamm 215, 218, 270, 275; Baker 372, 426-27; Dempster 514, 555; Loveman 597-98; Perkins 780, 798; Kimerling 854). Fuel gases such as propane, butane, and propylene are not classified by the Bureau of the Census as industrial gases and are specifically excluded from SIC 2813 (CX 312A, CX 312 n. 10). These fuel gases are hydrocarbon products and are part of the petroleum industry (Baker 426; Perkins 798; Cunningham 933-34). The small amount of these gases sold by members of the industrial gases industry are used in metal cutting, which is one of the uses of acetylene. Such gases are not, however, used for welding, which is a major use of acetylene (Giordano 1912; Kridl 2138-39). These latter gases and mixtures thereof, are specialty gases, and are sold by some companies and not others. However, such gases constitute a very small and insignificant percentage of total industry sales (Flamm 214, 218, 270, 275; Dempster 514-15, 569; Loveman 612; Heckel 750; Kimerling 854-55; Cunningham 934; Smith 1891; Giordano 1984).

40. Industrial gases companies in the U.S. market a broad range of industrial gases although they may not produce all of them (Flamm 213-15; Baker 363, 372-73; Heckel 730; Kimerling 855; Cunningham 917,

923-24). The principal industrial gases companies market essentially the same products (Baker 373). As one industry witness stated, the industrial gases business consists basically of the heavy investment in air separation gases and such others of a "package of gases" as can be marketed profitably (Dempster 555; Flamm 213-15; Baker 363, 372-73; Heckel 730; Kimerling 855; Cunningham 917, 923-24). Both BOC and Airco market a wide range of industrial gases (Smith 1797-99; Giordano 1904-05, 1913-14). Industrial gases companies market industrial gases that they do not produce in order to provide their direct customers and their dealers a synergistic or total marketing package (Flamm 215-16; Cunningham 923). It is necessary for industrial gases companies to market a full or broad line of gases in order to compete effectively (Flamm 215-16; Baker 373-74; Heckel 730; Kimerling 855). Customers of industrial gases companies prefer to purchase their total gases requirements from a single supplier (Baker 374; Heckel 730-31; Smith 1800). While some industries may use certain industrial gases more than others, most industries generally use a wide range of industrial gases (Baker 431-32; Dempster 569).

41. The production, transportation and marketing of industrial gases require substantial, complex and specialized technical knowledge and expertise (Flamm 233-37; 351; Baker 383-86; Dempster 526-27; Kimerling 872-73). The atmospheric gases—oxygen, nitrogen, argon, krypton and xenon—are produced commercially by the cryogenic liquifaction and fractional distillation of air. Air consists of about 78 percent nitrogen, 21 percent oxygen, and 1 percent argon and traces of other elements, including krypton and xenon (CX 335Z). It is cooled to approximately -300° F, at which point it is a liquid, and the elements are separated by virtue of their different boiling points (Kridl 2132-33, 2139; Flamm 264-66; Baker 368). Air separation plants necessarily produce oxygen and nitrogen as co-products, although in many instances only one product is marketed while the other will be vented (Kridl 2159-61). These plants can be designed so as to derive argon, krypton and xenon in addition (Dempster 515; Kridl 2165). Regardless of the purpose for which it is used, all oxygen is identical and is produced in similar plants (Baker 372; Loveman 603; Cunningham 954; Kuehn 1145). Gases produced in air separation plants accounted for over 63 percent of the total value of all industrial gases shipments by primary manufacturers in the United States in 1972 as reported by the Bureau of the Census (CX 312C-D). The science of cryogenics or low temperature is also used in the production of other industrial gases such as helium and hydrogen (Flamm 271-72, 275). Other industrial gases such as hydrogen and carbon monoxide are also produced together in the same plants (Baker 425). Operation of cryogenic

facilities for the production of industrial gases requires highly specialized knowledge and can be quite hazardous to the people concerned as well as surrounding communities (Baker 384).

42. The industrial gases industry has two marketing aspects: tonnage and merchant. Tonnage refers to the supply to customers whose demand at a particular location is sufficient to justify the construction of a plant at or near the customer's facility which is devoted entirely or primarily to providing that customer with gaseous product delivered through a pipeline (Flamm 317-19; 329; Giordano 1914-15, 1917-18). Typical tonnage users include Ford Motor Company, U.S. Steel, Bethlehem Steel, Armco Steel, Republic Steel, Allied Chemical, McLough Steel and National Steel (Giordano 1917; Baker 442-43; Perkins 802-03; Flamm 290-96). Merchant refers to other sales of gases, which take place in much smaller quantities and in which the gas is transported to the customer by truck or rail (Giordano 1985-86). The merchant side of the business is also composed of two segments: bulk liquid and cylinders. Bulk liquid refers to gases shipped in relatively large quantities in liquid form (Giordano 1914-15; Flamm 318-19). In cylinder distribution, the gas is distributed in gaseous form under high pressures in small metal cylinders (Giordano 1926). The only gases which are produced and sold in the United States on a tonnage basis are oxygen, nitrogen and hydrogen (Giordano 1918). Gases distributed as bulk liquid include oxygen, nitrogen, argon, hydrogen, carbon dioxide and helium (Giordano 1927-28). All of the gases are sold in cylinders.

43. Gases that are manufactured as liquids for economics of distribution are transported in bulk form in tank cars or trucks. Bulk liquid gases are used either as liquids or are converted by vaporization and used as gases (Flamm 317-19; Giordano 1913-16, 1927-28). Plants used to supply gases to customers either in liquid form or as gas in cylinders are referred to as merchant plants. It is common, however, for onsite tonnage plants to have merchant capacity, *i.e.*, incremental to that required to supply onsite users, and used to supply other customers (Flamm 317-19; Giordano 1913-14, 1917-18, 1927-28; Baker 2740-41). The marketing of bulk liquid gases and cylinder gases requires special skills and equipment designed to withstand extreme temperatures. The products are shipped over highways in conformance with rather strict Federal regulations and delivered to especially designed containers where it is stored and released to meet individual customer needs. All of this equipment is very specialized and used almost exclusively within the industrial gases industry (Baker 384; Kridl 2137). Industrial gases are also marketed through a network of

independent distributors (Flamm 218-19, 300, 344-45; Baker 428, 2757; Dempster 574; Loveman 578; Cunningham 923).

44. The cluster of products and services offered by industrial gases companies, the common technology and specialized equipment utilized in the production, distribution and marketing of industrial gases by the industry, the identity of marketing methods and customers, the recognition and identification by the industry members of only other industrial gases producers and sellers as their competitors, trade associations which recognize only industry members, and the reporting system utilized by federal agencies over a long period of time all clearly establish the industrial gases industry as a relevant line of commerce for analyzing the effects of the challenged acquisition (Findings of Fact 32-43).

B. Relevant Geographic Market

45. The three largest industrial gases companies in the United States—Linde, Air Products, and Airco, all produce and market industrial gases throughout the United States (Flamm 231; Baker 395-96; Giordano 1922, 1938, 2005-06; Airco Admissions, Pars. 8, 9, filed Apr. 10, 1974). Airco bids for both tonnage and merchant accounts nationwide (Giordano 1922). Chemetron, Inc., another major producer, markets industrial gases throughout virtually all the United States (Cunningham 920). The smaller companies which sell industrial gases in tonnage quantities do not sell nationwide. Big 3 sells only in the Southern part of the country (Flamm 321). Liquid Air sells no significant amount in the Northeast and Midwest (Dempster 544). Burdett of Cleveland sells primarily in the Midwest (Loveman 580). The other smaller companies are even more localized; *i.e.*, Northern Gases (Milwaukee and Wisconsin), and Alabama Oxygen (Alabama, parts of Florida, Georgia, Mississippi, and Tennessee)(Heckel 731; Kimerling 856-57).

46. The cost of distributing merchant quantities of industrial gases is substantial and this high distribution cost limits the distance to which most industrial gases can be shipped economically. Oxygen and nitrogen are usually not shipped more than 100 to 300 miles (Flamm 316-17; Baker 448-49; Kimerling 882-83; Giordano 1928, 2019-20; Kridl 2180). Argon can be shipped somewhat longer distances (Flamm 320-21; Giordano 1928), but carbon dioxide is normally shipped shorter distances (Giordano 1928; *see* Flamm 338). Hydrogen can be marketed within 200 to 600 miles of the producing plant (Kimerling 882-83; Giordano 2007). Helium, since it is not commercially available in many parts of the world, is shipped much greater distances than are other industrial gases (Giordano 1928). The major producers are able to

market merchant gas nationwide because they have numerous producing plants located throughout the United States; *i.e.*, Linde has 70 to 100 plants, Air Products has a substantial number of plants, and Airco has at least 51 plants (Flamm 231; Baker 2740; RAX 7).

47. BOC was interested in becoming a nationwide competitor in the U.S. industrial gases market. According to BOC's Chairman, BOC would need more than 5 percent of the national market in order to become a viable competitor; and that had BOC acquired a small company, BOC would have been interested in expanding it into a national company (Smith 1837). The scope of Airco's operations throughout the United States was one of the primary reasons BOC chose to acquire a stock interest in Airco; it gave BOC national scope in one jump (Smith 1732-36).

48. Since the major industrial gases companies compete nationwide in both the tonnage and merchant segments of the industrial gases market, and since BOC's interest in the United States industrial gases market was on a nationwide basis, the relevant section of the country or geographic market in which to determine the probable competitive effects of BOC's stock acquisition of Airco with respect to the industrial gases market is the United States as a whole (Findings of Fact 45-47).

C. Market Performance and Concentration

(1) Growth and Demand

49. The United States industrial gases market is the largest industrial gases market in the world (Baker 391; Dempster 541; Smith 1728; Laister 2557). The industrial gases market in the United States is growing rapidly and many new applications for industrial gases have been developing (Flamm 245-46; Baker 391, 2718-19, 2722-23; Heckel 735; Cunningham 925-26). Industry witnesses anticipate an annual growth rate of up to 10 percent over the next 5 years (Baker 2719; Flamm 246). The U.S. market is, in fact, the most dynamic of the industrial gases markets in the world and presently provides more new business opportunities than all the other industrial gases markets in the world combined (Baker 2718).

50. Two significant new applications for industrial gases in the United States have been the development of nitrogen food freezing and the use of industrial gases in sewage treatment. The shortage of petroleum products has brought about additional new applications for industrial gases. Industrial gases are now being used in the production of synthetic natural gas or low-BTU gas that can be used for commercial purposes or in power generation. The elevated price of oil

has also led to the production of gas for pipeline transmission by the combustion of coal with oxygen. Additionally, industrial gases are now being used to generate basic chemical feedstock for a number of chemical products such as fertilizers and methanol. These new applications have created demand for large tonnage plants by public utilities and by chemical companies. The scarcity of natural gas has also made economically prohibitive the use of ammonia for generating nitrogen for metallurgical processes. This has further increased demand for nitrogen produced by air separation. Another new application for industrial gases is by the steel industry. The high price of scrap metal has resulted in steel companies using liquid pig metals to produce more steel rather than melting scrap. This new technique increases the requirements of steel companies for oxygen (Baker 439-41, 2716-18, 2724-25; Heckel 735; Cunningham 925-26). The industrial gases market as of 1974 is "very buoyant," one industry witness testified (Baker 2716).

51. The new applications for industrial gases and the very high level of economic activity in the United States have led to substantial growth of the U.S. industrial gases market (Baker 2718). During the last 2 years, the volume of industrial gases shipments by Air Products, for example, has increased 50 percent for merchant gases and 25 percent for tonnage gases (Baker 2723). Further, Air Products' sales of industrial gases increased 25 percent from 1972 to 1973 (Baker 2771-72). The demand for the principal industrial gases products, particularly tonnage oxygen, has increased to such an extent that the engineering and manufacturing capacity of the U.S. industry is insufficient to meet the demand for construction of new plants (Baker 2727). Air Products has recently had to tell customers that it was unable to supply their requirements for new industrial gases plants (Baker 2760). Many of the industrial gases, particularly the air separation gases, have been in short supply in the U.S. in the last year to two years (Flamm 239-40; Baker 403-04, 437-38; Dempster 543-44, 556-57; Perkins 787; Kimerling 871-72; Cunningham 924-25). Some industrial gases are, in fact, in such short supply that Linde has had to allocate customers (Flamm 240).

(2) Pricing

52. Prices for industrial gases have also increased in the last 2 years (Baker 403, 2723; Kimerling 879; Cunningham 925). Linde increased prices 10-15 percent in April 1974, which was followed by Airco (Flamm 304). The price controls of the Cost of Living Council, however, prevented industrial gases prices from rising as significantly as they might have (Cunningham 950). Mr. Baker of Air Products testified that prices have firmed since 1970, that marginal costing and marginal

pricing have disappeared and full costing and full pricing have become the standard (Baker 2723).

53. There is no price data in the record as such. BOC respondents contend that price competition in the industry is extremely rigorous, and reference is made to testimony of industry executives (Dempster 556; Baker 436-37; Flamm 305). This testimony is, however, somewhat equivocal. Mr. Flamm of Linde stated that between Linde, Air Products and Airco—"they argue their service is equal, I would say a fair amount of vigorous price competition." (Flamm 305). Further, this testimony, which is of the most general nature, must be viewed in perspective with the supply-demand situation existing during the past 2 years, and testimony that prices have firmed, marginal pricing has disappeared and full pricing has become the standard. Respondents also rely upon the observations in the Perham-Greenfield (BOC) report on the United States industrial gases market as of 1969-1970 (BOC RX 62). This report is, however, unreliable for the purpose of establishing actual price competition in the market, or the degree of price competition that actually existed. The report is not only self-serving, but it is double hearsay, consisting of what BOC officials reported industry executives told them. The report also covers the period 1969-early 1970. The supply-demand situation and industry pricing practices changed substantially from early 1970 to the end of 1973 when the challenged acquisition occurred (Findings of Fact 50-52).

54. BOC respondents placed several charts in evidence which demonstrate that actual unit value of major industrial gases has declined in recent years (BOC RX 246; BOC PF 123). Conclusions regarding prices have been drawn from data compiled by the Bureau of the Census on the total value and quantity of shipments of the various gases, f.o.b. plant, with the unit value (*i.e.*, the ratio of total value of shipments to total quantity of shipments) used as an approximation of price. These conclusions have some validity when applied to the tonnage segment of the market because pipeline distribution is cheap and distribution expense is not a significant cost element. In the merchant segment of the market the conclusions are meaningless because distribution costs are a significant factor in pricing, and the f.o.b. plant values utilized by BOC do not take into account such expenses. Further, declining unit value has little significance in establishing that the marketplace is highly competitive. The basic pattern in the industry has been an increase in volume purchased by individual customers and a trend toward pipeline delivery. Thus, the increasing use of tonnage oxygen with low delivery costs has had an averaging-down effect on the unit value of shipments. Economics of

scale in production and delivery has also effected lower unit costs (Baker 2745-46).

(3) Structural Features

55. BOC respondents also contend that there are structural features of the industry which assure price competition and prevent oliogopolistic pricing practices. These features are backward integration by tonnage users, the high fixed costs in the industry, concentration and economic power on the buyers' side, and product homogeneity (BOC PF 130, *et seq.*). There has been some vertical integration by large users of industrial gases into producing their own requirements of certain gases. The record, however, does not reflect any trend towards vertical integration, nor does it show any significant existing threat that customers will back integrate. The probable pricing effect of the threat of back integration is speculative; no direct evidence of effect has been presented. Back integration is not practical for all industrial gases. The record does not establish the percentage of potential customers which have vertically integrated. Further, the potential for integration is confined to tonnage customers; it has no effect on the merchant market. The record does establish that potential customers which might seek to back integrate must look, in large measure, to industrial gases companies to construct a plant (Smith 1669). In periods of shortage, such as existed in the market in 1973-1974, industrial gases companies were over-committed and were refusing requests to construct plants (Baker 2727). Thus, the threat of back integration is minimal. Back integration by large buyers is present in many industries and there is no showing that the effect of such possibility on pricing in the industrial gases industry is more significant or as significant as in other industries. In fact, the record does contain evidence that back integration has had little effect on pricing. Air Products, a major industry factor, normally makes a profit on tonnage gases (Baker 2741). Industry witnesses testified that companies that have back integrated normally sell any surplus production to an industrial gases company for distribution to the general market (Baker 2744; Flamm 345). Further, the companies that have to some extent back integrated, are not looked upon as possible entrants into the industrial gases industry (Baker 443, 2743-44).

56. A significant feature of the industrial gases industry is the fact that fixed costs are quite high in relation to the total cost of producing atmospheric gases. The largest elements of cost are depreciation on the physical plant and power cost. Because of this, BOC respondents argue that as a matter of economic theory, there should be extreme price competition in the industry, citing F. Scherer, *Industrial Market*

Structure and Economic Performance, 192-198 (1970). As complaint counsel point out (CCRB, p. 28), according to Dr. Scherer, as a matter of economic theory there should be price competition in high fixed cost industries during periods of oversupply and overcapacity, but in actual practice firms in high fixed cost industries avoid price competition. As explained by Mr. Scherer:

> Recognizing the temptations confronting them, firms in high fixed cost industries seem to exercise extraordinary restraint in their pricing actions, and when tacit restraint fails, they have an unusually high propensity to scurry into formal collusive agreements. (*Id.* at 195).

In recent periods, there has been a very tight supply situation in industrial gases. Thus, the economic theory relied upon by BOC respondents can be given little weight in establishing extreme price competition.

57. For reasons already stated, BOC respondents' other two arguments, economic power of the buyers and product homogeneity, afford little proof of extreme price competition. A substantial part of the industrial gas market—the merchant market—is composed of small purchasers. Even the large purchasers of certain gases purchase other gases in small quantities. Thus, the economic power of the buyers is lessened by other market factors. The effect of product homogeneity on pricing is tempered by an emphasis on service competition (Flamm 305). There is some indication that instead of extreme price competition, the dominant firms in the industrial gases market engage in interdependent and parallel behavior. At a private meeting on Sept. 6, 1973, Airco's Chairman, George Dillon, told Mr. Smith, BOC's Chairman, that the U.S. industrial gases market had stabilized, and "the three main competitors no longer encroach on each others' area of domination." (CX 95D). Therefore, the evidence of record does not support a finding of extreme price competition.

(4) Profitability

58. BOC respondents contend that the industrial gases industry has not been profitable in comparison to other manufacturing and chemical industries (BOC PF 151, *et seq.*). BOC's reliance is based upon consolidated returns of industrial gases companies which are engaged in many lines of business (BOC RX 254). Consolidated returns of corporations engaged in several lines of commerce shed little light on the profitability of individual segments of their business. RAX 7, Airco's 1973 annual report, shows that in 1973, industrial gases, cryogenic, welding and cutting equipment accounted for 44.9 percent of sales and 52.7 percent of earnings; in 1972, these divisions accounted for

48.7 percent of sales and 60.8 percent of earnings. Thus, this segment of Airco's business was more profitable than the other segments. BOC respondents also claim, on the basis of Dr. Andrew Kridl's testimony, that the industrial gases operations of the diversified companies are less profitable than their other operations (Kridl 2196-98). Dr. Kridl's testimony, however, is diametrically opposed by the Stanford Research Institute study in which Dr. Kridl participated. The S.R.I. study concludes that the industrial gases portion of the operations of these diversified companies is more profitable than the other activities of the companies (CX 345J, *in camera; see* CX 345C, *in camera*). The S.R.I. study also indicates that the U.S. industrial gases market is more profitable than industrial gases markets in Western Europe (CX 345I, *in camera; see also* 345M, *in camera*). Thus, the record evidence on profitability is equivocal at best. No hard evidence on rate of return on industrial gases was placed in the record. BOC's attempt to utilize information in the Commission's investigative files on rates of return produced summaries of doubtful probative value (BOC RX 254; Topkis 2693). The record is clear, however, that no industrial gases company has abandoned the market, or any segment of the market because of low profitability. In fact, the major companies are expanding capacity rapidly (Flamm 289, 322-23; Baker 438, Dempster 558; Giordano 1962-63, 1991-92).

(5) Concentration

59. Firms that produce and sell industrial gases are required by law to report to the Bureau of the Census the quantity and net selling value, f.o.b. plant, of the industrial gases produced and shipped by them (CX 299A-D; CX 300A-D; CX 298A-D). The Bureau of the Census publishes annual reports entitled "Current Industrial Reports" of the yearly shipments of industrial gases by manufacturers classified in the industrial gases industry, SIC 2813 (CX 312A-K).

60. The Bureau of the Census also publishes a "Census of Manufacture" report which sets forth for every fifth year the value and quantity of industrial gases shipments by all manufacturers (CX 296A-F). The manufacturers not classified under SIC 2813 that produce industrial gases are those companies which produce industrial gases as other than their primary product at a given establishment; generally such gases are produced for their own use. These companies occasionally have surplus gases which they generally wholesale to industrial gases companies on a spot basis (Flamm 345, 354-55; Baker 2743-44). These companies do not market industrial gases on the open market and are not considered by industrial gases companies to be part of the industrial gases industry (Flamm 345-46; Kimerling 885;

Cunningham 952-53; Baker 2743-44). Accordingly, those companies are not part of the relevant market in this proceeding (Finding of Fact 67).

61. The total value of industrial gases shipments f.o.b. plant in the U.S. for 1972 reported to the Bureau of the Census by those firms primarily engaged in the manufacturing of industrial gases for sale was $595 million (CX 296A). The total value of industrial gases shipments f.o.b. plant in the U.S. for 1972 reported to the Bureau of the Census by all manufacturers was $649 million (CX 296A).

62. See Confidential Finding of Fact.

63. The total value of industrial gases shipments f.o.b. plant for 1972 reported to the Bureau of the Census by the four largest U.S. producers and marketers of industrial gases was $414 million. The total value of industrial gases shipments reported by the four largest producers and marketers of industrial gases accounted for 69.6 percent of the total value of industrial gases shipments for 1972 by all primary manufacturers of industrial gases and 63.8 percent of the total value of industrial gases shipments for 1972 by all manufacturers (Confidential Finding of Fact 62).

64. The eight largest producers and marketers of industrial gases in the United States in 1972 were Linde, Air Products, Airco, Chemetron Corporation, Liquid Air, Inc., Big Three Industries, Liquid Carbonics Corporation, and Burdett Oxygen Company of Cleveland (Flamm 227-29; Baker 366-67; Heckel 746; Hines 757; Kimerling 864; Cunningham 921-22). The total value of industrial gases shipments f.o.b. plant for 1972 reported to the Bureau of the Census by the eight largest producers and marketers of industrial gases in the United States was $514 million, as adjusted on a *pro forma* basis to include the acquisitions of Liquid Air (Confidential Finding of Fact 62). The total value of industrial gases shipments reported by the eight companies accounted for 86.5 percent of the total value of industrial gases shipments for 1972 by all primary manufacturers and 79.3 percent of the total value of industrial gases shipments for 1972 by all manufacturers (Confidential Finding of Fact 62).

65. Over the past 5 years, top four concentration in the U.S. industrial gases market has increased significantly from 67 to 70 percent while top eight concentration has increased from 84 to 86.5 percent, based on total shipments by all primary manufacturers of industrial gases.

Concentration Ratios From 1967 to 1972 Industrial Gases; SIC 2813

Value of Industry Shipments[2]

Year	*Top 4 Concentration*	*Top 8 Concentration*	*Source*
1967	67	84	BOC RX 72F
1972	70	86.5	CX 296A; CX 325A, *in camera;* Flamm 221;

(Confidential Finding of Fact 62)

66. The increase in concentration in the U.S. industrial gases industry, as shown above, is also demonstrated by record evidence that there has been a considerable decrease in the number of industrial gases firms in the last 15 years as a result of acquisitions and mergers. Both Air Products and Liquid Air, Inc. have made significant acquisitions of industrial gases companies during this period. Air Products acquired three industrial gases producers in 1961: Southern Oxygen Company, Delta Oxygen Company, and Hill Industrial Gas Company. At the time of their acquisitions, these three companies had sales of approximately $12 million, $3 million and $1.5 million, respectively (Baker 409-11). Canadian Liquid Air Ltd. entered the U.S. industrial gases market in 1968 by acquiring American Cryogenics, Inc. American Cryogenics, Inc. later became Liquid Air, Inc. Subsequently, Liquid Air, Inc. acquired Industrial Air Products of Oregon in 1969, Gulf Oxygen Company of Lake Charles, La., and Dye Oxygen of Phoenix, Ariz., as of 1973. At the time of its acquisition, American Cryogenics had industrial gases sales of approximately $13.5 million per year. The other companies at the time of their acquisition by Liquid Air had industrial gases sales of approximately $7.7 million, $3 million and $6 million, respectively (Dempster 511, 518-19, 528-30, 552). A number of other small companies have also gone out of existence during this period through acquisitions and mergers (Kimerling 861-62; Baker 407-08).

67. BOC contends the Census universe relied upon by complaint counsel is not a meaningful universe because the value of shipments excludes gases produced for consumption in the producing plant; the data excludes hydrocarbon gases such as propane, butane, propylene; sulphur dioxide and chlorine; and the value of helium produced in government plants (BOC PF 161-65). BOC's contentions, while

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[2] Value of industry equipment figures as reported for 1967 are not strictly comparable with 1972 data. Shipments included in 1967 data but not included in 1972 data are values of all secondary products primary to other industries, values of miscellaneous receipts for contract work on materials owned by others, scrap, salable refuse, repairs, etc., and value of resales *i.e.*, products resold in the same condition as bought (RX 72F, n. 3).

factually accurate, are without merit. The relevant market, as previously found, is the production and distribution of industrial gases by the industrial gases companies. Industrial gases produced for in-house consumption are not part of this market as such gases are not resold in the marketplace (Flamm 345). Further, the industrial gases industry does not consider such production a part of the industrial gases business (*see* Flamm, 294-95). Hydrocarbon gases such as propane, butane and propylene are not considered part of the industrial gases industry, but a part of the petroleum industry (*see* Finding of Fact 39; Baker 426). Chlorine is not considered an industrial gas (Flamm 319; Kridl 2140). The record contains little evidence of the value of helium produced in government plants; however, the government does not participate in the industrial gases industry and hence is not part of the relevant market in this proceeding.

68. The Census figures showing value of shipments of industrial gases produced by *all* producers is $649 million in 1972, as compared to value of shipments of industrial gases produced by plants classified in the industrial gases industry of $595 million. This difference in value of $54 million could be accounted for by production by back-integrated producers who have a surplus, or by petroleum companies and chemical companies that have a surplus of in-house industrial gases production. The record establishes that this production is primarily sold to industrial gases companies which resell in the marketplace (Flamm 272, 354-55; Giordano 1924-25). Thus, this production is marketed by industrial gases companies although not reflected in Census figures for the industrial gases industry.

69. The universe figures utilized by complaint counsel and adopted by this Initial Decision do not include industrial gases sold by industry companies but not reported to the Bureau of the Census in SIC 2813, such as propane, etc. To this extent the total universe figures are understated. However, as previously found, these gases account for an insignificant percentage of sales by industrial gases companies (*see* Finding of Fact 39).

70. In sum, industry concentration figures proposed by complaint counsel based on Bureau of the Census reports and heretofore found (*see* Findings of Fact 62-65) appear to be an accurate basis upon which to assess industry concentration and to evaluate the economic effects of the challenged acquisition of Airco by BOC.

(6) Barriers to Entry

71. There are substantial barriers to entry into the production and marketing of industrial gases in the United States. The principal barriers to entry into the U.S. industrial gases market are high capital

cost, technical knowledge and expertise, and marketing capability (Flamm 233-37; Baker 383-86, 2734-35; Dempster 526-27; Kimerling 872-73; Cunningham 944).

72. The production and marketing of industrial gases in the United States is capital intensive. Substantial capital is needed for production plants. For example, the cost of a 250-ton air separation plant and related equipment is $7 or $8 million dollars (Cunningham 944). Large plants cost up to $16 million (Giordano 1939-40). There is a considerable time lapse between the decision to build and the actual construction of an industrial gases plant. The time for bringing an air separation plant on stream can be as long as two years (Flamm 235).

73. A high degree of technical expertise, particularly in the field of chemical engineering, is required to produce and transport industrial gases. The cryogenic facilities which produce atmospheric gases are operated at extremely low temperatures and can be hazardous to employees and the surrounding community if misoperated. Many industrial gases are distributed at low temperatures in bulk liquid form and must be transported in specially constructed vessels and equipment designed to withstand extreme temperatures. Additionally, there are strict federal regulations which must be adhered to in shipping industrial gases (Baker 384; Giordano 1915-16).

74. The marketing of industrial gases requires an in-depth understanding about how the gases are produced and purified and how their integrity is maintained. Marketing also requires a thorough knowledge of the physical and chemical properties of industrial gases as the gases are used in a wide range of industries and each industry has many different applications. Knowledge of the unique applications of industrial gases by customers in different industries is therefore paramount to success in the marketing of industrial gases (Baker 384-85; Dempster 527; Kimerling 872). Further, a firm needs an established reputation as a technically sound supplier of industrial gases before its products will be accepted in the marketplace. A company that is not known in the marketplace as a technically sound supplier of industrial gases cannot achieve marketing success in the U.S. market simply by employing three or four people with previous marketing experience (Flamm 351-52; Baker 2734-35; Laister 2671).

75. The necessity of technical and marketing experience and capabilities for successful entry into the U.S. industrial gases market is clearly demonstrated by the unsuccessful attempt by Standard Oil of New Jersey (now Exxon, Inc.) to enter the U.S. industrial gases market by acquiring American Cryogenics, Inc. Standard's expertise was not in the industrial gases field and American Cryogenics, Inc. at the time Standard sold it to Canadian Liquid Air was losing $4 million a year on

sales of $20 million. Canadian Liquid Air did have the necessary expertise and capabilities to produce and market industrial gases and consequently turned American Cryogenics, Inc. into a profitable operation (Dempster 518-21, 526-27).

76. In contrast to the many U.S. industrial gases firms that have gone out of existence in the last 15 years, there have been only two entrants of any consequence that have come into the market during the period, both entering by acquisition. Canadian Liquid Air entered the U.S. market by acquiring American Cryogenics, and Houston Natural Gas entered by acquiring Liquid Carbonic (Baker 406; Dempster 518-19).

D. Competitive Impact of the Acquisition

(1) The Combination of BOC and Airco

77. Airco produces and markets industrial gases throughout the United States, and it is one of the largest firms in the industrial gases market in terms of value of shipments (Giordano 1922, 38; Finding of Fact 62, *in camera*). Airco is therefore not a toehold (Topkis 913).

78. BOC produces and markets industrial gases in a multitude of countries and is reportedly the second largest industrial gases company in the world (Flamm 262; see also Smith 1801-08). Prior to BOC's stock acquisition in Airco, BOC was the only one of the three largest industrial gases companies in the world that was not operating in the United States. The largest industrial gases company in the world prior to BOC's acquiring a stock interest in Airco was thought to be L'Air Liquide, and the third largest was Linde (Flamm 262). L'Air Liquide and Linde are already in the U.S. industrial gases market. L'Air Liquide entered in the U.S. market through its Canadian affiliate, Canadian Liquid Air, which acquired American Cryogenics, and operates in the United States as Liquid Air, Inc. (Dempster 518-19).

79. See Finding of Fact, *in camera*.

(2) Elimination of BOC as a Perceived Potential Entrant

80. BOC was recognized by members of the industrial gases industry in the United States as one of the few firms possessing the capital resources, technical knowledge and expertise and marketing capability required to successfully enter the U.S. industrial gases market (Flamm 237-38, 248-51; Baker 385-86; Dempster 543, 561; Muller 681; Giordano 1992). Further, BOC was recognized by Linde and Air Products, two of the largest firms in the industry, as the firm most capable of entering the U.S. industrial gases market (Flamm 250; Baker

390). Additionally, BOC was one of a few firms perceived by members of the industrial gases industry in the United States as being able to enter and likely to enter into the U.S. industrial gases market (Flamm 251-52, 335; Baker 393; Loveman 594; Muller 681-83; Kimerling 876). Linde and Air Products perceived BOC as the firm most likely to enter the U.S. industrial gases market (Flamm 251-52; Baker 393). Linde had considered BOC a potential entrant for the past two to three years (Flamm 335). Mr. Loveman of Burdett of Cleveland testified that "* * * over the next five years, I would expect that they [BOC] would [enter the U.S. market] in some connection." (Loveman 594).

81. BOC's interest in entering the U.S. industrial gases market was well known throughout the U.S. industrial gases industry. BOC participated in the manufacturing and selling of industrial gases production facilities in the United States through a joint venture with Airco from 1967 through 1971 (Finding of Fact 5; Smith 1717-19, 1810; Giordano 1948-50; Laister 2535). During 1969-1970, BOC investigated the industrial gases industry in the United States for the purpose of entering the market and while doing so contacted numerous industrial gases firms in the U.S. market (CX 232A-Z-47, *in camera*). Further, in every year from 1970 through 1973, BOC representatives met with firms in the U.S. industrial gases industry to consider possible acquisition of those firms by BOC (*see infra*, Findings of Fact 90, 93, 96-102). It was generally known throughout the industrial gases industry in the United States that BOC had contacted firms in the industry about possible acquisition (Flamm 257-58; Dempster 545-46). Industry witnesses on cross-examination testified that their pricing and marketing decisions had not been affected by the perceived potential entry of BOC (Flamm 336-37; Dempster 567-68; Kimerling 881-82; Baker 446).

82. Aside from BOC, the only other firms considered by members of the industrial gases industry in the United States as possible entrants into the U.S. market were Messer Greisheim and Linde A.G., both of Germany, and AGA of Sweden (Flamm 250; Baker 390). Messer Greisheim and Linde A.G. operate as a joint venture in entering markets outside of Germany (Baker 2747-48). Linde A.G. lacks BOC's marketing skills as it is primarily a manufacturer of industrial gases plants for sale to others. Its marketing area for industrial gases is limited to Germany, Central Europe and South Africa (Muller 719-20). Messer Greisheim does not have the technology nor marketing capabilities of BOC and does not market industrial gases to any extent outside of Germany (Muller 720-22). BOC was of the opinion that Messer Greisheim's interests lay in other directions than industrial gases (CX 76L, *in camera*). AGA of Sweden was perceived as having

some of the prerequisites for entry; however, its resources were questionable (Smith 1760; CX 76L). Although Japanese companies have the resources and technology to enter the U.S. industrial gases market, none has ever invested in industrial gases markets outside Japan (Smith 1761).

83. None of the companies in the United States which operate industrial gases plants for their own use [vertically integrated] are considered potential entrants into the industrial gases market by members of the U.S. industrial gases industry, nor are they considered to have the expertise and capabilities needed to enter into the open market sales (Flamm 346; Baker 443-44, 2743-44; Dempster 564). None has entered the industrial gases market to date; all have sold their surplus production, if any, to industrial gases firms (*see* Finding of Fact 55). Thus, it is concluded that BOC was the most likely potential entrant into the U.S. industrial gases market and was so perceived by members of the industrial gases industry.

(3) Elimination of BOC as an Actual Potential Entrant

(a) *BOC's Incentives for Entry Into the U.S. Market*

84. The Board of Directors of BOC was convinced that it was in BOC's economic interest to further expand its international operations. On Feb. 25, 1974, in a statement to shareholders, Mr. Smith, chairman of BOC, declared that the acquisition of 4 million shares of Airco stock enabled BOC to pursue its "long-term objective." Further, Mr. Smith explained that BOC's future lies in expanding its international operations, especially in industrial gases and equipment (CX 292D, H).

85. The history of BOC demonstrates its commitment to expansion of its industrial gases operations throughout the world. BOC began as a small Scottish company toward the end of the last century. Its industrial gases operations eventually extended throughout the United Kingdom and Ireland. By 1956, BOC had expanded beyond the U.K. into the following countries: Australia, South Africa, Canada, India, Pakistan, Singapore, Malaya, Hong Kong, East Africa, Rhodesia, the Philippines, Fiji, and New Guinea (Smith 1800-03). Since 1956, BOC has expanded into Italy, Indonesia, Thailand, Bangladash, and most recently into Brazil (Smith 1806-07). On August 18, 1969, BOC's Chairman stated that it was BOC's "declared policy" to become more "truly international." (CX 36A-B; Muller 652; Smith 1723, 1822). BOC officials realized that BOC could not operate as a truly international industrial gases company without being in the U.S. industrial gases market (Smith 1728-29, 1731; Laister 2557, 2659).

86. In addition to BOC's commitment to becoming a truly interna-

tional company (which would involve entry into the U.S. market), there were several other significant incentives for BOC's entry into the industrial gases market in the United States. First, the U.S. market is the largest industrial gases market in the world and also the most important and advanced market in the world (CX 36A-B; Smith 1728; Laister 2557). BOC also regarded the United States as the strongest economy in the world, and one that still enjoyed a respectable growth rate (Giordano 2000-01). Over the past two years, the growth rate in the United States for industrial gases has been substantial and this growth is projected to continue (Baker 2722-23).

87. Further, BOC desired to be "in tune" with the U.S. industrial gases market not only because of its size and opportunity for growth, but also because it is a source of substantial new technology (Smith 1728). The U.S. market presently provides more new applications for industrial gases than all the other industrial gases markets in the world combined (Baker 2718; Findings of Fact 49-51). Also BOC had determined that it was to its advantage to be in the U.S. market, as its major international competitors participate therein (Smith 1729; Laister 2658). BOC planning documents prepared in August 1969, stated that "[T]here must be competition with American-based international corporations on their home grounds, at least in certain selected businesses, if [BOC] is to be confident of survival internationally against American-based firms." (CX 38C.)

(b) *BOC has the Capital Resources, Technical Knowledge and Marketing Expertise for Entry into the U.S. Industrial Gases Market*

88. BOC has the necessary capital to enter the U.S. industrial gases market (Topkis 237, 874; Smith 1760). The establishment by BOC of approximately 40 subsidiaries in countries around the world attests to BOC's immense capital resources (Smith 1644-45). Sales in fiscal 1973 for the BOC group were approximately $765 million (CX 292Q). Capital employed in 1973 for the group was over $715 million (CX 272Z-3), total assets were $906,412,000 as of September 30, 1973, with current liabilities and provisions of only $272,467,000 (CX 292S).

89. BOC has the technical and marketing expertise to enter the U.S. industrial gases market and was so viewed by Airco and other industry members (Topkis 237, 874-75; Flamm 248, 249; Baker 383-85; Dempster 543; Muller 697; Smith 1760; Giordano 1950, 1992). BOC's history of entering industrial gases markets around the world clearly demonstrates BOC's marketing, organizational and managerial skills. Of the 19 countries outside the U.K. that BOC has entered for the production and marketing of industrial gases, 14 were *de novo* entries; 5 were

entries by acquisition of small companies (Smith 1803-07). BOC has become the dominant company in many of the industrial gases markets it has entered (CX 301Z, *in camera*). The executive of the largest industrial gases company in the United States testified that the same marketing expertise BOC exploited in entering industrial gases markets throughout the world could be used by BOC to enter the industrial gases market in the United States (Flamm 238). Further, BOC has already had the benefit and experience of participating in the U.S. industrial gases market from 1967 to 1971 through its joint venture with Airco in the marketing of industrial gases production plants (Airco Admissions, Pars. 87, 88, filed April 10, 1974; Kimerling 876; Smith 1717-19, 1810; Giordano 1948-50; Laister 2535).

(c) *BOC's Investigation of Methods of Entry Into the U.S. Industrial Gases Market*

(i) Dr. Muller's Consultancy

90. BOC has actively pursued various possible means of entering into the U.S. industrial gases market since at least 1968. In April 1968, BOC entered into a consulting agreement with Dr. Albert Muller. One of the primary responsibilities of Dr. Muller was the development of promising business opportunities for BOC in the United States (CX 111A). Dr. Muller has a strong background in industrial gases (Muller 648). On behalf of BOC, Dr. Muller contacted several U.S. companies in 1968, including the Clinton Oil Company, for the purpose of a possible joint venture in helium, Will Ross, Inc., with respect to the possible acquisition of its Mathieson Special Gases Division by BOC, and Gardner Cryogenics ("Gardner") regarding possible acquisition of that company by BOC (CX 186L-N; Muller 654-55). Canox, the Canadian subsidiary of BOC, had previously considered acquiring Gardner, which is a producer and marketer of helium in the United States (CX 208Z-66). At the time of Dr. Muller's contact, BOC gave serious consideration to acquiring Gardner. Dr. Muller held several meetings with William Gardner, president of Gardner. BOC also had a study made of the possibility of acquiring Gardner (CX 15A-Z-8, CX 17).

91. In 1969, BOC adopted a policy of becoming more truly international and accordingly sought "profitable opportunities to extend its operations in the world's most important and advanced market." (CX 36A). BOC's management had decided that BOC should enter the U.S. market in its major lines of business (Muller 653, 656-57). In order that more attention could be devoted to this task, J. A. Perham, president of Canox, was directed to assume responsibility for all such activity. To permit Mr. Perham to devote the necessary time to

this task, A. R. Dow was appointed executive vice president of Canox, relieving Mr. Perham of the responsibility for day-to-day operations of Canox (CX 36A-B; Muller 653, 656). Dr. Muller and Mr. Perham worked together in assessing and recommending profitable business opportunities in the United States to BOC (CX 29A). They were to devote their attention to product lines which were the same or complimentary to BOC's. They were to seek companies having sales between $1-50 million. Acquisition candidates with sales of $5-20 million were considered desirable by BOC (CX 29C-D).

92. In October 1969, Dr. Muller was told by the chairman of BOC to terminate all activities other than searching for opportunities for BOC in the U.S. industrial gases field (CX 42, CX 248A-B). In December 1969, the chairman of BOC informed Dr. Muller that BOC was going to be represented in the United States; the only questions were what, how, when and where (CX 47A).

93. As part of an overall study of the industrial gases market in the United States conducted by BOC between December 1969 and February 1970, Dr. Muller contacted several distributors of industrial gases in the United States for BOC (Muller 661-62; CX 121A).

94. In the spring of 1970, when Dr. Muller's consultancy contract expired, BOC instructed Dr. Muller to continue to forward to BOC any attractive prospects he discovered in the United States (CX 113, 114; Muller 669-70). In the summer of 1970, BOC employed Dr. Muller to assist Allan Perham in a further effort to acquire Gardner (Muller 679-80). Throughout Dr. Muller's association with BOC, BOC continually stressed its intention to enter the U.S. industrial gases market (CX 42, 47A; Muller 668).

(ii) Perham-Greenfield Study

95. By 1969, BOC had made a definite decision to enter the U.S. industrial gases market (CX 40A, CX 246). In the fall of 1969, BOC's planning group prepared a detailed study of the U.S. industrial gases market (CX 44, CX 246). In December 1969, BOC decided to investigate in depth the U.S. industrial gases market (CX 47). An extensive investigation was undertaken during which BOC contacted many U.S. industrial gases producers (CX 47, CX 232A-Z, *in camera*). The report on this investigation was completed in February 1970, and it was recommended that BOC not enter the U.S. industrial gases market at that time, but that this conclusion should not be considered final and that BOC should continue to look for future opportunities in that market (BOC RX 62B, *in camera*). After February 1970, BOC continued to have acquisition negotiations with producers in the market (Findings of Fact 96-102).

(iii) BOC's Efforts to Acquire Chemetron

96. In November 1969, Mr. Johnson of Loeb, Rhoades and Company, an investment banking firm, was told by BOC that BOC was interested in acquiring a U.S. industrial gases producer, and in particular, Chemetron (Johnson 832-33). In January 1970, BOC discussed with Chemetron the possibility of BOC acquiring a majority of Chemetron's stock (CX 223A; Johnson 833-35). Subsequently, BOC discussed with Chemetron the acquisition of a minority position in Chemetron with the later possibility of obtaining control (CX 223, 224, 225A).

(iv) BOC's Efforts to Acquire Burdett of Norristown

97. On Aug. 11, 1971, BOC discussed with Burdett Oxygen Company of Norristown (Burdett-Norristown) the acquisition of that firm and its affiliates by BOC. Also discussed at that time was the possible acquisition by BOC of National Welders, Selox, Alabama Oxygen and Gulf Oxygen (CX 250A; Perkins 792-93). Subsequently, a BOC official visited Burdett-Norristown to consider acquiring it (CX 254A, *in camera*). The visit by the BOC official lasted four days, during which he met all key personnel, inspected the plants and headquarters facilities and examined the books and records (CX 254A, *in camera;* Perkins 794-96). BOC continued to analyze Burdett-Norristown by checking out all the references Burdett-Norristown supplied to BOC (CX 254L-N, *in camera;* CX 255A-B, *in camera*). BOC subsequently informed Burdett-Norristown that although it was not then interested in acquiring the company, it had a continuing interest in the U.S. industrial gases market (CX 258).

(v) BOC's Efforts to Acquire Burdett of Cleveland

98. BOC considered Burdett Oxygen Company of Cleveland (Burdett-Cleveland) a likely acquisition candidate in 1969 (CX 40A). In 1969, BOC told Burdett-Cleveland that it would be interested if the company ever wished to dispose of its operations (CX 216). Mr. Perham and Mr. Greenfield of BOC visited Burdett-Cleveland during BOC's 1970 study of the U.S. industrial gases market and recommended that BOC watch to see if this firm would become available (CX 232D-E, *in camera*).

99. Early in 1970, an investment banker told BOC that 50 percent of the stock of Burdett-Cleveland could be purchased for $4-5 million. In April 1970, BOC informed the banker that it would be interested in a majority position in Burdett-Cleveland (CX 233A, CX 234). After BOC was told it was then impossible to obtain control, BOC told the banker

that if the situation changed it would still be interested (CX 243). In September-October 1970, BOC told Burdett-Cleveland and its bankers that it was interested in buying Burdett's Niagara Falls, N.Y., industrial gases plant (CX 244A, CX 245).

100. On Oct. 15, 1973, BOC informed Burdett-Cleveland of its continued interest in acquiring Burdett-Cleveland (Loveman 592; *see* also Smith 1826). Burdett-Cleveland would not then sell out but stated it might do so within the next five years (Loveman 592). The interest expressed by BOC in Burdett-Cleveland convinced Mr. Loveman of Burdett-Cleveland that BOC would enter the U.S. industrial gases market at sometime in the future (Loveman 594).

(vi) Other Means of Entry Explored by BOC

101. Prior to the sale of Gulf Oxygen Company to Liquid Air, Inc. in 1972, a BOC representative asked John Hines of Gulf Oxygen Company if Gulf were for sale. Mr. Hines responded that it was not but that it would be available some day (Hines 759-60).

102. In 1972, BOC considered a joint venture with Chemetron to produce and market certain industrial gases, including oxygen and nitrous oxide (Keuhn 1155). BOC informed Chemetron during these discussions that it intended to enter the U.S. market for oxygen and nitrous oxide either on a "grass roots basis" or through acquisition (Keuhn 1152-53).

(d) *Testimony of BOC Executives*

103. The testimony of two of BOC's top executives was to the effect that BOC did not intend to enter the industrial gases market in the United States and that BOC would not have done so in the foreseeable future, but for the Airco transaction. Mr. Smith, chairman of the board of directors of BOC (Smith 1642), testified (1741-42, 1744):

> Q * * * Had you not acquired a stock interest in Airco, would BOC have entered the American, United States, gases business in any way in the foreseeable future?
>
> [Colloquy Omitted]
>
> JUDGE BARNES: You may answer, Mr. Smith. Do you recall the question?
>
> THE WITNESS: Yes. I cannot conceive any circumstances whatsoever that would bring BOC into the American market in the foreseeable future, barring Airco.

Similarly, Peter Laister, a director of BOC since 1969 (Laister 2528, 2533), testified (2552-53):

> Q After the Perham-Greenfield report was received and considered [February 1970] (and before the meeting) which you had with merchant bankers which you have mentioned here today [regarding Airco in June 1973], did BOC have any intention

whatever to enter the U.S. gases business either on a Greenfield [greenfield] basis or by acquisition?

A There was no intention. Quite the reverse. We were quite determine[d], we decided when we had read the Perham-Greenfield report, that we would not enter on such a basis.

104. Mr. Smith testified that *de novo* entry would be extraordinarily costly. He estimated that it would be likely to cost $240 million and to take ten years to produce a viable national competitor, by which he meant a market share in excess of 5 percent (Smith 1835-36). He added that he could not "conceive the circumstances in which [he] would have persuaded [his] board to expend that amount of money and take that amount of time, and to have that deteriorating effect on [BOC's] return that they would have said yes." (Smith 1836-37). Entry by acquisition of a firm smaller than Airco was viewed by Mr. Smith as subject to most of the same difficulties as *de novo* entry.

105. These denials by BOC officials must be considered in the light of their other testimony given at the hearings. Mr. Smith testified that BOC had a stated objective of becoming a more international company (Smith 1723). In describing BOC's reasons for acquiring Airco, Mr. Smith testified that the first reason was BOC could work with Airco and:

> The second reason was that despite having had to turn our backs on the American market in the belief that there was no way in, the fact is that the American market is much the most powerful and largest in the world, and it must be of continuing interest to any company which has ambitions to act internationally.
>
> The third reason is that the American market, partly as a result of its size, is the source of much technology, much new development, and we have to be in tune with that.
>
> We have to keep pace with that.
>
> And there was no better way of doing it than by getting an interest in Airco.
>
> The international—the industrial gas business has moved in the last five, seven years to really being a well competitive situation.
>
> In fact, the single national economy is very rarely these days sufficient to maintain the pace of development and to get the best out of capital resources and technological resources.
>
> And this is why or partly why the world scene is dominated by a handful of international companies.
>
> Now, two of the international competitors with whom we meet at different parts in the world are American companies.
>
> And certainly we saw an advantage in being present in the same market in which our own international competitors are present.
>
> Q What two do you have in mind, sir?
>
> A Air Products and Union Carbide [Linde].
>
> Q All right.
>
> A And lastly, but I don't doubt just as important, is our belief that at the price we were paying for Airco we would get a reasonable return, and in circumstances much better than anything else we could have devised so far as American markets are concerned (Smith 1728-29).

* * * * * * *

Q There was reference in one of the documents which you identified and which was received in evidence, and indeed there was reference in your earlier testimony to BOC's ambition to be ever more international, ever more multi-national.

Did that play a role in this decision?

A Yes.

I don't believe that one can really claim to be a multi-national company without operating in the North American market. (Smith 1731).

* * * * * * *

Q What was the purpose in acquiring the stock in Airco?

A I think as a matter of fact, I have given this in my testimony yesterday, I am very happy to go through it again.

The first reason is that we have always been interested in the industrial gas market in America. While there is no virtue attached to the claim of being an international company, there are nevertheless benefits which can be obtained by being an international company, and quite clearly, those benefits are diminished if we don't have a position in North America. (Smith 1843-44).

Airco offered BOC the national [U.S.] market in "one jump" (Smith 1736).

106. Peter Laister, a BOC managing director, testified:

The next point is that we are an international company but in an international sense we were incomplete. We were not operating in America where three of our international competitors, Air Liquide, Union Carbide and Air Products, for example, operate. (Laister 2557).

* * * * * * *

A * * * There were a number of reasons why I personally thought that the tender offer was the right thing to do for BOC and for its shareholders.

First of all, it shows a return upon the investment.

Secondly, it adds to the international strength of BOC.

Thirdly, it gives us a place in the American market which we could see no other way of obtaining.

Q In the American industrial gas market?

A In the American industrial gas market.

Fourthly, it gives us the opportunity of benefiting in the longer term and with providing benefit to Airco in terms of some product or technological interchange, but that is for the future.

Lastly, it places us in the same marketplace as our major international competitors.

Q Let's discuss that. Why is that important to you, sir?

A Basically I think because if they operate in America and there is technological or other development or marketing development, then there are opportunities open to them which are not open to us. That is the first point.

Q Such as?

A Well, I don't know. You know, it is a very large marketplace. Certainly the use of liquid nitrogen for freezing has developed in America ahead of the way it has developed in Europe. Those who take part in America will obviously have that technology available to them, so it is all matter like that.

> I don't feel that we could pretend to be a fully international company in the long term if we had given no consideration to the possibilities of the American marketplace. (Laister 2658-59).

107. Although testifying that BOC could not enter the U.S. industrial gases market *de novo* or by toehold acquisition, Mr. Smith acknowledged that BOC has entered many industrial gases markets throughout the world on a *de novo* basis; in other countries, very small acquisitions served as a basis for market entry (Smith 1804-07). In Brazil, BOC is starting in the market with a tonnage plant where it does not have any merchant business (Smith 1807).

(e) *BOC Documents*

108. In 1969 and early 1970, Allan Perham, chairman of the board of Canox, and I. Greenfield, a member of BOC's London marketing research staff, were detailed by BOC to conduct an extensive study of the U.S. industrial gases business. The purpose of the study was two-fold:

> (i) To analyse the present and likely future situation in the American market, and to draw therefrom any lessons and experience which might have application in BOC Group. Subsequently,
>
> (ii) To consider whether there are any identifiable opportunities in USA which BOC might wish to exploit at some future date. (BOC RX 181-C; *accord*, CX 47A)

Perham and Greenfield conducted such a study of the U.S. industrial gases market, which included interviews and visits with participants in the industrial gases business in this country, collection of much data, and visits to American distributors (CX 44, CX 232). The Perham-Greenfield report was negative on entry at that time by BOC into the industrial gases business in the United States; however, the report noted that this conclusion was not final and that the situation should be subject to periodic review (BOC RX 62B).

Mr. Smith, BOC's chairman, testified (1710):

> Q Now, I would like to ask you, please, sir, following the receipt of the Perham-Greenfield report, what did you do about the US gases field afterward?
>
> A What we did was to continue to be very interested in what was going on in the American industrial gas market but what the Perham-Greenfield report told us was that it confirmed an existing belief which existed among all of the top management of the BOC Group was that there was no practical way of coming into the American market.

109. In July 1970, the BOC board of directors adopted priorities of investment and a budget for the development of its business through 1973. Contemporaneous BOC board minutes record these priorities and funds allocated for BOC development:

Following outline approved:

		Millions
1st:	For the UK	28.0
2nd:	For restoring BOC holdings in existing overseas subsidiaries to minimum 60%	3.1
3rd:	For expansion of existing overseas subsidiaries	5.0
4th:	For Europe	10.0
5th:	For Japan, USA and South America	3.9
		50.0 millions

(BOC RX 67A)

The funds allocated to the United States, Japan and South America included no sums for entering the industrial gases market (Smith 1714). Mr. Laister testified, however, that acquisitions are left out of planning documents when it is uncertain what acquisitions will occur in the future (Laister 2569-70). He also testified that:

> Quite obviously in any large business you can't read the future a few years out. (Laister 2621A).

(f) *Feasibility of BOC's Entry*

110. It was clearly feasible for BOC to enter the industrial gases market in the United States either *de novo* or by toehold acquisition (*See* Smith 1760). Further, there is no evidence which indicates the presence of any unique features in the U.S. market which would preclude entry by BOC in the same manner BOC entered many industrial gases markets around the world which has been accomplished by a *de novo* or "grass roots" entry, or by the acquisition of a small producer (Smith 1803-07). BOC entered the Canadian industrial gases market *de novo* after World War II and is now the third largest firm in that market with sales of $8 million (Smith 1759; Dow 2042; Laister 2560). BOC recently entered the Brazilian industrial gases market with a small plant (Smith 1006). The Brazilian market has a growth rate comparable to the U.S. market (Baker 2731). Other major producers have entered foreign markets successfully on a small basis. Air Products successfully entered Great Britain in 1957 as a *de novo* entrant. By 1973, Air Products held 25 percent of the industrial gases

market in Great Britain (Baker 413-17). Air Products recently entered the Canadian market on a very small basis, having less than 1 percent of the market (Baker 2711-15).

111. Liquid Air, Inc. successfully entered the U.S. industrial gases market through the purchases of toehold firms in 1968, 1969, 1972 and 1973 (CX 335V-W; Dempster 528-30). At the time Liquid Air entered the U.S. market, it purchased American Cryogenics from Standard Oil of New Jersey. At that time, American Cryogenics was losing money at the rate of $4 million per year. Liquid Air was able to turn the company around, and with the acquisition of other small industrial gas producers, developed a substantial and profitable U.S. operation (Dempster 518-21, 526-27).

112. BOC could have entered the U.S. industrial gases market in any of several ways. It could have entered by acquiring one or several small producers of industrial gases; it could have entered by bidding on a tonnage plant; it could have added incremental capacity to the tonnage plant for sale in the merchant market; it could have entered into a joint venture as was discussed with Chemetron (*see* Finding of Fact 102); or it could have utilized any combination of the above. At the time BOC acquired the stock of Airco, there were and still are a number of attractive small U.S. industrial gases producers available for acquisition, including Burdett of Norristown, Northern Gases and Supply, and Alabama Oxygen (Heckel 736; Perkins 788; Kimerling 876; Baker 393, 2734-35, 2750, 2781; Flamm 260).

113. BOC argues that *de novo* entry would involve a very high cost (BOC PF 247-49). BOC's chairman estimated that *de novo* entry producing a viable operation—over 5 percent of national sales—would be likely to cost $240 million. This high cost would be coupled with uncertainty as to whether there would be a return on such an investment, and, if so, when such a return would be realized. Another obstacle to entry into the industrial gases business in the United States, according to BOC, is the need for "backup"—the supply of gas to major customers from alternative sources when the producer's supplying plant is out of service, either for scheduled maintenance or as a result of plant failure (Giordano 1931-32; CX 335Z). BOC also argues that major tonnage supply contracts in the industrial gas industry typically are for terms of 15 years (Baker 2739-40), and that it is not feasible to enter the tonnage end of the industry by soliciting existing customers of the firms in the business already.

114. None of these arguments are persuasive. BOC has entered markets around the world *de novo* and on a small basis. The record does not establish that it is necessary to immediately secure 5 percent of the national market. As to uncertainty as to whether there would be an

adequate return, this is always a concern to any enterprise in a free competitive society. The health of the U.S. industrial gases market as of December 1973, is a strong indication that BOC could have entered the market, with an excellent chance of realizing a normal profit. There is no evidence that backup supplies are not readily available to all industry members (Loveman 585). There is no evidence that backup has caused any company to avoid any market in the world, or to avoid any contract of any kind. Backup may be a competitive obstacle, but it is not a barrier to market entry. As for long term tonnage contracts, BOC's opportunity for market entry is not limited to seeking existing customers under contract; BOC can compete for the new market demands which the record indicates existing firms were unable to satisfy.

115. BOC argues that the small companies which are in the U.S. industrial gases market are either unattractive investments or there is no showing they are available for acquisition (BOC PF 257-314). The record does establish that there are small companies in the industrial gases market and that they are available for acquisition now or would be in the future (Loveman 592; Perkins 788; Heckel 736, 746-48). The record does not establish whether they would be good investments or bad investments. Such a burden would be unrealistic. The record does establish, however, that Liquid Air entered the U.S. market by acquiring a company in 1968, that was losing $4 million per year. Liquid Air now has a profitable U.S. operation. The industrial gases market was much more attractive in 1973 than in 1968 when Liquid Air entered the market.

116. December 1973 would have been an opportune time for BOC to enter the U.S. industrial gases market either on a "grass roots" basis or through the acquisition and expansion of a small company (Baker 2734-35). BOC's apparent reason for acquiring Airco stock as its method of entry into the U.S. industrial gases market was that it undoubtedly offered BOC a substantial share of the U.S. industrial gases market at "one jump" with less risk to its investment. As a matter of fact, BOC had been considering purchasing Airco, or Airco's gases division, for several years (CX 37A, CX 40A; Laister 2540-41). It is thus concluded that BOC was an actual potential entrant into the U.S. industrial gases market as of December 1973.

IV. *Inhalation Anesthetic Equipment*

A. Relevant Product Market

117. The complaint alleges that one of the effects of the acquisition of Airco stock by BOC may be substantially to lessen competition or to

tend to create a monopoly in the manufacture, distribution or sale of inhalation anesthetic equipment, or any submarket thereof, throughout the United States or sections thereof (complaint, Par. 27). "Inhalation anesthetic equipment" (hereinafter IAE) is defined in the complaint as equipment and accessories used in the administration of gas for anesthetic purposes (complaint, Par. 1(b)). Dr. John Hedley-Whyte, an anesthesiologist, testified as complaint counsel's expert on IAE (Hedley-Whyte 1189-1294). He defined IAE as that equipment necessary and useful for the giving of inhalation anesthesia to patients (Hedley-Whyte 1196).

118. Complaint counsel issued a subpoena to the leading firms in the industry calling for sales of all IAE products (CX 316B, *in camera;* Kuehn 1140; Scott 1355-56; Schreiber 1060-63; Hedley-Whyte 1156-57, 1170). This subpoena listed the following products as comprising the IAE market:

(a) *Anesthesia machines.* The essential elements of an anesthesia machine are a cart and a cabinet which provide a framework for the other equipment, and yokes, regulators, needle valves and flow meters, vaporizers, breathing circuits (conducting tubes), masks, CO2 absorption cannisters and rebreathing reservoir bags (Cosgrove 2286-89, 2295, 2320-21).

(b) *Anesthesia vaporizers.* These are small metal or glass containers which convert a liquid anesthetic agent into vapor, combine it with a stream of carrier gas, which is delivered to the patient (Schreiber 1054, Cosgrove 2288).

(c) *Rebreathing reservoir bags.* There are two general systems used for the administration of inhalation anesthetics: rebreathing and non-rebreathing. In the former, some of the gas administered to the patient is recirculated to the patient again and again after carbon dioxide is first removed from the expired gas. In non-rebreathing systems, all the gas administered to the patient is fresh, and the patient's exhalations are not recirculated to him (Schreiber 1055; Cosgrove 2320; Hedley-Whyte 1200). The rebreathing reservoir bag collects the expired gas from a patient in a rebreathing system. These units retain the moisture in a patient's lungs and mouth (Cosgrove 2320; Schreiber 1055; Hedley-Whyte 1200).

(d) *Anesthesia conducting tubes* carry the gas from the anesthesia machine to the patient and may be either disposable or reusable. Typically, the reusable tubes are rubber and the disposable tubes are plastic (Cosgrove 2321; Schreiber 1055-56).

(e) *Anesthesia airways* are small curved tubes that are inserted into the patient's mouth in order to prevent him from biting endotracheal tubes that are inserted into the trachea (Hedley-Whyte 1202).

(f) *Anesthesia face masks* are used to conduct gas from the anesthesia conducting tube directly to the patient's nose and mouth (Cosgrove 2323-24; Schreiber 1056-57; Hedley-Whyte 1202-03).

(g) *Connecting Y-pieces.* In rebreathing systems, two conducting tubes lead from the anesthesia machine to the patient. One conducts fresh gas from the machine to the patient and the other carries the exhaled gas back to the machine. The Y-piece is a small rubber fitting that connects these two conducting tubes to the face mask (Cosgrove 2325; Schreiber 1056-57; Hedley-Whyte 1203).

(h) *Adapters and fittings.* Y-pieces typically have an inside diameter connection of 15 millimeters while older face masks often have 22 millimeter diameter connections. Adapters are used to connect these older type masks to the 15-millimeter Y-pieces (Schreiber 1057-58).

(i) *Carbon dioxide absorption cannisters.* In rebreathing systems, it is necessary to remove carbon dioxide from gas exhaled by the patient before recirculating the gas. Hence, anesthesia machines are normally equipped with a plastic and metal cannister which contains a chemical compound, called an absorbant, that absorbs carbon dioxide from the exhaled gas before it is recirculated (Schreiber 1058; Hedley-Whyte 1203-04). The absorption cannister is made from polypropylene plastic and steel castings obtained from ordinary foundries (Cosgrove 2297-98). The absorbants are manufactured by chemical companies (Kuehn 1172-74).

(j) *Flow meters* are used to control the flow of gas to the patient during anesthesia (Cosgrove 2293-94, 2287).

(k) *Carts.* Anesthesia carts are used to support drugs and equipment that may be needed in the operating room during an anesthesia procedure (Hedley-Whyte 1204).

(l) *Yokes, handscrews and valves* are used to maintain the anesthesia machine and attach gas cylinder to the machine (Cosgrove 2292; Schreiber 1059).

(m) *Anesthesia ventilators* are devices which mechanically assist and control a patient's breathing during anesthesia (Schreiber 1059; Hedley-Whyte 1205-06).

(n) *Anesthesia respirometers* measure the respiratory minute volume, *i.e.*, the total volume of air breathed in one minute by a breathing patient (Schreiber 1059; Cosgrove 2328-29), and is an indication of the level of anesthesia, *i.e.*, the level of unconsciousness of the patient (Schreiber 1059).

(o) *Endotracheal tubes* are long tubes inserted into the patient's trachea to keep the patient's airway free. They are connected to the anesthesia machine via the conducting tubes and conduct air or the anesthetic mixture into the patient's respiratory system (Cosgrove 2328; Hedley-Whyte 1206-07; Schreiber 1060).

Complaint counsel's subpoena specifications also included a category entitled "other." Some of the companies responding to complaint counsel's subpoena listed products not specifically mentioned in the specifications under this category. Dr. Hedley-Whyte testified that the items on complaint counsel's subpoena represented a listing of IAE products and to this listing he would add one other item-direct laryngoscopes. Direct larynogoscopes are small metal devices containing a light which permits the anesthesiologist to view the area behind the patient's tongue in order to facilitate insertion of endotracheal tubes through the voice box (Hedley-Whyte 1207-08). Any other products, according to Dr. Hedley-Whyte, would constitute an exceedingly small part of the overall IAE market (Hedley-Whyte 1197).

119. An anesthesia machine, the most significant product in the IAE market, consists essentially of a cart, cabinet, yokes, needle valves, flow meters, vaporizers, breathing circuits (conducting tubes), masks, CO2 absorbers and rebreathing reservoir bags (Cosgrove 2286-89, 2295, 2320-21). Ventilators are used in conjunction with an anesthesia machine and may be mounted directly on most anesthesia machines in use today (Cosgrove 2326; complaint counsel physical exhibit "A"-C8). Flow meters are used in both anesthesia and therapy procedures; however, anesthesia flow meters are designed specifically for the inhalation anesthesia apparatus (Porter 1309; Cosgrove 2287), and are not normally sold apart from the anesthesia machine (Cosgrove 2326). IAE products each have a very specific function, although there are a few exceptions to this generalization. Reusable and disposable endotracheal tubes are substitutable for one another, as are reusable and disposable face masks and conducting tubes, respectively. Although each product has a specific use, the anesthesia machine and attachments together provide the vehicle for administering anesthesia during surgical procedures.

120. IAE products have distinct physical characteristics which distinguish them from other types of inhalation equipment and accessories. Inhalation anesthetic equipment and accessories must be semiconductive to prevent electrocution or explosions (Schreiber 1097-98; Hedley-Whyte 1201, 1205, 1229-30). Due to its necessary semiconductive property, the price of IAE is substantially higher than the price of inhalation therapy equipment and accessories. Although a few items of IAE can be substituted for items of inhalation therapy equipment and accessories in an emergency situation, the price difference between the two lines make any such substitution economically prohibitive (Hedley-Whyte 1201, 1229).

121. IAE is recognized by the medical profession and by firms in the industry as a separate and distinct product market. IAE is defined by the medical profession and by firms in the industry as those items utilized in the dispensing of anesthetic gases or the vapors of anesthetic liquids to the lungs of patients to be anesthetized, including surgical, dental, and veterinary anesthetic equipment and accessories (Schreiber 1041; Kuehn 1125; Hedley-Whyte 1196-98; Porter 1297-98). Such products have peculiar characteristics and end uses as they are the only products which are used together to directly administer anesthetic vapors.

122. The Z-79 Committee of the American National Standards Institute recognizes the IAE market as a separate and distinct market. This committee consists of the leading manufacturers of IAE, representatives of the medical professional societies in the United States and representatives of the Federal Government (Hedley-Whyte 1212-13). The Z-79 Committee is primarily concerned with the standards of design, performance and terminology of IAE (Schreiber 1081; Hedley-Whyte 1213). Standards set by the Z-79 Committee apply to surgical and dental inhalation anesthetic equipment and accessories (Hedley-Whyte 1213-14).

123. Dental anesthetic equipment and accessories include nitrous oxide sedation units used in the inhalation of nitrous oxide for purposes of anesthesia. Dental anesthesia refers to the administration by inhalation of anesthesia gases whereby the patient is usually rendered unconscious. In contrast, dental analgesia refers to the administration of a local anesthetic by use of a syringe and needle and merely provides relief from pain rather than rendering the patient unconscious. Only in rare circumstances does nitrous oxide act as an analgesia rather than as an anesthesia (Hedley-Whyte 1197-98, 1246-48; Porter[3] 1298, 1306, 1331). Nitrous oxide sedation units are used for surgical procedures (Porter 1330-31). There is a cross-fertilization between the dental and medical anesthesia professional societies and a dentist may serve on the anesthesia staff of a hospital (Hedley-Whyte 1210). The level of sophistication and technology used in manufacturing dental anesthetic equipment and accessories is the same as that of surgical anesthetic equipment and accessories (Porter 1301, 1331-32).

124. Veterinary inhalation anesthetic equipment and accessories are part of the overall IAE market (Schreiber 1041; Hedley-Whyte 1198). The principles involved in the manufacture and use of veterinary

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[3] Porter's testimony consistently refers to "dental analgesia equipment." Porter's definition of dental analgesia equipment as apparatus used to measure and regulate the flow of oxygen and nitrous oxide to the patient through inhalation rather than intravenous means corresponds with the definition of dental anesthetic equipment and accessories used by Dr. Hedley-Whyte (1197-98, 1246-47). Therefore, Porter's reference to "dental analgesia equipment" in his testimony apparently refers to dental anesthetic equipment.

inhalation anesthetic equipment and accessories are the same as those for human inhalation anesthetic equipment (Schreiber 1094-95, 1121-22; Hedley-Whyte 1198). Veterinary anesthesia machines and human anesthesia machines are interchangeable to a degree. Components are sometimes identical (Schreiber 1044-45). Human anesthesia machines are commonly used on animals (Schreiber 1094-95; Hedley-Whyte 1198-99). Ohio Medical Products Division of Airco (Ohio) manufactures both human and veterinary anesthesia machines (Cosgrove 2311).

125. BOC contends that there are other products which should be included in the IAE market. These are products, the sales of which were reported by companies in response to complaint counsel's subpoena under the category "other," and products that were "mentioned" during the hearings (BOC PF 378-379). Complaint counsel have included some of these "other products in their IAE market while not including others (CCRB, Table I). The most significant differences between the parties as to what is in the IAE market is monitoring equipment, which complaint counsel have excluded (CCPF 142).

126. The medical profession does not recognize monitoring equipment as a part of IAE. Monitoring equipment gives feedback on the patient's general condition; *i.e.*, temperature, pulse, blood pressure, heart action, but it is not used as a direct measure of the level of anesthesia (Hedley-Whyte 1250, 162; Cosgrove 2478-79). Monitoring devices are used in a limited number of surgical cases (Hedley-Whyte 1286-87). Some such devices are dangerous to use (Hedley-Whyte 1254-58). Ohio regards monitoring equipment as separate and distinct from IAE. Ohio does not manufacture monitoring equipment as it requires a different technology from that necessary for IAE. Mr. Cosgrove, executive vice president of Ohio, testified in regard to monitoring equipment:

> Judge Barnes: Why don't you make them?
>
> The Witness: Your honor, our technology lies in another direction. It has for years. It is a case of having to work very hard and spend large sums of money just to bring yourself up to the state of the art and that is being practiced by the other manufacturers. (Cosgrove 2364)

Different companies manufacture monitoring equipment than manufacture IAE; companies such as Hewlett-Packard and General Electric make monitoring equipment but not IAE (Hedley-Whyte 1262; Cosgrove 2363-64). The same type of monitoring equipment used inside an operating room is also used outside the operating room (Hedley-Whyte 1286; Cosgrove 2480-81); in fact, such equipment's primary usage is outside the operating room (Hedley-Whyte 1251, 1256, 1286-87). Most blood pressure monitoring in surgical procedures is by the same piece of equipment that is used in a doctor's office for routine blood pressure checks (Hedley-Whyte 1259, 1289). Because different departments will be using the same monitoring equipment, hospitals attempt to standardize on the monitoring equipment purchased (Hedley-Whyte 1263). Further, the hospital committee that purchases anesthetic equipment is separate from the committee purchasing monitoring equipment (Cosgrove 2481).

127. IAE is usually sold to the head of the anesthesia department in hospitals (Schreiber 1060), and it is only anesthesiologists and nurse anesthesiologists who work with IAE (Hedley-Whyte 1209-10). IAE products are also purchased by veterinarians and dental anesthetists.

B. Geographic Market

128. The relevant geographic market within which to assess the competitive effects of the BOC stock acquisition in Airco with respect to the IAE market is the United States as a whole. The leading manufacturers of IAE, including Airco and BOC subsidiaries Fraser Sweatman, Inc. and Harris Lake, Inc. sell such products throughout the United States (Schreiber 1061; Kuehn 1141; Scott 1355; Cosgrove 2310, 2436-37). There is no dispute as to the geographic market (BOC PF 399).

C. BOC's Operations in IAE

(1) International Operations

129. The Advanced Engineering Division of BOC, formerly the Equipment Division, manufactures and markets IAE (CX 3H, CX 10Z-8, CX 11Z-8). BOC had sold these products in the United States for at least ten years (Cosgrove 2439). During 1973, Medishield Corporation, Ltd., a subsidiary of BOC, consisted of 15 subsidiary companies selling inhalation anesthetic equipment and other medical products throughout the world (CX 292K). During 1973, Medishield Corporation, Ltd., had distributors in over 130 countries (CX 292K). BOC formed Medishield, Inc. to coordinate the activities of its North American medical interests (Smith 1784-85).

(2) Fraser Sweatman, Inc.

130. During 1972, BOC acquired Cyprane, Ltd., a United Kingdom company which manufactured anesthetic equipment, and their wholly-owned subsidiaries, Fraser Sweatman, Inc. (hereinafter FS) and Fraser Sweatman, Ltd. of Canada (CX 11L, CX 11Z-8; Smith 1781-82). As a manufacturer and as a distributor for Cyprane, Ltd., FS sold anesthetic equipment in the United States for general medical, dental and

veterinary applications (CX 11Z-8). During the period fiscal year 1965 through fiscal year 1973, FS increased its U.S. sales of anesthetic equipment from $604,721 to $2,498,146 (CX 109K). In 1972, FS marketed a wide range of surgical, dental and veterinary inhalation anesthetic equipment and accessories (CX 130-33, CX 135-48). FS has sold vaporizers to Ohio for the last three years (Cosgrove 2307-08).

(3) Harris Lake, Inc.

131. Harris Lake, Inc., a U.S. company (hereinafter HL), was incorporated in 1970 (CX 70A, CX 101A). During 1972, BOC owned 24 percent of the Harris Calorific Company, the parent of HL (Topkis 1153). During November 1972, HL became a manufacturer of anesthesia machines and distributor of respirometers for BOC (CX 51B, CX 94). During November 1973, BOC acquired full control of HL (CX 102D, CX 107). At the time of its acquisition, HL had approximately 3 percent of the U.S. anesthetic equipment market, although its position in Cleveland, Ohio [HL's location], was much greater (CX 101B).

D. Airco's Operations in IAE

132. Ohio is the dominant firm in the U.S. IAE market (CX 169B, *in camera;* CX 101B). Ohio has been recognized by the industry as the largest manufacturer, in terms of dollars, of IAE in the United States, since at least 1956 (Schreiber 1073, 1088; Kuehn 1156-57; Porter 1316; Cosgrove 2420-21). Ohio's major competitors in the U.S. IAE market in 1973 were Foregger Division of Air Products, Dupaco, and the two BOC subsidiaries, FS and HL (CX 169C, *in camera;* CX 101B; Schreiber 1073; Kuehn 1156-57; Porter 1316-17).

E. Concentration in the IAE Market

133. The data in the record concerning market shares of the companies in the IAE industry comes from subpoenas served by complaint counsel on 37 companies (CX 314-15, CX 316B, CX 317-31, CX 326, CX 329). The data concerning respondent companies was stipulated (CX 327, CX 330). There is no evidence as to how complaint counsel arrived at the names of the companies to be served with subpoenas. Complaint counsel's subpoena served on the companies called for net sales data by product category for all inhalation anesthetic equipment and accessories including but not limited to the listing of products set forth in the subpoena specifications (CX 316B, *in camera;* Finding of Fact 118). A category of "other" was also provided in the subpoena. The subpoena also called for data showing all such

products manufactured by each company to eliminate the possibility of double reporting of resale products (CX 316B, *in camera*). The listing of products on the subpoena was stated to be a substantially complete listing of IAE products (Finding of Fact 118).

134. Table I in the confidential section of this initial decision contains market share data compiled from subpoena returns and stipulations. This table is basically the same as that proposed by complaint counsel (CCRB, Table I, *in camera*). Table I data for BOC includes FS and HL sales as well as sales by BOC in the United States through other methods. Table I also includes one-half of BOC respirometers sold in the United States. Respirometers may be used in either inhalation anesthesia or inhalation therapy depending on the attached adaptor (Cosgrove 2493-94). BOC refused to allocate the sales of respirometers between these two markets although North American Draeger was able to do so (Schreiber 1050-52). On Table I, Narco Scientific Industries, Inc. includes Isolette, McKesson and Air Shields; Becton, Dickinson and Company includes Bard Parker; American Hospital Supply Corporation includes Pharmaseal Division; C. R. Bard, Inc. includes Med-Econ Plastics Division; and Sherwood Medical Industries, Inc. includes Aloe Medical.

135. The market share of the four largest manufacturers in the U.S. IAE market in 1972 was 64.5 percent and of the eight largest 87.9 percent (Table I, *in camera*).

136. The universe figure utilized in Table I is the total of all sales of IAE reported by the 37 companies which were served with subpoenas and respondents' stipulated sales. Complaint counsel did not include insignificant sales reported by the companies of items not in the IAE market. Complaint counsel also solicited testimony from industry executives as to their estimate of the total U.S. IAE market. Mr. Scott, general manager of Foregger, testified that the total IAE market was $30 million within an error range of 15 percent (Scott 1359). He listed 13 companies (Foregger, Ohio, BOC, Dupaco, North American Draeger, National Catheter, Rusch, Porter, Welch Allyn, Anesthesia Associates, Bard Parker, Narco Scientific, Bird), which he identified as accounting for 90 percent of the net U.S. sales, at the manufacturing level plus imports, of IAE (Scott 1356-59). These companies, whose sales figures are reflected on Table I, had aggregated sales of $22.4 million in 1972, which results in an estimated universe figure of $24.9 million. The aggregated sales of all the companies shown on Table I were $24.5 million, or more than 98 percent of the estimated universe. Mr. Schreiber, president of North America Draeger, estimated the total market as $25 million (Schreiber 1072). Mr. Porter, president of Porter

Instrument Company, estimated the total market as $20 million (Porter 1315).

137. BOC contends that the record does not furnish any reliable data from which market shares or industry concentration can be measured (BOC PF 416-447). BOC contends that complaint counsel's subpoena was not directed to all firms manufacturing IAE, that the list of products on the subpoena was not an exhaustive list, and the subpoena specifications were ambiguous. Complaint counsel's expert witness, Dr. Hedley-Whyte, testified that the listing of IAE products on complaint counsel's subpoena was substantially complete. Also, complaint counsel's subpoena called for sales data on *all* IAE equipment to be broken down by product category. A category of "other" was provided to cover IAE products not specifically covered by complaint counsel's listing of products. If all the IAE items reported by companies responding to the subpoenas had been included in Table I, it would represent only an insignificant change in the data actually utilized therein. In fact, such data would only serve to increase the sales of Ohio and Foregger, two of the largest companies in the IAE market, and thus to increase industry concentration.

138. Industry witnesses identified the leading firms in the IAE market. Dr. Hedley-Whyte testified that sales of the principal items of IAE—anesthesia machines—were made by Ohio, Foregger and BOC (Hedley-Whyte 1218). Mr. Schreiber, Mr. Scott, Mr. Porter and Mr. Kuehn, executives of IAE manufacturers, all identified as IAE manufacturers, those companies which were served with subpoenas and whose sales data is shown on Table I (Schreiber 1061-63, 1073; Kuehn 1156-57, 1170; Porter 1311; Scott 1356, 1369-73). BOC estimated that Ohio had 33 percent of the IAE market and Foregger 10-15 percent (CX 101B). By contrast, respondents did not call as witnesses any IAE manufacturers other than Mr. Cosgrove of Ohio. No subpoenas were served on IAE manufacturers by respondents to secure sales data, and only the most general testimony was elicited as to other companies that might have been manufacturers or importers of IAE, what products they manufacture, and their total sales of IAE. Examples of some of this testimony is as follows:

DIRECT EXAMINATION

Kaplan (*BOC counsel*): Have you heard of a vaporizer called Takiocha?

Cosgrove (*Ohio executive*): Takiocha is manufactured in Brazil by a Japanese doctor and there are a few of them in the United States which I have seen in use. (Cosgrove 2309).

CROSS EXAMINATION

Nickel (*Complaint Counsel*): You also mentioned a Brazilian firm that you believe

> imported vaporizers. Do you have any idea of the amount of their sales of vaporizers in the U.S.?
>
> Cosgrove: No.
>
> Nickel: Do you know whether they have sold any in the U.S.?
>
> Cosgrove: I don't know.
>
> Nickel: Have you seen them in hospitals?
>
> Cosgrove: We are talking about a vaporizer now as opposed to a machine. I have never seen a tachio machine in this country and I have never seen a vaporizer either. (Cosgrove 2426)

In another instance, Mr. Cosgrove testified as follows regarding a manufacturer of oxygen analyzers:

> Kaplan: How about Beckman Instruments?
>
> Cosgrove: Very possible.
>
> Kaplan: How about Electrodym?
>
> Cosgrove: I believe they do.
>
> Kaplan: Now—
>
> Judge Barnes: Mr. Cosgrove, I think you ought to be certain in these answers. If you are not certain—you just said "very possibly," and "I believe they do." That won't be helpful to me. If you know, say yes.
>
> Kaplan: Specifically, with respect to Electrodym, do you know?
>
> Cosgrove: I don't know. (Cosgrove 2343).

139. The record does reflect that there are some products which possibly should be included in the IAE market and are not reflected on Table I. For example, Air Products (Foregger) reported sales of "alarms, monitors" (CX 317E, *in camera*). Mr. Scott testified that these products are "oxygen alarms, low pressure alarms that are included on anesthesia machines" (Scott 1375). Thus, these products apparently should have been included in the IAE market. Another product that arguably could be included in the IAE market is CO2 absorbent material used in surgical anesthesia, although this product is a chemical and differs in this regard from other IAE products. Complaint counsel have included the CO2 cannisters in the IAE market, but not the absorbent material (Kuehn 1129-30, 113; CX 316A, *in camera*). The testimony reveals, however, that there are only two manufacturers of this product—Chemetron and Dewey and Almy [W. R. Grace]. Dewey and Almy is considerably larger in this product category than Chemetron. Dewey and Almy, a chemical company, manufactures the product; it is marketed through Ohio and Puritan-Bennett (Kuehn 1172-74). If oxygen alarms were included in the IAE market, it would increase industry concentration. As for CO2 absorbent material, inclusion of this product in the IAE market would not make a significant change in concentration figures (CX 329X). Further, a realistic appraisal of this product is that Ohio is a significant factor in

its sales and its inclusion in the market would increase market concentration and Ohio's dominance.

140. It is concluded that market data set forth on Table I is sufficiently precise to constitute a basis for measuring concentration in the IAE market.

F. Barriers to Entry

141. Barriers to entry in the manufacture and distribution of IAE in the United States include technological expertise in manufacturing and marketing; sales and service organization; capital; brand loyalty; and, entrenchment of leading companies in this market.

142. Technological expertise, such as engineering capabilities; extensive knowledge and experience in the medical field of anesthesia; administrative expertise; and production knowledge including research and development are necessary for a new company to enter into the manufacturing of IAE (Schreiber 1077-78; Kuehn 1161; Porter 1317).

143. Capital requirements are high for a company to enter the production and distribution of IAE (Schreiber 1076; Kuehn 1161-62; Porter 1318). North American Draeger, a recent entrant into the IAE market, had technical assistance and financial backing from Draeger Werke, A.G., a German firm (Schreiber 1039).

144. A national distribution network is necessary to enter successfully the IAE market. The leading companies all distribute their inhalation anesthetic products either through dealers or by direct sales to hospitals (Schreiber 1060; Kuehn 1141; Scott 1355; Cosgrove 2369). Ohio has over 800 dealers, a number of whom do not carry products which compete with Ohio's IAE products (Cosgrove 2427-29). HL has 108 dealers (CX 101B).

145. A sales force is essential for a new company to enter successfully into this market (Schreiber 1078; Porter 1319). A sales force introduces and demonstrates products through direct sales or by working with a dealer when introducing a new product (Schreiber 1078). Ohio has approximately 73 salesmen selling IAE; HL and FS have a combined total of 10-11 such salesmen (Cosgrove 2427; Laister 2561-62). Companies with a more complete line of products have several advantages over companies with a narrower line of products. Companies with a full line have a lower cost of selling (Schreiber 1080). Only Ohio, Foregger and BOC have a broad line of IAE products (Kuehn 1170; Hedley-Whyte 1218; Table I, *in camera*).

146. A service force is necessary for the successful marketing of IAE (Schreiber 1078; Porter 1319-20). Service is one of the major concerns of hospitals when deciding what equipment to buy (Schreiber 1078-79; Hedley-Whyte 1219). Hospitals prefer to sign contracts for

service on a regular basis (Schreiber 1079). Ohio has 75 servicemen in their medical service organization (Cosgrove 2428).

147. When a hospital purchases IAE it considers: the reliability of the selling company and its equipment; the selling company's ability to provide good service; and, how the medical profession views the design characteristics of the machine or line of equipment offered by the selling company (Hedley-Whyte 1219). Hospitals tend to train residents on the anesthesia machines they are most likely to encounter in their practice (Hedley-Whyte 1282-83). Medical practitioners tend to continue using the same type of equipment they used during their training (Smith 1792; Cosgrove 2439). The three most common anesthesia machines are manufactured by Ohio, Foregger and BOC (Hedley-Whyte 1268-70; 1282-83).

148. For a new firm to successfully enter the IAE market it is essential to develop a reputation which reflects the image of the company, the quality of the product and service (Schreiber 1079; Cosgrove 2431). At least one smaller manufacturer of IAE, Porter Instrument Company, contemplated marketing directly its own equipment and concluded that it did not have the resources, capital, and sales and service personnel to do so (Porter 1319).

149. The entrenchment of the major companies offering a broad line of equipment in the IAE market constitutes the major barrier facing a new entrant into this market. Mr. Kuehn, a former executive of Chemetron, testified:

> The main barrier would be the establishment, the firm establishment of the major companies involved in this particular product area today. (Kuehn 1162)

Dr. Hedley-Whyte testified that anesthesiologists are inherently conservative; they get used to a certain design, a history of reliability of a given machine and service provided by a given company (Hedley-Whyte 1219). This knowledge led Dr. Hedley-Whyte to advise at least two companies against entering the IAE market (Hedley-Whyte 1224-25). Ohio has been the dominant firm in IAE since at least 1956 (Schreiber 1088; Kuehn 1156-57; Porter 1316; Cosgrove 2420-21).

G. Anticompetitive Effects of Airco Acquisition in IAE Market

150. Prior to the acquisition of Airco, BOC competed with Airco for sales in the IAE market (CX 135-48; Complaint Counsel Physical Exhibit "A"; Table I, *in camera*). Ohio's medical products are "identical or closely parallel to those of BOC" (CX 76B, *in camera*). BOC's stock acquisition in Airco eliminated that competition.

151. Prior to the acquisition, Airco anticipated that FS, with the

backing of BOC, would challenge Airco's position in the IAE market (CX 169C, *in camera;* Cosgrove 2510-11). If BOC had not acquired Airco, BOC would have expanded its IAE operations in the United States (Smith 1788; Cosgrove 2510-11). This combination of BOC and Airco eliminates any possibility of BOC challenging Airco's dominance of the IAE market.

152. The acquisition of Airco by BOC has enhanced the dominant position of Airco in the manufacture of IAE by raising Ohio's market share significantly (Table I, *in camera*).

153. The acquisition of Airco by BOC raised the already high barriers to entry for any firm wishing to enter the U.S. IAE market (Kuehn 1162, 1166).

V. *Inhalation Therapy Equipment*

A. Relevant Product Market

154. The complaint alleges that one of the effects of the acquisition of Airco stock by BOC may be substantially to lessen competition and to tend to create a monopoly in the manufacture, distribution or sale of inhalation therapy equipment, or any submarket thereof, throughout the United States or sections thereof (complaint, Par. 27). "Inhalation therapy equipment" (hereinafter ITE) is defined in the complaint as equipment and accessories used in the administration of gas for therapeutic purposes (complaint, Par. 1(c)). Dr. Ronald John Karpick, a physician specializing in pulmonary medicine, testified as an expert witness for complaint counsel (Karpick 1381-1432), and he defined ITE as:

> Inhalation therapy equipment would have to involve all of the machinery which is involved with administering the respiratory therapy, as I like to call it rather than inhalation therapy services. This involves everything from the simple nasal catheter for administration of oxygen straight through to the large complicated machinery needed for constant volume ventilation of patients who are otherwise unable to ventilate themselves. (Karpick 1387.)

155. Complaint counsel's subpoena (CX 316B-C), previously discussed in connection with the IAE market, also requested sales data on ITE from the same 37 companies. This subpoena called for data on all ITE, including but not limited to the following products which were separately listed on the subpoena:

(a) *Ventilators and respirators.* For practical purposes, the terms "ventilators" and "respirators" are synonymous (Karpick 1389). Both assist a patient in breathing by administering a gas, usually oxygen or air, to the patient under positive pressure; in effect, they force the gas into the patient's lungs (Matsch 1523-25, 1521; Karpick 1386-88).

(b) *Humidifiers and nebulizers* are devices which vaporize water or convert it into fine particles in order to humidify air or oxygen administered to the patient and prevent the airways from becoming dried out.

(c) *Resuscitators*. A resuscitator is an emergency device used for the immediate establishment of a breathing pattern in a person who has stopped breathing (Karpick 1930).

(d) *Inhalation therapy delivery tubing* is used for the administration of gases for therapeutic purposes (Karpick 1390; CX A, form 1764, pp. 5-6).

(e) *Inhalation therapy face masks* conduct gases to a patient's nose and mouth and exclude room air (Karpick 1390-91; CX A, form 1764, pp. 2-3).

(f) *Inhalation therapy flow meters* are used to control the rate of flow of gases to the patients (Karpick 1391; CX A, form 1766).

(g) *Nasopharyngeal catheters and cannulae* are used to convey gases into the patient's nose or nasal passages (Karpick 1391).

(h) *Oropharyngeal airways* are tubes inserted through the mouth and into the pharynx in order to conduct oxygen or compressed air into the airways and to prevent the patient's tongue from obstructing the airways (Karpick 1391).

(i) *Inhalation therapy drain and condensation bottles* are bottles attached to ventilators to collect excess humidity from the gas administered to the patient (Karpick 1391).

(j) *Adaptors and fittings*. These are self-explanatory.

(k) *Yokes, hardscrews and valves* were described by complaint counsel's expert as "the nuts and bolts * * * that help get all of this together." (Karpick 1392).

(l) *Respirometers* are used to measure the air breathed by patients (Schreiber 1059). Respirometers can be used either for inhalation anesthesia or inhalation therapy with appropriate adaptors (Cosgrove 2493-94).

(m) *Bacteria filters* are employed in ventilators and respirators to remove bacteria from the air or oxygen administered to the patient (Karpick 1392).

(n) *Tracheotomy tubes* are placed in a surgical incision into the trachea in the lower part of the neck to permit easy access to the airways for the administration of ventilation and for intratracheal suctioning. They are used primarily by patients requiring long-term assistance (Karpick 1392).

(o) *Incubators* are used in controlling and in assisting pediatric patients in breathing (Karpick 1392). Complaint counsel's subpoena also included a category entitled "other." Some of the companies listed products not specifically mentioned in the subpoena specifications under this category. Dr. Karpick testified that he would add oxygen tents and mist tents to the above products (Karpick 1392-93), but that otherwise the product listing was adequate (Karpick 1393). Complaint counsel have also added IPPB (intermittent positive pressure breathing devices) to the ITE market (CCPF 184). IPPB devices are machines that administer pressure to the upper airways in order to assist patients in breathing (Karpick 1423).

156. Over the years, the medical profession has begun to recognize respiratory therapy or respiratory care as a separate speciality (Karpick 1385-86, 1393-95, 1429-31; Cosgrove 2478-88). Most hospitals which provide major patient care have respiratory therapy departments (Karpick 1386). There are now respiratory therapy specialists who have specialized training and who assist physicians in administering respiratory therapy (Karpick 1393-97).

157. Professional recognition of respiratory therapy, however, is not equivalent to recognition of inhalation therapy as a separate entity. For example, complaint counsel's expert, Dr. Karpick, in explaining why these paraprofessionals had changed their titles from inhalation therapists to respiratory therapists, testified:

> [I]t became obvious to everyone that inhalation therapy was not the proper term for this group of individuals in that they were dealing more than just with inhalation of various gases and humidity, but they are really responsible for the entire respiratory function of the patient. This does involve intra-tracheal suctioning of the patient, physical therapy, physical rehabilitation; and they are getting involved in the pulmonary function laboratories now. (Karpick 1396). *See also* Cosgrove 2373-74; Schreiber 1089-90).

Dr. Karpick testified that respiratory therapy is related to the entire respiratory function of the patient, and that inhalation therapy is one method of administering respiratory therapy, with no medical personnel specializing in it (Karpick 1396, 1404, 1407, 1416, 1430-31). Inhalation therapy is a subsection of respiratory therapy and it deals with the inhalation of various gases and the humidification of those gases for therapeutic purposes (Karpick 1396). Inhalation therapy is a distinct method of treating respiratory deficiencies (Karpick 1407).

158. Inhalation therapy includes the modalities of oxygen, carbon dioxide and helium, as well as the use of aerosols and nebulizers to provide humidity to the airways (Karpick 1387, 1404). Complaint counsel contend that inhalation therapy does not include the administration of medications by the use of a nebulizer; the use of suctioning apparatus; the administration of physical therapy and physical rehabilitation; and the use of pulmonary function laboratories. Suction equipment is not part of the ITE market as such equipment is not used for the therapeutic administration of gas. Further, it is widely used in

other areas of the hospitals and for purposes other than respiratory therapy (Karpick 1398, 1407, 1426-27). Pulmonary function equipment is a series of products which analyze the lung function to determine the impairment of the lungs or the patient's ability to properly exchange gases in the lungs (Cosgrove 2384). This type of equipment is marketed towards a specific group of physicians interested in diagnostic respiratory products and is not necessarily shown at the same meetings or advertised in the same media as ITE. Such equipment is not used for the therapeutic administration of gases and therefore is not a part of ITE (Cosgrove 2383-85). Complaint counsel's contentions that the administration of medication by use of nebulizers is not inhalation therapy is not logical. Where drugs are administered in connection with a gas, other than the ordinary atmosphere, it is considered part of inhalation therapy (Karpick 1409, 1415). Furthermore, the administration of medications by the use of nebulizers is part of respiratory therapy (Karpick 1404). Therefore, nebulizers are part of the ITE market since they are used to administer drugs by the same process as with the administration of gases. The Riker Medihalor, and similar products, are hand bulb nebulizers which deliver nebulized medication to the patient without employing an accompanying gas other than the atmosphere (Karpick 1410-13; Cosgrove 2378-79). The hand bulb nebulizers are primarily over-the-counter items (Karpick 1387), are rarely used by physicians, although occasionally prescribed for home use by patients (Karpick 1410-13). These products can be distinguished from the ITE market on this latter basis rather than for the reasons advanced by complaint counsel (CCPF 186).

159. The gases administered for inhalation therapy purposes, oxygen, carbon dioxide, helium and compressed air, differ from those used for anesthetic purposes, such as nitrous oxide (Karpick 1387, 1421). Respiratory therapy and anesthesiology are distinct and separate areas in medicine (Karpick 1430). Presently, anesthesiologists generally do not receive specialized training in respiratory therapy (Karpick 1430). There is a growing trend for pulmonary physicians to head up respiratory therapy departments separate from the anesthesiology departments (Karpick 1385, 1428-30). There is a similar trend for ITE to be purchased by the respiratory therapy department under the direction of a pulmonary physician rather than anesthesiologist (Hedley-Whyte 1271; Karpick 1429-30). The respiratory therapist is the person who actually administers inhalation therapy to a patient. Therapists work with and are under the supervision of physicians (Hedley-Whyte 1210-11; Karpick 1393-94, 1417). Respiratory therapists have minimal access to anesthetic equipment in most anesthesiology departments, even in hospitals where they are under the anesthesiolo-

gy department (Hedley-Whyte 1211). Advertising of ITE is aimed at different medical personnel and toward an area of medicine separate from anesthesiology (Schreiber 1090). Respiratory therapists have their own professional journals (Karpick 1395). Accordingly, ITE is a separate product market from IAE for purposes of this proceeding.

B. Geographic Market

160. The relevant geographic market within which to assess the competitive effects of the BOC stock acquisition of Airco with respect to ITE is the United States as a whole. The leading ITE manufacturers, including Airco and BOC, sell such products throughout the United States (Fegan 1439; Matsch 1493; McWhinnie 1538; Cosgrove 2497). There is no dispute as to the geographic market (BOC PF 399).

C. BOC's Operations in ITE

(1) International Operations

161. The Advanced Engineering Division of BOC manufactures and markets ITE throughout the world including the United States (CX 3H, CX 6F, CX 10Z-8, CX 11L, CX 11Z-8). Since at least 1968, BOC has sold directly a small volume of ITE in the United States, including oxygen therapy apparatus, resuscitation equipment and Wright respirometers (CX 6F, CX 328, *in camera*).

162. HL, subsequently acquired in toto by BOC, was a small factor in the U.S. ITE market selling essentially the BOC Wright respirometer (Table II, *in camera*).

163. Since 1968, BOC has sought to expand its position in the U.S. ITE market and has considered acquiring several U.S. firms (CX 274, 276, 278). During May 1969, David Morgan, planning manager for BOC Medical Products, concluded after visiting the United States that the ITE market was the most obvious and immediately profitable area for exploitation in the United States by BOC (CX 26D). Further, Mr. Morgan concluded that HL could easily be expanded into the ITE market (CX 26D). During 1972 and subsequently, BOC actively explored expanding its operations in the ITE market in the United States and had contacts with several medical companies engaged in the manufacture and sale of inhalation therapy equipment and accessories (Kuehn 1152-53).

164. From 1972 to 1973, BOC through its representative, Mr. Fraser Sweatman, had a series of contacts with Oxequip Health Industries for the purpose of possible acquisition of Oxequip (McWhinnie 1545-55). Oxequip is a manufacturer of ITE (Table II, *in camera*). During this period, Oxequip was visited by several represent-

atives of BOC, including Mr. Sweatman, A. I. Ray, and a chartered accountant (McWhinnie 1547-49, 1552). The accountant spent an entire day studying confidential financial records of Oxequip (McWhinnie 1552-53).

165. In October 1973, William C. Moeller, president of FS, communicated with Frank Fegan, president of OEM Medical, concerning possible acquisition of OEM by BOC (Fegan 1439-40). OEM is a manufacturer of ITE (Table II, *in camera*). As a result of this meeting, financial information concerning OEM was sent to Moeller (Fegan 1441).

Further discussions were postponed until early 1974, when Fegan was told that BOC was no longer interested in acquiring OEM (Fegan, CX 294; 144). By this time BOC had already acquired a 35 percent interest in Airco including the Ohio Medical Products Division (Finding of Fact 31).

D. Airco's Operations in ITE

166. Ohio manufactures and markets a line of ITE products, including mist tents, nebulizers and humidifiers, masks, catheters, tubes and airways, resuscitators and IPPB devices, and flow meters (CX Physical Exhibit A; Table II, *in camera*). Ohio was mentioned by industry witnesses as being a principal competitor in respiratory care equipment (Matsch 1494, 1530; McWhinnie 1539). Ohio has been attempting to expand its share of the ITE market (Cosgrove 2511-12; CX 169Q, *in camera*).

E. Concentration in the ITE Market

167. The data in the record concerning market shares of the companies in the ITE industry comes from subpoenas served by complaint counsel on 37 companies (*see* CX 316C, *in camera*). Data concerning respondent companies was stipulated (CX 326, CX 329). There is no evidence as to how complaint counsel arrived at the names of the companies to be served with subpoenas. Complaint counsel's subpoena served on the companies called for net sales data by product category for all inhalation therapy equipment and accessories including but not limited to the listing of products set forth in the subpoena specifications (CX 316C, *in camera*). A category of "other" was also provided in the subpoena specifications (Finding of Fact 155). The subpoena also called for data showing all products manufactured by each company to eliminate the possibility of reporting resale products (CX 316C, *in camera*). The list of products on the subpoena were stated

to be a substantially complete listing of ITE products (Karpick 1392-93).

168. Table II in the confidential section of this Initial Decision contains market share data compiled from subpoena returns and stipulations. This table is substantially identical to that proposed by complaint counsel (CCRB, Table II, *in camera*). Table II data includes sales by BOC directly and through its subsidiaries FS and HL [it appears FS had no sales of ITE in 1972]. On Table II, Narco Scientific Industries, Inc. includes Isolette, McKesson and Air Shields; Becton, Dickinson and Company includes Bard Parker; Air Products and Chemicals, Inc. includes Foregger; American Hospital Supply Corporation includes Pharmaseal; Sherwood Medical Industries, Inc. includes Aloe Medical; and C. R. Bard, Inc. includes Med-Econ Plastics Division. Smith & Wesson Electronics was formerly the Stephenson Company. Table II also includes one-half of BOC respirometers sold in the United States. Respirometers may be used in either inhalation therapy or inhalation anesthesia depending on the attached adaptor (Cosgrove 2493-94).

169. The market share of the four largest manufacturers in the U.S. ITE market in 1972 was 61.4 percent and of the eight largest, 77.7 percent (Table II, *in camera*). The universe figure utilized in Table II is the total of all sales reported by the 37 companies which were served with subpoenas and respondents' stipulated sales. Table II does not include certain items reported by the companies, which items complaint counsel contend are not in the ITE market.

170. Complaint counsel also solicited testimony from industry witnesses as to the names of their principal competitors and their estimates of the total U.S. ITE market (Schreiber 1061-62; Scott 1356, 1369-73; Matsch 1494, 1530; McWhinnie 1539). Mr. Matsch, an official of Monahan Company, testified that his four largest competitors were Puritan-Bennett, Ohio, Bird and Air Shields (Narco); he estimated the total ITE market at $75 million (Matsch 1494, 1497). Mr. Cosgrove, Ohio's chief executive officer, also estimated the total U.S. ITE market at $75 million (2498-99). Both officials did not include certain insignificant items of ITE in their estimates.

171. BOC contends that the record does not furnish any reliable data from which market shares or industry concentration can be measured (BOC PF 451-476). BOC contends that complaint counsel's subpoena was not directed to all firms manufacturing ITE, that the list of products on the subpoena was not an exhaustive list, and the subpoena specifications were ambiguous. In this regard, complaint counsel's expert witness, Dr. Karpick, testified that the list of ITE products on complaint counsel's subpoena was substantially complete

(Karpick 1393). Also complaint counsel's subpoena called for sales data on all ITE equipment to be broken down by product category. A category of "other" was provided to cover ITE products not specifically covered by complaint counsel's listing. For example, IPPB devices were not listed as a separate category on the subpoena (*see* BOC PF 464). However, several companies reported sales of IPPB devices, and these sales have been included in Table II.

172. Complaint counsel did not include sales data for several products which were reported pursuant to the subpoenas. These products, such as diagnostic products, compressors, emergency oxygen, monitors, are not in the ITE market. However, if all sales of such products had been included in Table II, it would not change the overall data to any significant degree. In fact, the most substantial omitted data was for such companies as Ohio, Narco, Puritan-Bennett, and Hudson Oxygen. Inclusion of this data in Table II would only serve to increase market concentration.

173. The principal products in the ITE market are ventilators, respirators, resuscitators, humidifiers and nebulizers. The leading manufacturers of these products are identified in the record (Finding of Fact 170), and their sales data appears on Table II. By contrast, respondents did not call as witnesses any manufacturers of ITE other than Mr. Cosgrove of Ohio. No subpoenas were served on ITE manufacturers by respondents to obtain sales data. Respondents have offered only the most general testimony regarding other companies that might have been manufacturers or importers of ITE, what products they manufacture, and their volume of sales of ITE.

174. Market data on the ITE market is not as clear or convincing as with the IAE market; primarily lacking is data relating to the ITE universe. However, even assuming that the total ITE market is $75 million, which is undoubtedly an exaggerated universe based on this record, four-firm concentration would be 45 percent and eight-firm concentration 57 percent. Further, Table II clearly establishes that under either criteria the market is concentrated and Ohio is one of the leading firms in the market. Accordingly, it is concluded that the market data set forth on Table II is sufficiently precise to constitute a basis for measuring concentration in the ITE market.

F. Barriers to Entry

175. A high degree of technology is necessary for a company to enter into the manufacture and distribution of ITE in the United States (Matsch 1501; McWhinnie 1540). A company would need people skilled in many disciplines including mechanics, rubber, plastics, mechanical and bio-engineering (Matsch 1501). Substantial capital

requirements are necessary for a company to enter into the manufacture and distribution of ITE or to expand a product line (Matsch 1499-1500; McWhinnie 1540-41).

176. Before an ITE product can be successfully marketed, it is necessary to have a good clinical evaluation of the item demonstrating its quality and acceptance by the medical profession (Matsch 1501-02). Ohio has a good working relationship with the medical profession including people who will provide clinical evaluation of new ITE products for Ohio (Cosgrove 2410-13).

177. A distribution network is also necessary to enter the ITE market (Matsch 1501-02). The leading companies all distribute their ITE products nationwide through dealers or by direct sales (Cosgrove 2497; Scott 1355; Fegan 1439; Matsch 1493). Ohio has over 800 dealers for ITE, a number of whom do not carry products which compete with Ohio's ITE products (Cosgrove 2427-29). Highly trained, technical sales personnel are important to a company in the U.S. ITE market since they make the initial contact with the hospital's purchasing department representative (Karpick 1384; Cosgrove 2409, 2427-28). Ohio has approximately 73 salesmen handling its ITE products (Cosgrove 2427-28). A highly trained service force is necessary for the successful marketing of ITE (Matsch 1501-02). Ohio has 75 men to service their ITE (Cosgrove 2428).

178. The ability to deliver the apparatus requested, the ability to service the product and the ability to maintain the product, including replacement parts, are all major factors taken into account by the purchasing department of hospitals in buying ITE (Karpick 1385). For a new firm to successfully enter the ITE market, it is essential to develop a reputation which reflects the quality of the product and the image of the company (Matsch 1501-02; Cosgrove 2431). The same requirements for a company to enter the ITE market would also be required for a company in the market to expand its product line (McWhinnie 1541). BOC possessed the resources and expertise necessary to expand in the U.S. ITE market (Matsch 1502-03).

G. Anticompetitive Effects of Airco Acquisition in ITE Market

(1) Elimination of Competition

179. Prior to BOC's stock acquisition in Airco, BOC competed to a small extent with Airco for sales in the U.S. ITE market (CX 328, *in camera;* CX 150C, Z-20-21; Commission Physical Exhibit "A"-F-B, H-6; Table II, *in camera*). This acquisition eliminated actual competition between the two companies.

180. BOC, in 1973, had the technical and marketing expertise necessary to expand its small U.S. operations in the ITE market (Matsch 1502). BOC had the capital resources required for expansion (Topkis 1503). BOC is extensively engaged in marketing medical products in 60 countries throughout the world (Smith 1790), including ITE (Smith 1791). But for the acquisition, BOC would have expanded its manufacturing and marketing operations in the United States in its attempts to become one of the leading companies in the U.S. ITE market (Smith 1788). BOC had considered acquiring small U.S. firms engaged in the ITE market (Finding of Fact 163), and the ITE market appeared to BOC to be the most obvious and profitable area in the U.S. medical market for exploitation by BOC (Findings of Fact 163-165). The combination of BOC and Airco eliminated any possibility of increased competition between BOC and Airco.

181. The acquisition of Airco by BOC strengthened the market position of Airco in the ITE market by increasing Ohio's market share (Table II, *in camera*).

(2) Heightened Barriers to Entry

182. The acquisition of Airco by BOC raised the already high barriers to entry for any firm wishing to enter the U.S. ITE market or to expand its product line (Kuehn 1166; Findings of Fact 175-178).

CONCLUSIONS

I. *Industrial Gases*

A. The Industrial Gases Industry Comprises a Line of Commerce

It is well settled that an entire industry may constitute a line of commerce within the meaning of Section 7 of the Clayton Act. *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U.S. 350 (1970); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *A.G. Spalding & Bros., Inc.*, 56 F.T.C. 1125 (1960), *aff'd*, 301 F.2d 585 (3rd Cir. 1962); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

The United States Supreme Court held that the relevant line of commerce in which to appraise the probable competitive effects of a proposed merger in *Philadelphia National Bank*, *supra*, was

> * * * the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking." * * * composes a distinct line of commerce. (374 U.S. at 356).

Commercial banking was found by the Supreme Court to be a distinct line of commerce even though the various services and products offered by commercial banks are distinguishable from each other and in some instances are also provided by financial institutions other than commercial banks. The Court emphasized that it was the cluster of products and services that commercial banks offered that as a matter of trade reality made commercial banking a distinct line of commerce. The Supreme Court later reaffirmed its holding that the commercial banking industry as a whole was a relevant line of commerce for Section 7 purposes. *Phillipsburg National Bank, supra,* 399 U.S. at 359-62.

The Commission has similarly held an entire industry to constitute a relevant line of commerce. *A.G. Spalding & Bros., Inc., supra,* 56 F.T.C. at 1160. In determining the relevant line of commerce within which to measure the impact of a merger between Spalding and Rawlings Manufacturing Company, the Commission ruled:

> Counsel supporting the complaint also contends that the athletic goods industry as a whole constitutes a line of commerce within the meaning of Section 7 of the Clayton Act. We believe the record fully supports this contention. The testimony of AGMA [Athletic Goods Manufacturing Association] officials establishes that the principal products of this industry are those listed in the AGMA Census Reports. These products are manufactured and sold by Spalding and formerly had been manufactured and sold by Rawlings. They are products which are required to be used in established and well-organized athletic games. They have peculiar characteristics and end-uses for which there are no substitutes; they are distinct from the products of other industries; and are sold in a recognized market with its own competitive standards. See *United States* v. *Bethlehem Steel Corporation,* 168 F. Supp. 576 (1958). Moreover, the athletic goods industry is recognized by its members and by its trade association as a separate and distinct industry. It is our opinion, therefore, that the industry itself is a relevant market within which to measure the impact of the merger (56 F.T.C. at 1160).

On appeal, Spalding argued that a line of commerce may consist of only competitive indistinguishable products and therefore various athletic products such as baseballs, baseball gloves and mitts, footballs, and basketballs could not constitute a market. The Third Circuit Court of Appeals rejected Spalding's argument and held that the Commission, for the reasons set forth in its opinion, had "properly determined that the athletic goods industry as a whole is a relevant market within which to measure the impact of the merger." *A.G. Spalding & Bros., Inc.,* 301 F.2d at 606.

In *United States* v. *Bethlehem Steel Corp., supra,* the District Court for the Southern District of New York held that the sum of all products of the iron and steel industry constituted a line of commerce within the meaning of Section 7. The basis for the District Court's conclusion was as follows:

> The products of the iron and steel industry as a group are generally standardized, are not subject to the vagaries of style appeal, and have peculiar characteristics and uses for which there are no effective substitutes. The manufacture of such products requires special know-how and experience, huge capital investment and a trained labor force. The products of the iron and steel industry are generally distinct one from the other and as a group distinct from the products of other industries. They are sold in a recognized market with its own competitive standards. The iron and steel industry is commonly recognized by its members as well as the community at large as a separate industry. It has its own trade association, treating the industry as separate and distinct. In the light of these facts the conclusion is warranted that the sum of all the products of the iron and steel industry constitute a line of commerce. Since Bethlehem and Youngstown both produce and sell the principal products of the iron and steel industry, it is an appropriate line of commerce for analyzing the effect of this merger. (168 F. Supp. at 593-94).

The evidence of record in this present proceeding clearly establishes that the industrial gases industry as a whole constitutes a relevant line of commerce within which to measure the impact of BOC's stock acquisition in Airco. The industrial gases industry is recognized by its members and two trade associations as a separate and distinct industry. Industrial gases companies only recognize other industrial gases companies as their competitors. The Bureau of the Census has classified the production and marketing of industrial gases as a separate economic entity since at least 1945. Further, the Bureau of the Census and members of the industry generally define the same group of gases as industrial gases. Industrial gases companies generally market the same group of gases, although some companies market insignificant volumes of gases not marketed by others. Both Airco and BOC market a wide range of industrial gases. Further, customers for industrial gases can look only to industrial gases companies for their needs.

There is also a commonality of technical expertise and capabilities involved in the production, transportation and marketing of the various industrial gases. Unique production and marketing facilities are utilized. Further, industrial gases have unique characteristics and end-uses, and, accordingly, are distinct from and do not compete with the products of other industries.

Respondents argue that only products which are completely interchangeable may constitute a relevant line of commerce, and that industrial gases are generally not substitutable for each other (BOC PF* 214-228). Respondents' position is based upon the Supreme Court's statement in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), that

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. (Footnote omitted.)

The Supreme Court clearly did not intend to preclude an economically significant group of noninterchangeable products from being defined as a relevant line of commerce. In *Philadelphia National Bank, supra*, and *Phillipsburg National Bank, supra*, both decided after *Brown Shoe*, the Supreme Court held that the cluster of products and services offered by commercial banks constituted a relevant line of commerce. The products and services of commercial banks such as personal loans, checking accounts, estate and trust planning, and safety deposit boxes are clearly not interchangeable.

Moreover, the Supreme Court has made it abundantly clear that "* * * submarkets are not a basis for the disregard of a broader line of commerce that has economic significance." *Phillipsburg National Bank, supra*, 399 U.S. at 360. In the present case, it would be inappropriate to divide industrial gases into submarkets for the purpose of assessing the competitive impact of BOC's stock acquisition in Airco. Both BOC and Airco market a wide range of industrial gases and there is no evidence in the record which suggests that BOC intended to enter the U.S. industrial gases market with less than a broad line of industrial gases. There is no evidence of record that any industrial gases company markets only a single industrial gas; all companies market a broad line of industrial gases. Industrial gases customers normally use a wide range of industrial gases. Further, the evidence of record firmly establishes that the industrial gases market is "sufficiently inclusive to be meaningful in terms of trade realities." *Crown Zellerbach Corp.* v. *FTC*, 296 F.2d 800, 811 (9th Cir. 1961).

B. Industrial Gases Geographic Market

Section 7 of the Clayton Act, as amended, prohibits an acquisition if its effect may be substantially to lessen competition in any line of commerce in "any section of the country." The United States Supreme Court has recently reiterated the proper test for determining the relevant "section of the country" within which to measure the competitive impact of an acquisition:

> Without exception the Court has treated "section of the country" and "relevant geographic market" as identical, and it has defined the latter concept as the area in which the goods or services at issue are marketed to a significant degree by the acquired firm. (*United States* v. *Marine Bancorporation, Inc.*, 42 U.S.L.W. 5210, 5215 (June 26, 1974)).

Airco, the acquired firm in the present case, produces and markets industrial gases throughout the United States. Further, Airco bids for both tonnage and merchant accounts nationwide. BOC, the acquiring firm, was interested in participating in the United States market on a national basis. The nationwide scope of Airco's industrial gases operation was one of the primary reasons for BOC acquiring stock in Airco.

Therefore, considering the area where Airco operates as well as the area where BOC intended to enter, the nation as a whole is the geographic market within which the effect of BOC's acquisition should be measured. Further, the other large U.S. industrial gases companies produce and market industrial gases throughout the United States and, like Airco, bid for new accounts nationwide. Accordingly, BOC's acquisition of stock interest in Airco will affect competition in the industrial gases industry throughout the entire United States.

Respondents contend the competitive impact of BOC's acquisition must be considered on a regional basis because some industrial gases cannot be shipped economically more than 100 to 300 miles. Such a contention, however, ignores the fact that the large industrial gases companies, in fact, compete throughout the entire United States. This is accomplished by having plants strategically located throughout the United States.

Respondents' argument is also contrary to the Commission's holding in *Kennecott Copper Corp.*, 78 F.T.C. 744 (1971), *aff'd*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 94 S. Ct. 1617 (1974). *Kennecott Copper*, which is squarely on point with this issue, was a potential competition case involving the coal industry. Coal, like some industrial gases, can only be economically shipped limited distances, and coal marketing is therefore generally confined to the geographic area of its production.

The Commission held in *Kennecott Copper* that although the distance over which coal is shipped is limited, the nation as a whole constituted the relevant geographic market within which to assess the impact of the challenged acquisition. The Commission based its conclusion on the fact that the large coal companies, including the acquired company, compete with each other throughout the United States and the fact that the acquiring company intended to become a nationwide competitor. The geographic market issue was raised on appeal to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit upheld the Commission's determination that the nation as a whole was a relevant geographic market. 467 F.2d at 71. That same conclusion must be reached in this proceeding.[4]

C. Market Concentration

The industrial gases market in the United States is highly concentrated. BOC respondents do not dispute that the top seven or eight firms account for the bulk of the market. The evidence of record establishes that in 1972, the top eight industrial gases firms in the United States accounted for 86.5 percent of the market and the top four firms held 69.6 percent of the market.[5] Top eight firm concentration in the industrial gases market has increased from 84 percent to 86.5 percent during the past five years and the top four firm concentration has increased from 67 percent to 70 percent. Further, the record discloses a significant increase in industry concentration from 1967 to 1972 through mergers (Findings of Fact 65-66).[6]

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[4] The Commission's holding in Kennecott is not inconsistent with the Supreme Court's decision in *United States* v. *General Dynamics Corp.*, 42 U.S.L.W. 4368 (*see* BOC RB 51). In *General Dynamics*, the Court expresaly did not reach geographic or product market; further *Kennecott* was affirmed by the Court subsequent to the *General Dynamics* decision.

The degree of concentration in the U.S. industrial gases industry is well above the level considered by the Commission and the federal courts to constitute a concentrated market.[7] In *The Stanley Works*, 78 F.T.C. 1023 (1971), *aff'd*, 469 F.2d 498 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973), the Commission and the Court of Appeals for the Second Circuit found that the cabinet hardware industry in which four firms accounted for 49-51 percent of the market was "* * * sufficiently concentrated to invoke the proscriptive sanction of the Clayton Act * * *" 469 F.2d at 504.

The Supreme Court, in *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 278 (1964), found that the relevant line of commerce was "highly concentrated" as the top five firms controlled 65.4 percent of the market and the top nine companies held 88.2 percent. Recently, the California gasoline market, in which the top four and seven firms accounted for 61 and 83 percent respectively of refining capacity and 58 and 81 percent respectively of sales, was held to be highly concentrated. *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1252 (C.D. Cal. 1973), *aff'd mem.*, 42 U.S.L.W. 3710 (July 8, 1974).

BOC respondents have asserted that the value of shipments for industrial gases reported by the Bureau of the Census should not be considered as a reliable basis for establishing concentration in the industrial gases market. This assertion is based on the testimony of one witness who stated that value of shipment information required by the

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[5] These concentration figures are based upon the total value of shipments by primary producers of industrial gases. These concentration ratios are an accurate reflection of industry concentration since it is to the industrial gases companies which customers must look to supply their needs. Concentration ratios based upon value of shipments of industrial gases of all manufacturers including those not in the industrial gases industry are also extremely high, with the top eight and four firms accounting for 79.3 and 63.8 percent respectively of total value of shipments in 1972 (Findings of Fact 62-64).

[6] Other evidence of industry concentration in industrial gases exists. There are only three "national bulk producers" in the industrial gases market—Linde, Air Products and Airco. It is basically these three companies that purchasers of industrial gases have to look to fill the shortages of industrial gases which existed as of 1973 (Dempster 559; Smith 1732-33; CX 95D).

[7] An authority frequently used by the Commission and the federal courts as a guideline for measuring concentration is *C. Kaysen & D. Turner, Antitrust Policy: An Economic and Legal Analysis 72* (1959), which defines a "tight oligopoly" as an industry in which eight firms share at least 50 percent of the market and the largest firm has at least 20 percent.

Census could be subject to different interpretation by different companies. He criticized the Census information as providing only the value of gases at the producing plant and not at the point of actual distribution. Further, his company did not normally measure company achievements on f.o.b. plant data.

Bureau of the Census reports are traditionally used in antitrust cases and their reliability is well established. *See, e.g., Avnet, Inc.*, 78 F.T.C. 1562, 1563 n. 1 (1971). Reporting companies are required by law to accurately report their value of shipments to Census. Industrial gases shipment reports have been made to Census for many years. Census reports are clearly as reliable, if not more so, than any overall industry data which could be compiled for the purpose of litigation.

Respondents also contend captive production of industrial gases should be included in the universe. This argument is without merit. Captive production is not part of the industrial gases industry; captive production is not available to serve the industrial gases market. There is no competition between such producers with respect to the industrial gases each produces and consumes. To the extent surplus production is available, the record establishes that such surplus is sold to industrial gases companies who resell in the marketplace (Finding of Fact 55). Thus, to include captive production in the market would not be meaningful in terms of trade realities; it would recognize competition where competition, in fact, does not exist.

BOC respondents misread *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972), *aff'd*, 315 F. Supp. 372 (E.D. Mich. 1970), and 286 F. Supp. 407 (E.D. Mich. 1968). There, the Supreme Court regarded AC Spark Plugs as a competitor in the spark plug market, although AC was owned by General Motors and AC plugs were installed as original equipment in GM cars. Of critical importance in that case, however, was the fact that GM actively marketed AC plugs in the spark plug market including the lucrative replacement market. GM did not simply manufacture its spark plugs as a necessary component or input to its car production.

Respondents also attempt to dilute market statistics by including in the industrial gases market, production and sales of other products such as propane, butane, propylene, chlorine and sulphur dioxide. These gases are not considered as part of the industrial gases industry. The bulk of such gases are sold by other industries for different purposes. To the extent such gases are sold by industrial gases companies, the volume is insignificant (Finding of Fact 39).

Moreover, it is well settled that precise market data in antitrust cases is simply not necessary. For example, in *Brown Shoe Co.* v. *United States*, *supra*, the defendant argued that the government's statistics concerning its own sales were improperly derived since they included both wholesale and retail sales in the same category. The Supreme Court rejected the argument, stating:

> Again, while recognizing a possible margin of error in statistics combining sales at two levels of distribution, we believe they provide an adequate basis upon which to gauge Brown sales through outlets it controlled * * * In summary, although appellant may point to technical flaws in the compilation of these statistics, we recognize that in cases of this type precision in detail is less important than the accuracy of the broad picture presented. We believe the picture as presented by the government in this case is adequate for making the determination required by §7: whether this merger *may* tend to lessen competition substantially in the relevant markets. (370 U.S. at 342 n. 69).

The Commission has also recognized that the government is not required to establish the *exact* size of a market in Section 7 cases. In *Papercraft Corp.*, 78 F.T.C. 1352, 1405-06, (1971), *aff'd*, 472 F.2d 927 (7th Cir. 1973), the Commission held that estimates by experienced members of the industry were an adequate basis for determining the size of the relevant market. It is thus concluded that market data in this proceeding is sufficiently precise to present an accurate assessment of market concentration in the industrial gases industry.

D. Potential Competition

The Supreme Court, in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315 (1962) stated:

> The dominant theme pervading congressional consideration of the 1950 Amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy * * *.

The greater the concentration "the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280 (1964). The Court also observed that "* * * competition will be most vital when there are many sellers, none of which has any significant market share." *Ibid.*

Decisions by the Supreme Court have made it abundantly clear that Section 7 of the Clayton Act is to be construed at the possibility of not only preventing the rising tide of economic concentration, but preserving the possibility of eventual deconcentration. Further, Section 7 deals with probabilities, not with certainties. *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 577 (1967). Section 7 "look[s] not merely to the actual present effect of a merger but instead to its effect upon future competition." *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 277 (1966).

With these basic premises in mind, the elimination of potential competition as well as actual competition is prohibited by Section 7. *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972); *United States* v. *Procter & Gamble Co., supra; United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964). The potential competition doctrine has meaning only as applied to concentrated or oligopolistic markets. "The present procompetitive effects that a perceived potential entrant may produce in an oligopolistic market will already have been accomplished if the target market is performing competitively. Likewise, there would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive." *United States* v. *Marine Bancorporation, Inc.*, 42 U.S.L.W. 5210, 5218 (U.S. June 26, 1974).

There are two kinds of potential competition which an acquisition may foreclose. An acquisition may eliminate the procompetitive influence that a firm which is positioned on the edge of a market, threatening to come in, exerts upon the behavior of the companies within the market. Secondly, an acquisition may eliminate the likelihood of a procompetitive entry into a market by an actual potential competitor, *i.e.*, a firm that, were it not for the acquisition, would likely have entered the market either *de novo* or by a toehold acquisition.

A party to an acquisition may be both a perceived potential entrant and an actual potential entrant. In such an instance, the acquisition would foreclose both types of potential competition. The elimination of either type of potential competition by itself renders an acquisition illegal under Section 7. *E.g., United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1235 (C.D. Cal., 1973), *aff'd without opinion*, 42 U.S.L.W. 3710 (July 8, 1974); *United States* v. *Falstaff Brewing Corp., supra*, at 538 (Douglas, J., concurring). An acquisition which eliminates a company that is both a perceived and an actual potential entrant "renders the anticompetitive consequences of the acquisition even greater." *Phillips Petroleum Co., supra.* (367 F. Supp. at 1234).

The procompetitive influence exerted by a perceived potential entrant has been succinctly stated by the Supreme Court in *United States* v. *Penn-Olin Chemical Co., supra* at 174:

> The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be substantial incentive to competition which cannot be underestimated.

The potential entry effect of an actual potential entrant arises from the likelihood of actual market entry by the potential competitor at some time in the future and set the stage for noticeable deconcentration. The merger deprives the market of the procompetitive effect of an increase in the number of competitors. *United States* v. *Ford Motor Co., supra* at 587 (Burger, C.J., concurring).

BOC argues that the record in this proceeding is filled with references to price wars and severe competition, with evidence of declining prices, product surpluses, and low profitability. Hence, the doctrine of potential competition does not apply to this case (BOC PF 190). The administrative law judge had concluded just the opposite, that the market is highly concentrated, entry barriers are high, prices have firmed substantially, product shortages exist, and that, in fact, there is evidence the major companies stay out of each other's way (Findings 49-76). Thus, the doctrine of potential competition is highly applicable to this proceeding.

E. The Acquisition of Airco Eliminated BOC as a Significant Perceived Potential Entrant

Prior to BOC's stock acquisition in Airco, BOC was perceived by companies within the industrial gases market in the United States as waiting on the edge of the market for the right opportunity to enter. Members of the U.S. industrial gases industry not only recognized BOC as one of the few firms possessing the necessary resources, technical knowledge and expertise and marketing capability to enter the U.S. market, but also believed BOC was very likely to enter. Indeed, the two largest U.S. industrial gases firms not only perceived BOC as the firm most capable and most likely to enter the industrial gases market in the United States, but both Linde and Air Products anticipated BOC would enter the U.S. industrial gases market at some time in the future (Flamm 250-52, 335; Baker 392). Executives of Alabama Oxygen and Burdett of Cleveland anticipated market entry by BOC (Kimerling 876, 878; Loveman 613). Dr. Muller, a consultant in the industrial gases industry in the United States, also anticipated BOC would enter the U.S. market (Muller 682).

Moreover, the belief by firms in the U.S. market that BOC was a likely entrant was well founded. BOC had actively pursued various means of entry into the U.S. industrial gases market since at least 1968, and had participated in the U.S. market with Airco in a joint venture selling industrial gases plants. BOC was known to have the resources, technical knowhow, and marketing expertise to enter the market. BOC was recognized as being an international company with 50 percent of its profits coming "off-shore the United Kingdom" (Flamm 238). BOC had entered the industrial gases market in numerous countries since 1956, most recently Brazil (Finding of Fact 85). The United States industrial gases market is the largest and most technically advanced market in the world, and in 1973, the market was very bouyant (Findings of Fact

86-87, 49-51). The attractions of the United States market to an international company was very much appreciated by U.S. industrial gases companies (Flamm 255). Further, BOC was the most likely potential entrant into the U.S. industrial gases market (Findings of Fact 80-83).

In sum, based on BOC's history of being an international company and having entered numerous industrial gases markets around the world, and possessing the resources, technical ability, marketing knowhow and the motivation and incentives to enter the U.S. market, having made numerous contacts beginning in 1968, with U.S. firms concerning possible acquisition or market entry, having participated in the joint venture with Airco and being located in the adjacent Canadian market, considering the bouyant nature of the U.S. industrial gases market as of 1973, and the testimony of industry executives that they believed BOC to be the most likely entrant into the market, it must be concluded that BOC was a perceived potential entrant into the U.S. industrial gases market.

F. BOC Exerted Beneficial Influence on Competitive Conditions in the United States Industrial Gases Market

The Supreme Court in *Falstaff Brewing Corp., supra,* made it clear that an acquisition which eliminates a perceived potential entrant violates Section 7 if the potential competitor was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market (410 U.S. at 532-33).

In a lengthy footnote to the majority opinion in *Falstaff,* the Supreme Court spelled out the nature of evidence to be considered in weighing the effects of the elimination of a perceived potential entrant:

> The Government did not produce direct evidence of how members of the New England market reacted to potential competition from Falstaff, but circumstantial evidence is the lifeblood of antitrust law, * * * (citations omitted) especially for §7 which is concerned "with probabilities, not certainties," *Brown Shoe Co.* v. *United States,* 370 U.S. at 323. As was stated in *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 174 (1964), "[p]otential competition cannot be put to a subjective test. It is not susceptible of a ready and precise answer."
>
> Nor was there any lack of circumstantial evidence of Falstaff's on-the-fringe competitive impact. As the record shows, Falstaff was in the relevant line of commerce, was admittedly interested in entering the Northeast, and had among other ways * * * made its interest known by prior-acquisition discussions. Moreover, there were * * * objective economic facts as to Falstaff's capability to enter the New England market; and the same facts * * * would be probative of violation of §7 through loss of a procompetitive on-the-fringe influence. (410 U.S. at 534-35 n. 13).

The approach suggested by the Supreme Court in *Falstaff* was followed by the District Court in assessing the competitive impact of the acquisition by Phillips Petroleum Company of the Western Manufacturing and Marketing Division of Tidewater Oil Company in *United States* v. *Phillips Petroleum Co., supra*. On the basis of objective evidence, the District Court held that the acquisition was illegal under Section 7. Just recently, the District Court's decision was unanimously affirmed without opinion by the Supreme Court. 42 U.S.L.W. 3710 (U.S. July 8, 1974).

The District Court concluded that Phillips' elimination as both a perceived and actual potential entrant had substantial anticompetitive effects within the meaning of Section 7, on the basis of the following standard of proof:

> [W]here credible objective evidence shows the basic economic facts of the acquiring company's overall size, resources, capability, and motivation with respect to entry into an adjacent attractive market involving a line of commerce in which the firm is already heavily engaged, that firm must be considered to be a significant potential entrant unless it is objectively demonstrated that some unique feature of the market precludes such entry. Moreover, where the market is concentrated and there are few such likely entrants, whether due to the existence of high barriers to entry or for other reasons, no further inquiry is required as to the anticompetitive effect of the acquisition, and that effect must be considered to be substantial within the meaning of §7. (367 F. Supp. at 1239).

BOC argues that the Supreme Court's recent decision in *United States* v. *Marine Bancorporation*, 42 U.S.L.W. 5210, 5216 (June 26, 1974), requires proof that firms in the industry *in fact* guided their conduct in light of the perceived entrant's presence on the market fringes (BOC PF 168). Industry officials in the present proceeding testified that they had not made any business decisions based on the perceived potential entry of BOC into the U.S. industrial gases market (Finding of Fact 81). Mr. Flamm of Linde testified that such factors were "a degree of sophistication that did not enter our considerations." (Flamm 336).

Voluminous economic evidence in this record demonstrates that BOC's position on the fringe of the U.S. industrial gases market exerted a procompetitive influence on the market. This economic evidence satisfies any burden which may have been set forth in *Marine Bancorporation* since Section 7 deals with probabilities, not certainties. *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 577 (1967). The industrial gases market is highly concentrated with only three national "bulk" producers.[8] Barriers to entry are extremely high. BOC was the most likely potential entrant into the market with few, if any, other potential entrants. BOC's financial strength and experience in entering industrial gases markets throughout the world indicated BOC's capability of entering the U.S. industrial gases market on a unilateral basis. BOC had the economic incentives to enter the U.S. market, and in 1973, the market was ripe for entry. BOC had been actively exploring methods of market entry since 1968. Further, there are no unique features of the U.S. industrial gases market which would preclude entry by BOC. Thus, it must be inferred that BOC's position as a perceived potential entrant had a procompetitive effect on the U.S. industrial gases market.

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[8] Industry members do consider existing competitors in their marketing discussions, particularly the big three bulk producers (Flamm 305, 350).

G. The Acquisition of Airco Eliminated BOC as an Actual Potential Entrant

The elimination through merger of an actual potential entrant can be unlawful "[A]lthough its competitive conduct in the market may be the mirror image of that of the acquired company" since the entry eliminates a potential competitor exercising present influence on the market, *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 532 (1973); it also eliminates the possibility of eventual market deconcentration. *United States* v. *Ford Motor Company*, 286 F. Supp. 407 (E.D. Mich. 1968), aff'd, 405 U.S. 562, 587 (1972) (Burger, C. J., concurring in part).

Strong objective evidence of record indicates that BOC would have eventually entered the U.S. industrial gases market either *de novo* or through toehold acquisition. BOC had a "long-term objective" of expanding its international operations and BOC's chairman admitted the Airco acquisition was in furtherance of this objective. The U.S. market is the world's largest industrial gases market and the most technically advanced. BOC needed to be "in tune" with this technology (Smith 1788). BOC could not be truly "multi-international" without operating in the North American market (Smith 1731). BOC needed to be in competition with its American-based competitors "on their home grounds" to survive internationally (CX 38C; see Findings of Fact 84-87).

BOC continuously investigated methods of entry into the U.S. market from 1968 through 1973, including hiring a consultant who was a specialist in industrial gases, making an extensive investigation of the industrial gases market in 1969-1970, and holding acquisition discussions with several small industrial gases companies, including commencing a study of possible acquisition of Airco in June 1973 (Findings of Fact 90-101). BOC had the financial resources, technical knowhow and marketing ability, and the economic incentives and motivation to enter the market. Further, there were no barriers to such entry by BOC.

BOC argues that testimony by BOC officials and BOC contemporaneous documents prove conclusively BOC would not have entered the U.S. industrial gases market except for the Airco acquisition. The testimony by BOC officials, however, must be viewed in the light of other testimony given in this proceeding, and in light of other evidence of record. The BOC officials admitted there were strong economic incentives for BOC to enter the U.S. industrial gases market (Findings of Fact 103-107), and they authorized extensive acquisition discussions with several U.S. industrial gases firms. Thus, self-serving testimony that BOC would never enter the U.S. market *de novo* or by toehold acquisition can be given little weight.

BOC stresses two contemporaneous documents, (1) the Perham-Greenfield report of the BOC 1969-1970 investigation of the industrial gases industry, and (2) an internal budget and forecast for the development of business through 1973 (Finding of Fact 108).

The Perham-Greenfield report does not represent a BOC decision not to enter the U.S. industrial gases market. It was a report to the BOC managers on the U.S. market as of early 1970, and it was negative on entry by BOC at that time. However, the report recommended that BOC continue to look for future opportunities in the U.S. market (Finding of Fact 95).

The July 1970 BOC budget and forecast did not authorize any funds for entering the U.S. industrial gases market through 1973. However, Peter Laister, a director of BOC, testified that funds for acquisitions are left out of planning documents when it is uncertain what acquisitions will occur in the future (Finding of Fact 109). Mr. Laister also stated that in any large business you obviously cannot read the future a few years out.

There is no other documentation in the record to establish that BOC made a business decision not to enter the U.S. industrial gases market. If such a decision had been reached, it is inconceivable that BOC would have authorized several extensive merger discussions with U.S. firms after receipt of the Perham-Greenfield report. Further, the $80 million needed for the Airco transaction did not appear in any planning documents. Thus, this subjective evidence of BOC's state of mind is not persuasive.

The subjective evidence discussed above does not overcome the strong objective evidence of BOC's likely entry into the U.S. industrial gases market. It is well settled that subjective evidence of management's intent is entitled to little weight in determining whether a company is an actual potential entrant. The Supreme Court expressly rejected reliance on such subjective evidence in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). After a full review of objective evidence in that case showing the capability and incentives of joint venturers to enter a market independently, the Court held (at p. 174):

> Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do.

In his concurring opinion in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 545 (1973), Justice Marshall elaborated reasons for giving subjective evidence limited consideration in actual potential entry cases (at pp. 567-569):

> The reasons for so limiting the role of subjective evidence are not difficult to discern. Such evidence should obviously be given no weight if it is not credible. But it is in the very nature of such evidence that in the usual case it is not worthy of credit. First, any statement of future intent will be inherently self-serving. A defendant in a §7 case such as this wishes to enter the market by acquisition and its managers know that its ability to do so depends upon whether it can convince a court that it would not have entered *de novo* if entry by acquisition were prevented. It is thus strongly in management's interest to represent that it has no intention of entering *de novo*—a representation which is not subject to external verification and which is so speculative in nature that it could virtually never serve as the predicate for a perjury charge.

* * * * * * *

> Thus, in most cases, subjective statements contrary to the objective evidence simply should not be believed. But even if the threshold credibility gap is breached, it still does not follow that subjective statements of future intent should outweigh strong objective evidence to the contrary. Even if it is true that management has no present intent of entering the market *de novo*, the possibility remains that it may change its mind as the objective factors favoring such entry are more clearly perceived.

BOC also argues that it is incumbent upon complaint counsel to show that *de novo* or toehold entry was economically feasible and attractive. BOC stresses that there was no evidence at all to the effect that such a course of action would have been reasonably likely to yield even a modest profit (BOC PF*177).

Moreover, it is argued that after BOC offered testimony that *de novo* entry designed to produce a viable national competitor would have cost almost $250 million, taken at least 10 years to show a profit, and would not have been a prudent business decision, complaint counsel offered no rebuttal (BOC PF*178). BOC also points out that there was no evidence offered as to the asking prices or the profitability of small industrial gases companies which were available for acquisition.

BOC would impose an impossible burden on a trial record. It would be nearly impossible to determine reasonableness of asking prices of firms in the industry, and literally impossible to establish at what point in time *de novo* entry would produce a viable national competitor and return a "modest profit." It may have been easier and more immediately profitable for BOC to enter the U.S. industrial gases market purchasing a large existing market share than it would be for BOC to have to engage in the competitive struggle necessary to win a significant market share by *de novo* or toehold entry. "But the test in Section 7 cases is not whether anticompetitive conduct is profit maximizing. The very purpose of Section 7 is to direct the profit incentive into channels which are procompetitive." *Falstaff Brewing Corp., supra* (Marshall, J., concurring), at p. 572.

There is, moreover, substantial evidence of record showing that *de novo* entry or toehold acquisition would have been both feasible and attractive to BOC. The record is manifestly clear that BOC had the resources, technical knowhow and marketing experience to enter the U.S. industrial gases market *de novo* or by toehold acquisition. BOC found it economically feasible and attractive to enter *de novo* and by toehold acquisitions industrial gases markets in 19 different countries throughout the world. BOC found it economically feasible and attractive to recently enter the industrial gases market in Brazil *de novo* by building a small plant. The Brazilian and the U.S. industrial gases markets have comparable growth rates (Baker 2732).

Air Products' successful *de novo* entry into the industrial gases market in Great Britain in 1957 also demonstrates by analogy the feasibility and attractiveness of entry by BOC on a small scale into the U.S. industrial gases market. In 1957, Air Products was a small company and its entry into Great Britain was its first overseas penetration. It did not have the resources and world wide marketing experience that BOC had at the time of BOC's stock acquisition in Airco. Air Products began its operations in Great Britain by building very small plants and it had to compete with BOC, whose market share was in excess of 95 percent. Despite its meager beginning, Air Products was able subsequently to obtain a 25 percent share of the Great Britain industrial gases market (Baker 2738). Further, Air Products found it attractive to recently enter the Canadian market where it markets products from its U.S. gases plants, pays a 10 percent tariff, and has at the present less than 1 percent of the market (Baker 396-99, 2713-15).

Further convincing evidence of the feasibility and attractiveness of entering the U.S. industrial gases market by toehold acquisition is the successful entry by Liquid Air in 1968 through acquisition of American Cryogenics, a small company that was losing $4 million a year at the time of its acquisition. Liquid Air was able to turn American Cryogenics into a profitable operation. Furthermore, market conditions in 1968 were not as advantageous for entry into the market as conditions in recent years. Liquid Air has also been able to extend its initial penetration into the U.S. market through acquisition of other toehold firms and by internal expansion (CX 345H, *in camera;* Dempster 511, 518-19, 528-530, 552).

The record also establishes that had BOC not acquired a stock interest in Airco, it would have been an opportune time for BOC to enter the U.S. industrial gases market *de novo* by competing for tonnage supply schemes for industrial gases. BOC had already established itself in the United States market as a supplier of air separation plants through its joint venture with Airco which designed and sold air separation plants in the United States from 1967 through 1971. In recent years the demand for industrial gases in tonnage quantities has been increasing faster than the capacity of the U.S. industry to construct plants, and BOC could successfully compete in the United States for tonnage accounts (Baker 2734-35). Tonnage accounts are profitable (Baker 2741).

The prevailing market conditions of increased demand and shortage of production capacity also would make it an opportune time for BOC had it not acquired stock in Airco to enter the U.S. industrial gases market by acquisition and expansion of a toehold firm. The evidence of record clearly shows that entry into the U.S. industrial gases market by toehold acquisition was available to BOC. At the time BOC acquired the stock of Airco, there were a number of attractive small U.S. industrial gases producers available for acquisition, including Burdett of Norristown, Northern Gases, and Alabama Oxygen (Heckel 736; Perkins 788; Kimerling 876; Baker 2750, 2781). Further, Burdett of Cleveland, which BOC denigrates, was the subject of several BOC acquisition discussions, and in the fall of 1973, before the Airco acquisition, BOC was *still* interested in acquiring Burdett (Loveman 591-92). Thus, entry by toehold acquisition was available to BOC. (See the Commission's decision in *Kennecott Copper Corp.*, 78 F.T.C. 744, 927 (1971), *aff'd*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 94 S.Ct. 1617 (1974), where the existence of toehold firms in the market was stated to be sufficient to show the availability of entry by toehold acquisition.)

Executives of two of the largest industrial gases firms in the United States testified that BOC could enter the U.S. industrial gases market by a toehold acquisition, by building a tonnage plant, by building a tonnage plant with incremental capacity to serve the merchant market, or by any combination thereof (Flamm 260; Baker 393-94, 2734-2735). Early 1974 would have been an opportune time to enter the U.S. industrial gases market (Baker 2735).

Thus, it is concluded that *de novo* or grass roots entry into the U.S. industrial gases market was feasible and economically attractive to BOC. It is further concluded that there were toehold firms that could have been acquired by BOC on a practical basis. It is also concluded that, as of December 1973, BOC was an actual potential entrant into the U.S. industrial gases market either *de novo* or by toehold acquisition; its entry would have increased the number of effective competitors in the market. BOC was committed to becoming a viable national firm with at least 5 percent of the market. Thus, BOC would have been compelled to seek its place in the market at the expense of the established firms, and this effort by BOC would have resulted in a procompetitive effect in the marketplace.

Further, the substantiality of the anticompetitive effect resulting from the elimination of an actual potential entrant may be inferred from the objective facts as are present in this case. Objective evidence establishes that BOC was an actual potential entrant, that the market is highly concentrated, and that there are high barriers to entry and few, if any, other likely entrants. Thus, no further inquiry is required into the anticompetitive effects of the acquisition and the effect must be considered substantial within the meaning of Section 7. *United States* v. *Phillips Petroleum Company*, 367 F. Supp. 1226, 1239 (C.D. Cal. 1973); see *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 532 (1973).[9]

H. Acquisition of Airco by BOC Increased Entry Barriers in the U.S. Industrial Gases Market

Airco, one of the dominant firms in the U.S. industrial gases market was acquired by BOC, a company with substantial resources and technical and marketing skills and apparently the second largest industrial gases company in the world. It must be concluded that such an acquisition increased concentration in the market and substantially increased what were already exceeding high entry barriers.

I. Airco Is Not A Toehold

Airco clearly does not meet the criteria for a toehold firm as its assets and market position enabled BOC instantly to achieve a dominant, national position in the U.S. industrial gases market without any expansion effort. BOC's chairman testified that BOC would need over five percent of the national market to be a viable competitor

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[9] Even if BOC's conduct in the marketplace is the "mirror image" of that of Airco (*see United States* v. *Falstaff Brewing Corp.*, 410 U.S. at 532 (1973)), it appears that Section 7 is nevertheless violated. The Court, in *Falstaff*, stated that it would "leave for another day" the question of the applicability of Section 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped. (*Id.* at 537.) However, as observed by Justice Marshall, Section 7 prohibits an entry by acquisition [other than toehold] since such an acquisition eliminates the possibility of *future* actual competition. (*Id.*, Marshall, J., concurring, at 561.) Thus, even if *de novo* or toehold entry by BOC did not have immediate procompetitive effects, there is the possibility that such entry would have such effects at some time in the future. This is sufficient to establish a violation of Section 7, which looks to possibilities—not certainties, and looks to the future as well as the present.

(Smith 1837). Airco's share of the U.S. industrial gases market substantially exceeds that percentage.

The District Court in *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1258 (C.D. Cal. 1973), defines a toehold acquisition as:

> * * * one which is sufficient to assist the potential entrant over the entry barriers and into the market, but not so large that the entrant merely replaces the acquired company; the acquiring company must have a substantial need to build upon the acquisition. Such a foothold acquisition is fully consistent with the concept of unilateral entry, since both envision a significant market penetration effort by the entering company quite apart from whatever assets or market position have been acquired.

Under the above definition, with which the administrative law judge is in accord, Airco clearly is not a toehold acquisition.

II. *Inhalation Anesthetic Equipment*

A. Inhalation Anesthetic Equipment Comprises a Line of Commerce

Inhalation anesthetic equipment and accessories fall within the criteria for defining product markets set forth by the Supreme Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962):

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. * * * The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

The Court further emphasized that:

> * * * it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. (*Ibid.*)

It is now well established that it is not necessary for each of the seven criteria set forth in *Brown Shoe* to be present in every merger case in order to establish a market; a relevant market has been found to exist where less than all of the *Brown Shoe* criteria were present. *United States* v. *E. I. duPont de Nemours* [*Co.*, 353 U.S. 586, 593-95 (1957); *General Foods Corp.* v. F.T.C., 386 F.2d 936, 941 (3rd Cir. 1967); *Reynolds Metals Co.* v. *F.T.C.* 309 F.2d 223, 227 (D.C. Cir. 1962).

Applying the *Brown Shoe* criteria, it is clearly established that inhalation anesthetic equipment and accessories are a separate and distinct market. The medical profession, as well as firms in the industry, recognize inhalation anesthetic equipment and accessories as constituting a separate market. Inhalation anesthetic equipment and accessories have peculiar characteristics and uses, i.e., supplying anesthetic vapors to patients during surgical procedures. Production facilities for inhalation anesthetic equipment and accessories are unique, owing to the unique nature of the technology of supplying gases for anesthesia. Customers buying or using inhalation anesthetic equipment and accessories are distinct from those buying or using medical products generally. Inhalation anesthetic equipment and accessories are priced markedly higher than comparable equipment used in other medical applications.[10]

BOC respondents point out that there is a profusion of products in the IAE market and that individual IAE products are not interchangeable (BOC PF 311). On that basis, BOC argues that IAE products are not a relevant product market. However, the principal product in IAE, the anesthesia machine, consists of nearly every product in the IAE market. The remaining items in the IAE market are necessary in order for the patient to effectively receive the anesthetic vapors. Additionally, there is a degree of interchangeability among surgical, veterinary and dental anesthesia machines. These products have the common denominator of all being used by the anesthesiologist to administer anesthesia. The surgical, veterinary and dental anesthesia machines utilize common technology to perform the identical purpose of inducing anesthesia in surgical procedures.

B. IAE Geographic Market

Manufacturers of inhalation anesthetic equipment and accessories generally market their products throughout the United States. Airco markets inhalation anesthetic equipment and accessories throughout the United States, as does BOC's subsidiaries, Fraser Sweatman and Harris Lake. The acquisition will thus have a direct and immediate effect upon competition in the IAE market throughout the United States.

Accordingly, the United States as a whole is the relevant geographic market in which to appraise the effects of BOC's acquisition of Airco stock upon competition in inhalation anesthetic equipment and accessories. *United States* v. *Marine Bancorporation, Inc.*, 42 U.S.L.W. 5210, 5215 (U.S. June 26, 1974); *United States* v. *Pabst Brewing Co.*, 384

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[10] Inhalation anesthetic equipment and accessories must be semi-conducive to avoid danger of explosion. This pushes the cost of such items substantially above that of otherwise comparable or even identical items used in the practice of inhalation therapy. This price differential is further enhanced by the greater precision needed in equipment for the administration of potentially lethal anesthetic agents than that for the administration of gases for therapeutic purposes (Hedley-Whyte 1278).

U.S. 546, 549 (1966). Respondents do not dispute the geographic market.

C. Market Concentration

The record establishes that the IAE market is highly concentrated. Airco is the dominant firm in the IAE market; the consortium of BOC and its subsidiaries, Fraser Sweatman and Harris Lake, constitute a substantial part of the market. The record reveals that in the manufacture and sale of the anesthesia machine, three companies completely dominate the market—Airco, Foregger and BOC.

The record also reveals that barriers to entry are high, *i.e.*, technological expertise in manufacturing and marketing; the need for sales and service organization; high capital costs; brand loyalty; and the entrenchment of the leading companies in the marketplace. An already highly concentrated market with high entry barriers obviates any need to show a trend in concentration. *Stanley Works*, 78 F.T.C. 1023, 1065 (1971), *aff'd*, 469 F.2d 498, 503-504 (2nd Cir. 1972), *cert. denied*, 412 U.S. 928 (1973).

D. Competitive Effects

No difficult or novel issue is involved in appraising the effect of BOC's acquisition of Airco stock in the IAE market in the United States. The facts disclose a clear violation of Section 7. The Supreme Court has repeatedly struck down mergers between actual competitors with considerably smaller market shares than those of Airco and BOC. In *Brown Shoe, supra*, the Court determined that a merger resulting in a combined market share of 5% would be illegal. 370 U.S. at 343-44. Similarly, acquisition of the ninth-ranked firm, with 1.3 percent of the aluminum conductor market by the market leader, with 27.8 percent of the market, was struck down by the Court in *United States* v. *Aluminum Co. of America* (Alcoa-Rome), 377 U.S. 271 (1964), as was a merger between the sixth- and seventh-ranked firms with 5.84 and 5.48 percent, respectively, of the three-state beer market in *Pabst, supra*. The Court in *Pabst* also found the merger unlawfully anticompetitive in the national beer market where the two firms ranked tenth and eighteenth and had a combined market share of 4.49 percent of total U.S. beer sales. With a combined market share of 8.9 percent, a merger between the third-ranking firm with 4.7 percent and the sixth-ranking firm with 4.2 percent of the market was likewise invalidated by the Court in *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966).

In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363

(1963), the Supreme Court set forth the test for judging horizontal acquisitions between significant competitors:

> Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Concentration in the inhalation anesthetic equipment market is very high. The market shares of the top four firms in 1972 totaled 64.5 percent, and the top eight firms had 87.9 percent of the total market. Where "concentration is already great," the Supreme Court has observed, "the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Philadelphia National Bank*, *supra*, 374 U.S. at 365, n.42; *Alcoa*, *supra*, 377 U.S. at 279; *United States* v. *Continental Can*, 378 U.S. 441, 461-62 (1964).

Although it is not necessary to show the further likelihood of anticompetitive effects of the acquisition, such effects clearly present themselves in this market. While no firm in the IAE market has been able to approach Airco's market dominance, BOC has shown itself to be a formidable factor in the market. Instead of expanding its market share, with the possibility of market deconcentration, BOC joined forces with Airco to increase substantially Airco's market dominance. Thus, the merger of Airco and BOC increased concentration, heightened entry barriers, and more firmly entrenched Airco in the IAE market.

III. *Inhalation Therapy Equipment*

A. Inhalation Therapy Equipment Comprises a Line of Commerce

The product market criteria set forth in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), discussed hereinbefore in connection with the IAE market, establishes ITE as a relevant product market within which the effects of BOC's acquisition of Airco stock under Section 7 may be considered. ITE is recognized by the medical profession and by the firms in the industry as constituting a separate entity. ITE has peculiar characteristics and uses. Customer users and purchasers of ITE are distinct and the price of ITE is distinct from the prices of IAE (*see infra*, p. 105).

ITE is comprised of the equipment and accessories used in the administration of gases for therapeutic purposes. There is also a distinct group of medical paraprofessionals referred to as "inhalation therapists" and recently as "respiratory therapists" who specialize in inhalation therapy (Hedley-Whyte 1210-11; Karpick 1396). Although the duties of these professionals has in recent years expanded to include other aspects of respiratory care, they primarily are responsible for the administration of gases for therapeutic purposes, *i.e.*, inhalation therapy (Karpick 1393, 1396). Inhalation therapists are further differentiated from other medical personnel by virtue of their specialized training. They are certified and registered as respiratory therapists. Further, respiratory therapists have their own professional organization and medical journal (Hedley-Whyte 1210-1211; Karpick 1395). Inhalation therapy is recognized by the medical profession as a subsection of the broad field now referred to as respiratory therapy.

ITE equipment has a specialized production technology and requires specialized vendors to successfully market the products. ITE is distinct from IAE, and is separate from other respiratory therapy equipment such as suction equipment and monitoring equipment. ITE meets the criteria set forth in *Brown Shoe, supra*, 370 U.S. at 325, sufficiently to constitute a submarket for Section 7 purposes.

B. Geographic Market

The acquired firm, Airco, markets inhalation therapy equipment and accessories nationwide, as do its competitors, including BOC's subsidiary. The acquisition's effect will be felt directly and immediately in the ITE market throughout the United States. The United States as a whole is, therefore, the relevant geographic market in which to appraise the effects of BOC's acquisition of Airco stock upon competition in inhalation therapy equipment and accessories. *United States* v. *Marine Bancorporation, Inc.*, 42 U.S.L.W. 5210, 5215 (U.S. June 26, 1974); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). Respondents do not dispute the geographic market.

C. Market Concentration

The ITE market is concentrated, although not as concentrated as the IAE market. Further, in the ITE market Airco is not the dominant firm that it is in the IAE market. The sales of ITE by BOC and its subsidiaries are not very substantial (Table II, *in camera*). It is doubtful that the complaint in this matter would have been brought based on the market shares in the ITE market alone. However, other more substantial markets are involved in this proceeding [industrial gases and IAE]; and other significant factors are involved in the sale of ITE, such as the formidable position of BOC in the medical markets throughout the world, and BOC's intention to and capability of unilaterally expanding ITE sales in the United States.

D. Competitive Effects

Although the inhalation therapy equipment and accessories market is composed of many companies, the bulk of the sales in the market are concentrated in the hands of a few firms. Airco is a substantial factor in the ITE market and BOC's subsidiary, Harris Lake, backed by BOC, had established itself as a significant competitor.

Substantial barriers to entry and expansion limit the potential for growth of small firms in the rapidly growing inhalation therapy equipment and accessories market. Backed by BOC's vast capital, technological and marketing skills, BOC's operations not only had the ability to expand in this market, but were already doing so. Thus BOC's subsidiary, Harris Lake, though small, was a significant and closely watched competitor. BOC had carefully devised its strategy for growth when it entered the U.S. market. Through internal expansion, acquisition of other small competitors, or a combination of both approaches, BOC intended to become a significant firm in the U.S. inhalation therapy equipment and accessories market.

The fact that BOC had taken steps to accomplish its expansion goals made BOC a highly significant factor in the market. There can be little doubt that within a short span of time, BOC would have significantly increased its share of the ITE market. As a firm with immense resources and capabilities, already in the market, BOC exerted a significant restraining influence on the market leaders beyond its small market share, and was a strong force for competition.

Section 7 dictates that a small, significant competitor such as BOC, with its capability, interest, and incentives to expand, must be compelled to pursue internal development in lieu of an acquisition inimical to competition. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370 (1963); *United States* v. *Standard Oil Company* (New Jersey), 253 F. Supp. 196, 227 (D.N.J. 1966).

As recognized by the Second Circuit in *Stanley Works, supra*, at 508:

> [t]he continued independence of companies with relatively small market shares is * * * crucial to the health and vitality of a market threatening to become oligopolistic.

The legal principle set forth in *Stanley Works* is well established. The Supreme Court earlier noted that "the basic premise of * * * [Section 7 is] that competition will be most vital 'when there are many sellers, none of which has any significant market share.' *United States* v. *Philadelphia National Bank*, 274 U.S., at 363." *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280 (1964).

In *Alcoa*, only a dozen companies could claim market shares as large as one percent. This fact was specifically noted by the Supreme Court in finding the acquired firm, ranked ninth, with a 1.3 percent market share, a significant competitor. *Alcoa, supra,* at 281. In *Stanley*, ten firms had market shares as great as one percent and Stanley was ranked tenth. Similarly, outside the central core of dominant firms, of which Airco is a member, the inhalation therapy equipment and accessories market is composed of small competitors.

Section 7 "look[s] not merely to the actual present effect of a merger but instead to its effect upon future competition." *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 277 (1966). Elimination of competition between Airco and BOC in the ITE market has eliminated the probability of substantial future competition between the two firms, and has significantly increased entry barriers by combining BOC's tremendous resources and experience with Airco's existing market strength.

IV. *The Acquisition of Airco Stock by BOC Is a Violation of Section Five of the Federal Trade Commission Act*

An acquisition that violates Section 7 of the Clayton Act, as amended, also violates Section 5 of the Federal Trade Commission Act. *E.g.*, *Stanley Works* v. *F.T.C.*, 469 F.2d 498, 499 n.2 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973).

In the present case, BOC's acquisition of Airco stock violates Section 7 in several respects. The acquisition eliminated BOC both as a perceived potential entrant and as an actual potential entrant into the industrial gases industry in the United States. It also eliminated actual competition between BOC and Airco in the inhalation anesthetic equipment and accessories market and in the inhalation therapy equipment and accessories market. Therefore, the BOC acquisition also violated Section 5 of the Federal Trade Commission Act. Accordingly, BOC respondents, as charged in the complaint, violated both Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

Section 5 of the Federal Trade Commission Act also applies in the present case to Airco. The Commission has ruled that "* * * Section 5 is the proper statute under which to charge an acquired corporation where the acquisition substantially lessens competition." *Dean Foods Co.*, 70 F.T.C. 1146, 1291 (1966). In *Dean Foods*, the Commission held that the acquired firm, Bowman Dairy Corporation, violated Section 5 by entering into a purchase contract for the sale of its assets to Dean Foods (70 F.T.C. at 1292).

Although Airco did not enter into an agreement to sell its assets to BOC, the record clearly shows that Airco was instrumental in BOC's acquisition of Airco's stock. First, Airco actively sought out BOC and provided confidential information with respect to its business operations to BOC. Airco and BOC entered into an agreement on July 25, 1973, which provided for an exchange of confidential information between the two companies and also prohibited either company from making a tender offer for the other company's shares for a period of five years without the approval of the other company's board of directors (Finding of Fact 25).

On Dec. 10, 1973, Airco and BOC entered into another agreement in which Airco consented to BOC's tender offer for Airco shares. This agreement also provided for reciprocal representation by BOC and Airco on each other's board of directors. Further, the agreement gave Airco the right to purchase or designate a purchaser for any of the Airco shares acquired by BOC which BOC may subsequently sell (Finding of Fact 30).

Further, Airco actively assisted BOC in making its tender offer. Airco not only made its list of shareholders available to BOC, it also had Airco's transfer agent mail BOC's offer to Airco shareholders (Finding of Fact 30).

Airco's role in the acquisition of Airco stock by BOC was a significant part of the overall transaction. Airco actively opposed the Curtiss-Wright proposal and supported the BOC proposal. Accordingly, respondent Airco, as charged in the complaint, violated Section 5 of the Federal Trade Commission Act by taking affirmative actions which resulted in an acquisition prohibited by Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

Moreover, it is proper to join Airco as a party respondent to this case since the relief to be entered may affect the rights and interests of Airco. Accordingly, Airco was a proper party to this action. *See, e.g., United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1261-62 (C.D. Cal. 1973), *aff'd mem.*, 42 U.S.L.W. 3710 (July 8, 1974), and the cases cited therein.

V. *Form of Relief*

BOC respondents have consented to the jurisdiction of the Commission (Finding of Fact 12), and the Commission has jurisdiction over Airco (Finding of Fact 20). Thus, the Commission has authority to enter whatever remedy may be necessary to restore competition to the status that existed prior to December 1973, and to take steps to assure that the law will not be violated in the future.

It is well settled that the choice of the remedial order is committed to the discretion of the Commission. *F.T.C.* v. *Mandel Bros.*, 359 U.S. 385, 392-93 (1959); *L. G. Balfour Co.* v. *F.T.C.*, 442 F.2d 1 (7th Cir. 1971).

Generally, the most appropriate remedy to redress a Section 7 violation is divestiture. *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 (1972); *F.T.C.* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967).

In the present case, effective relief can only be achieved by complete divestiture of Airco's stock by BOC, removal of BOC representatives from Airco's board and removal of Airco representatives from BOC's board. Complete divestiture and removal of BOC and Airco representatives from each other's board of directors will restore BOC as a procompetitive force on the edge of the market and as a likely potential entrant into the United States industrial gases market. The same sanction will also restore BOC as an independent, actual competitor in the inhalation anesthetic equipment and accessories market and in the inhalation therapy equipment and accessories market.

BOC has shown some proclivity toward mergers in the lines of commerce relevant to this proceeding. To insure that the Commission's objective in bringing this proceeding is not circumvented, the Commission should retain jurisdiction over BOC respondents and the authority to approve future acquisitions in the three lines of commerce relevant to this proceeding for a period of ten (10) years. *Abex Corp.* v. *F.T.C.*, 420 F.2d 928, 933 (6th Cir. 1970); *cert. denied*, 400 U.S. 865 (1970); *Seeburg Corp.* v. *F.T.C.*, 425 F.2d 124, 129 (6th Cir. 1970), *cert. denied*, 400 U.S. 866 (1970).

The acquisition involved in this proceeding is 4 million shares of Airco stock. Because of a court injunction issued at the behest of the Commission, intermingling of assets of the two corporations has been prevented. *F.T.C.* v. *British Oxygen Co.*, 1974 CCH Trade Cas. ¶75,003 (D. Del. 1974) [*supra*]. Thus, divestiture will not cause undue difficulty to either BOC or Airco. Further, it is possible to get almost immediate relief since the divestiture involves stock only. The order entered herewith will require BOC to set up an independent Voting Trustee which shall have full independent authority to vote said stock until such time as the trusteed stock shall have been divested pursuant to the provisions of this order. Under this arrangement, the vagaries of the financial markets will not prevent some immediate relief.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of and over the subject matter of this proceeding and of respondents The British Oxygen Company Limited; BOC Financial Corporation; BOC Holdings Limited; and British Oxygen Investments Limited ("BOC respondents"); and respondent Airco, Inc. ("Airco").

2. BOC respondents and Airco were, at all times relevant herein,

corporations engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and in the Federal Trade Commission Act.

3. The appropriate lines of commerce within which to evaluate the competitive effects of the acquisition of Airco stock by BOC are: (a) industrial gases; (b) inhalation anesthetic equipment and accessories; and (c) inhalation therapy equipment and accessories.

4. The proper geographic market within which to determine the competitive effects of BOC's acquisition in the three relevant lines of commerce is the United States, as a whole.

5. The effect of the acquisition of Airco stock by BOC has been, or may be, substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, and in violation of Section 5 of the Federal Trade Commission Act, in the following ways:

(a) Substantial potential competition between BOC and Airco in the production and sale of industrial gases has been eliminated.

(b) BOC has been eliminated as a significant perceived potential entrant into the production and sale of industrial gases in the United States.

(c) BOC has been eliminated as a significant actual potential entrant into the production and sale of industrial gases in the United States.

(d) The already high concentration in the industrial gases market in the United States may be increased.

(e) Already high barriers to entry of new manufacturers into the production and sale of industrial gases may be raised significantly.

(f) Substantial actual competition between BOC and Airco in the manufacture and sale of inhalation anesthetic equipment and accessories has been eliminated.

(g) Concentration in the manufacture and sale of inhalation anesthetic equipment and accessories has been increased.

(h) Airco, through its Ohio Medical Products Division, has been further entrenched in the manufacture and sale of inhalation anesthetic equipment and accessories.

(i) Barriers to entry of new manufacturers into the manufacture and sale of inhalation anesthetic equipment and accessories may be raised significantly.

(j) Actual competition in the manufacture and sale of inhalation therapy equipment and accessories between BOC and Airco has been eliminated.

(k) Concentration in the manufacture and sale of inhalation therapy equipment and accessories has been increased.

(l) Airco, through its Ohio Medical Products Division, has been further entrenched in the manufacture and sale of inhalation therapy equipment and accessories.

(m) Barriers to entry of new manufacturers into the manufacture and sale of inhalation therapy equipment and accessories may be raised significantly.

6. The acquisition of Airco stock by BOC may be substantially to lessen competition, or to tend to create a monopoly, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18), and in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45).

ORDER

For the purpose of this order, BOC shall include all subsidiary or related corporations and all successor corporations of The British Oxygen Company Limited; BOC Financial Corporation; BOC Holdings Limited; and British Oxygen Investments Limited; and Airco shall include all subsidiary or related corporations and all successor corporations of Airco, Inc.

I

It is ordered, That BOC, its officers, directors, agents, representatives and employees, shall within one (1) year from the date this order becomes final, divest itself absolutely and in good faith, subject to the prior approval of the Federal Trade Commission, of all rights, title and interest including without limitation all shares of stock and all assets, properties, rights and privileges, tangible or intangible, including without limitation all plant, equipment, machinery, raw material reserves, inventory, customer lists, trade names, trademarks, good will, and other property of whatever description acquired by BOC as a result of its acquisition of the stock of Airco.

II

It is further ordered, That none of the stock, assets, properties, rights and privileges, tangible or intangible, required to be divested by BOC pursuant to Paragraph I above, shall be divested directly or indirectly to anyone who is, at the time of the divestiture, an officer, director, employee, or agent of, or under the control, direction or influence of BOC, or who owns or controls more than one percent of the capital stock of BOC.

III

It is further ordered, That BOC shall, within sixty (60) days from the date this order becomes final, transfer to an independent voting trustee, subject to the prior approval of the Federal Trade Commission, which shall not be under the direct or indirect control, domination, or influence of BOC, its officers, directors, agents or representatives, all of the stock of Airco presently held by BOC, and BOC shall maintain in existence the voting trust so created, or a successor thereof, until BOC has divested itself of all the stock of Airco in compliance with Paragraphs I and II above.

Said Voting Trustee shall have full independent discretion to vote the trusteed stock and BOC and its officers, directors, agents and representatives may not consult, advise or otherwise participate in any manner except in connection with the sale of the trusteed stock in accordance with the provisions of Paragraphs I and II above, or the appointment of a successor voting trustee.

IV

It is further ordered, That respondent BOC shall cease and desist for a period of ten (10) years from the date this order becomes final from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the normal course of business) of any concern, corporate or noncorporate, engaged at the time of acquisition in any State of the United States in any or all of the business of industrial gases, inhalation anesthetic equipment and accessories, and inhalation therapy equipment and accessories, without the prior approval of the Federal Trade Commission.

The prohibited acquisitions in this paragraph shall include but not be limited to the entering into any arrangement between BOC, and any concern engaged in any or all of the business of industrial gases, inhalation anesthetic equipment and accessories, and inhalation therapy equipment and accessories, or any segment thereof, pursuant to which BOC obtains the market share of any such concern (a) through such concern discontinuing its participation in the industries mentioned in this paragraph, or any segment thereof, under its own trade name or labels and thereafter manufacturing or distributing any of said products under the BOC trade name, or (b) by reasons of such concern discontinuing its participation in the industries mentioned in this paragraph, or any segment thereof, and thereafter transferring to BOC its customer lists, or in any other way making available to BOC access to its customers or its customer accounts.

V

It is further ordered, That BOC notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any change in the corporation which may affect compliance obligations arising out of the order.

VI

It is further ordered, That BOC cease any and all representation on the board of directors of Airco, and cease and desist from taking any steps to nominate, seat, or admit any representatives of Airco to the board of directors of BOC.

VII

It is further ordered, That BOC shall within sixty (60) days from the date this order becomes final, and every sixty (60) days thereafter until BOC has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which BOC intends to comply or has complied with this order. All compliance reports shall include, among other things that are from time to time required, a summary of contacts or negotiations with anyone for the specified stock, assets, properties, rights, and privileges, tangible or intangible, the identity of all such persons, and copies of all written communications to and from such persons.

VIII

It is further ordered, That Airco cease and desist from taking any steps toward achieving union of interest between Airco and BOC, including but not limited to merger, acquisition, consolidation or joint venture in any market referenced herein.

IX

It is further ordered, That Airco cease and desist from taking any steps to implement any provision of the agreements between Airco and BOC of July 25, 1973, and of Dec. 10, 1973.

X

It is further ordered, That Airco cease any and all representation on the board of directors of BOC, and cease and desist from taking any steps to nominate, seat, or admit any representative of BOC to the board of directors of Airco.

XI

It is further ordered, That Airco shall within sixty (60) days from the date this order becomes final, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Airco has complied with this order.

OPINION OF THE COMMISSION

BY ENGMAN, *Commissioner:*

This is an appeal by all respondents from an initial decision by Administrative Law Judge Ernest G. Barnes.

The British Oxygen respondents appeal his ruling that they violated Section 7 of the Clayton Act in acquiring approximately 35 percent of the outstanding shares of common stock in respondent Airco.[1] There appears to be no dispute that 35 percent gives BOC effective control of Airco.

The administrative law judge also found that certain agreements between BOC and Airco relating to the acquisition violated Section 5 of the Federal Trade Commission Act and both BOC and Airco appeal that ruling.

Prior Proceedings

In December 1973, BOC acquired 4 million shares, or 35 percent, of the outstanding common stock of Airco by means of a public tender offer. On Feb. 26, 1974, two months after the acquisition, the Commission issued a complaint charging that BOC's acquisition violated the antitrust laws. On the same day the Commission applied to a United States District Court for a temporary restraining order and a preliminary injunction requiring BOC to maintain Airco as a separate entity and restraining it from, among other things, voting its Airco stock, having BOC personnel serve on the Airco board, increasing or decreasing its holding of Airco stock, and exchanging trade secrets with Airco pending disposition of the Commission's complaint.

On Mar. 8, 1974, the District Court issued a preliminary injunction requiring BOC, among other things, to maintain Airco as a separate company. The court declined to enjoin BOC from voting its Airco shares or having BOC personnel serve on the Airco board. The injunction was conditioned on the Commission expediting its administrative proceeding: *FTC* v. *British Oxygen Co.*, 1974-1 Trade Cases ¶75,003 (D. Del. 1974), *appeal by Airco docketed*, No. 74-1492, 3rd Cir. May 20, 1974 [9 S&D 887].

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[1] Airco also appeals that ruling, joining in the British Oxygen companies' briefs. The British Oxygen respondents are represented by common counsel and will be collectively referred to as BOC. The corporate relationships between the BOC respondents are described in Findings 6-8. Airco is sometimes referred to in the record by its previous name, Air Reduction Company.

During hearings on the complaint which were commenced on May 6, 1974, some 28 witnesses were called and several thousand pages of documentary exhibits were received into the record. On Oct. 18, 1974, the administrative law judge issued his initial decision sustaining the major allegations of the complaint. Motions by all the parties for extensions of time to file appeal briefs were granted by the Commission. Oral argument on the appeals was heard by the Commission on Apr. 30, 1975.

The Respondents

British Oxygen Company is a publicly-held United Kingdom company with its main office in London. A principal part of its business is the production and sale of industrial gases, not only in the British Isles but in some 18 other countries. At the time of the acquisition it was the second largest industrial gases firm in the world. BOC also produces and sells equipment for the manufacture and storage of certain gases at extremely low temperatures (cryogenic equipment), welding and cutting equipment, medical equipment, chemicals, metals, vacuum engineering and some consumer products. In its fiscal year ending Sept. 30, 1973, BOC had total sales of about $766 million, approximately half of which were derived from operations in the United Kingdom and the balance chiefly from countries that were formerly parts of the British empire.

Airco, Incorporated is a publicly-owned New York corporation with its principal office in Montvale, N.J. It manufactures industrial gases and medical products, which account for about 35 percent of total sales. Airco also makes and sells welding and cutting equipment, cryogenic equipment, metals and specialized metal products, medical gases, and high vacuum equipment. It operates gases plants in 22 locations scattered throughout the United States. It is the third largest producer of industrial gases in the United States. Through its Ohio Medical Products Division it also engages in the sale of inhalation anesthetic equipment and inhalation therapy equipment. Its sales of inhalation anesthetic equipment exceed those of any other company in the United States. In 1973 Airco had net sales of $584 million and net income of approximately $19 million.

BOC's Acquisition of an Interest in Airco

BOC acquired its interest in Airco in late December 1973 in the context of a competing tender offer for Airco stock.

During 1973 Airco's stock had been selling at its lowest prices in over five years. In June 1973 BOC learned of rumors of an impending tender offer for Airco stock and the managing director of BOC discussed Airco's vulnerability to such a tender offer with a vice president of Airco. BOC also implemented a study of the possibility of BOC's acquiring Airco by a tender offer.

Later that month, the president of Airco met with the board chairman of BOC and proposed an amalgamation between BOC and Airco. Subsequently, on July 25, 1973, BOC and Airco entered into a written agreement that provided for the exchange of confidential financial information and contained a provision that neither company would make any offer for a period of 5 years to acquire any securities of the other without the prior approval of the other company's board of directors. Meetings exploring an amalgamation between the two companies were held during September and October.

In November 1973, the Curtiss-Wright Corporation suddenly informed Airco that it was prepared to make a tender offer for 2 million Airco shares at $16-17 per share. After consideration of the proposal and a study of the Curtiss-Wright company, the Airco board of directors decided to oppose any such tender offer. On Dec. 3, 1973, Curtiss-Wright made a public tender offer for 2.4 million shares of Airco stock at $18 per share. Airco's board recommended to Airco's shareholders that they not accept it and asked them to wait to consider possible alternatives to that offer.

Shortly thereafter, BOC and Airco entered into an agreement in which Airco consented to BOC making a tender offer for Airco shares. The agreement provided for reciprocal representation by BOC and Airco on each other's board of directors. Additionally, the agreement provided that Airco would have first right to purchase or to designate a purchaser for any Airco shares purchased by BOC should BOC subsequently decide to sell.

On Dec. 10, 1973, BOC made a tender offer to buy up to 4 million shares of Airco stock at $20 per share. Airco's board informed Airco's shareholders that it did not oppose the offer and advised them that a closer association of Airco and BOC would be beneficial.

The BOC tender offer was oversubscribed and the shareholders who tendered to BOC had their tenders pro rated. The cost to BOC of purchasing the 35 percent interest in Airco was $80 million plus $2.8 million in expenses. Subsequently Airco's board of directors was enlarged from 12 to 16 directors to provide for four representatives of BOC.

The Complaint

The Commission's complaint charges that the acquisition may substantially lessen competition in industrial gases, inhalation therapy equipment, and inhalation anesthetic equipment, and submarkets thereof.[2] The case was tried on the theory that BOC's acquisition of controlling interest in Airco substantially lessened potential competition in the U.S. industrial gases industry by eliminating BOC as the most likely potential entrant into that market, and that actual competition between Airco and U.S. subsidiaries of BOC in the inhalation anesthetic equipment and inhalation therapy equipment was eliminated. The ALJ sustained these charges and an additional charge that the July and December agreements between BOC and Airco, paving the way for the BOC tender offer, violated Section 5 of the Federal Trade Commission Act. He issued an order requiring BOC to divest its holdings of Airco stock and Airco to cease and desist from taking any steps to implement any provision of the agreements with BOC.

I. INDUSTRIAL GASES

"Industrial gases" are recognized as consisting of those gases, except for common fuel gases, sold in compressed or liquid (and sometimes solid) form including acetylene, carbon dioxide, carbon monoxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other medical gases, rare gases, and mixtures and combinations thereof. The term "industrial gases industry" is commonly used to refer to a distinct group of manufacturers who produce the principal atmospheric gases (oxygen, nitrogen, argon) and acetylene and who may produce or purchase for resale the other mentioned gases. Sales by industrial gases firms are direct or through distributors to other manufacturers, welders, contractors and other users.

The industrial gases industry has two major marketing segments; tonnage and merchant. "Tonnage" refers to supplying a single customer where demand at a particular plant location justifies the construction of a "tonnage" or "on-site" plant near that location. The gas is delivered through a pipeline, with many tons of gas delivered a day. Steel companies are typical tonnage users of oxygen. Tonnage plants are commonly owned and operated by industrial gases companies with output sold under long-term contracts. However, some customers own and operate a plant which has been built for them ("turnkey" plants).

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[2] The complaint also charged that the acquisition lessened competition in medical pipeline systems, electrical welding equipment, and gas welding and cutting equipment. These allegations were abandoned by complaint counsel early in the proceeding.

The only gases which are produced and sold on a tonnage basis are oxygen, nitrogen and hydrogen.

"Merchant" refers to sales of gases in smaller quantities. The gas is transported to the customer either in gaseous form in cylinders or as bulk liquid. The larger quantities are shipped as bulk liquid under reduced temperatures. Plants used to supply gases to customers in either liquid form or in cylinders are referred to as merchant plants. It is common, however, for on-site tonnage plants to have merchant capacity. A gases company building a tonnage plant for itself will often construct excess capacity, sell the excess in the merchant market, and benefit from the economies of scale which would otherwise not be available. Gases distributed into the merchant market, including gases coming from incremental production in tonnage plants, are sold at prices that are as high as eight or nine times the price of tonnage gas.

It is important to note that the production and handling of bulk liquid gases requires highly technical skills and special equipment designed to withstand extremely low temperatures. The equipment is specialized and used almost exclusively in the industrial gases industry.

A. *Relevant Market*

The ALJ found that the relevant product market is the production and distribution of industrial gases by industrial gases companies. Included are all gases sold by industrial gases firms including resale of gases purchased from companies who produce them as by-products. Because individual gases are utilized for different purposes, have different prices, and there is no cross-elasticity of production facilities except among the atmospheric gases, respondents contend that the ALJ erred in treating them all as part of one line of commerce. However, we agree with his reasoning and conclusions.

There is no doubt that each of the individual gases listed in the complaint could constitute a separate product market since most gases have specialized end uses. However, lack of interchangeability in use does not automatically bar recognition of a broader line of commerce encompassing such products where, for technological or other reasons, there is commonality in production and distribution resulting in a distinct and recognized "industry" of firms who sell a broad line of such products. *U.S.* v. *Grinnell Corp.*, 384 U.S. 563 (1966). *U.S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 594 (S.D.N.Y. 1958); *U.S.* v. *Ford Motor Co.*, 286 F. Supp. 407, 411-416 (E.D. Mich. 1968), *aff'd*, 405 U.S. 562 (1972); *cf. Sterling Drug, Inc.*, 80 F.T.C. 477 (1972).

Industrial gases companies typically either produce or distribute a broad range of gases. They do this in order to provide their customers and dealers in the merchant market with a full or nearly full line of gases because many buyers prefer to order and get delivery from one gases supplier. Also the technical skills used in production, are very similar for many gases. For example, oxygen, nitrogen and argon are all produced in identical air separation plants, generally by a highly technical cryogenic process. Gases produced in such plants accounted for over 63 percent of the total value of all industrial gas shipments by primary manufacturers in the United States in 1972. The skills and technical capability for storing and transporting are also similar for many of the industrial gases. Oxygen, nitrogen, argon, helium, carbon dioxide, and hydrogen are commonly transported and sold to distributors in bulk liquid form in special tank cars or trailers.

This type of synergetic marketing relationship is not unlike the "cluster of products and services" offered in response to "settled consumer preferences" which the courts have held set "commercial banking" apart as a separate line of commerce. *U.S.* v. *Philadelphia National Bank,* 374 U.S. 321 (1963); *U.S.* v. *Connecticut National Bank,* 418 U.S. 656 (1974). See also *U.S.* v. *Grinnell Corp., supra* 384 U.S. at 573-74 (1966). The industrial gases companies are recognized in the trade as a distinct industry and are represented by two trade associations. It was entry into the "U.S. industrial gases market" that BOC had studied and considered prior to its acquisition of Airco, not simply the production of one industrial gas or a limited group of gases.

BOC also challenges the ALJ's finding that the United States as a whole is the appropriate "section of the country" or geographic market in which to measure any adverse effects of the loss of BOC as a potential entrant. Although most industrial gases are sold and distributed in regional markets of a few hundred miles distance from the point of manufacture, it is appropriate to use the nation as a whole as the section of the country affected by the merger. To begin with, BOC was interested in becoming a nationwide competitor in this country's industrial gases industry and did not limit its studies or merger discussions to one particular area or region. As is apparent from the evidence discussed later in this opinion, the interest evinced by BOC in some regional firms was whether they would constitute feasible footholds for subsequent building of a national company. Airco, the company it eventually acquired, was engaged in the industrial gases business throughout the nation. This clearly was a factor in BOC's decision to acquire it (Tr. 1732-37).

In *FTC* v. *Procter & Gamble Co.,* where Procter & Gamble, a potential entrant into household liquid bleaches, acquired Clorox, an established nationwide seller of that product, the Commission and the courts found it appropriate to use national sales and concentration data even though liquid bleach was distributed within a range of only 300 miles from the point of manufacture, 63 F.T.C. 1467, 1537, 1561 (1963), *vacated*, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568, 571 (1967). In *U.S.* v. *Marine Bancorporation*, 418 U.S. 602, 622 (1974) the Court held that "in a potential-competition case * * * the relevant geographic market or appropriate section of the country is the area in which the acquired firm is an actual, direct competitor." See also *U.S.* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966); *U.S.* v. *Bethlehem Steel Corp.*, *supra;* and *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67, 71 (10th Cir.) *cert. denied*, 416 U.S. 909 (1974), where national "markets" were considered as appropriate alternatives to regional markets.

Furthermore, the record shows that in an important segment of the industrial gases business, namely tonnage gases, the leading gases companies (including Airco) compete on a national basis in submitting bids for the construction of onsite plants. Such nationwide competition among leading firms in the industry in an important segment of the business is in itself a sufficient basis for finding that the country as a whole is a relevant market area. *U.S.* v. *Grinnell Corp.*, *supra*, 384 U.S. at 575 (1966).

We conclude that the sale of industrial gases by U.S. industrial gases firms constitutes the appropriate market for the purpose of examining the effects of this acquisition.

B. *Concentration*

The U.S. industrial gases industry is highly concentrated. As indicated in the following table which shows 1972 market shares of leading firms based on f.o.b. plant selling value of shipments by all U.S. manufacturers classified in the industrial gases industry by the Bureau of Census, the top four firms accounted for approximately 70 percent of production and the top eight firms for over 80 percent:[3]

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[3] Some of the individual firm data in the following tabulation were given *in camera* treatment at the hearing. In view of the fact that the information is now nearly three years old, no competitive harm should result from its disclosure and we have decided to take it out of *in camera* status. See also Section 3.45 of the Commission's Rules of Practice.

INDUSTRIAL GASES MARKET SHARES, 1972

Company	*Value of Shipments ($1,000)*	*Market Share*[4]	*Source*
Union Carbide (Linde)	153,000	25.71	Tr. 221
Air Products and Chemicals	106,976	17.98	CX 325-A
Airco	93,577	15.73	CX 325-A
Chemetron	60,496	10.17	CX 325-A
Liquid Air	33,500[5]	5.63	CX 325-A
Liquid Carbonic	29,651	4.98	CX 325-A
Big Three	24,699	4.15	CX 325-A
Burdett (Cleveland)	12,680	2.13	CX 325-A
Total	514,579		
Census[4]	595,000		CX 296-A
Top Four Concentration	414,049	69.59	
Top Eight Concentration	514,579	86.47	

Furthermore the ALJ found that from 1967 to 1972 there was an increase in concentration in the U.S. industrial gases market. Four-firm concentration increased from 67 percent to 70 percent and eight-firm concentration increased from 84 percent and 86.5 percent between those years.[6]

BOC disagrees with the size of the market used in measuring the foregoing market shares and trends. Its arguments can be subdivided into three areas:

(1) the exclusion of the production of helium by the Federal Government,

(2) the exclusion of the production of atmospheric gases in air separation plants owned by backward-integrated firms,

(3) finally, BOC objects to the *inclusion* of tonnage gases sold pursuant to long-term contracts.

We find no merit in any of these objections.

The ALJ excluded all helium produced in government-owned plants. BOC challenges this exclusion, pointing out that one-half of all helium produced and sold is derived from government plants. However, the ALJ was clearly correct in not counting this production since the government does not sell its helium in the open market but sells it to industrial gases companies who purify it and resell it as part of their total marketing package. Such resales by industrial gases firms *were* included within the ALJ's market.

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[4] Based upon value of shipments of industrial gases produced by plants classified as in the industrial gases industry.

[5] Pro forma; includes value of shipments of two industrial gases companies acquired effective December 31, 1972 (CX 335-P, Tr. 516).

[6] It is true as BOC points out, and as is conceded in the initial decision, that concentration ratios reported for 1967 by Census in BOC RX 72F are not strictly comparable with 1972 data. Shipments included in 1967 ratios (both in the numerator and the denominator) but not included in 1972 data are products other than industrial gases ("secondary" products) shipped by plants classified in the industrial gases industry, and resales, and various miscellaneous receipts. But if one assumes that the percentage of total resales, secondary product shipments and miscellaneous receipts accounted for by the four largest firms remained fairly constant between 1967 and 1972—a reasonable assumption we think-then the figures are comparable.

BOC has proffered other calculations in an attempt to show a decline in concentration. (Reply brief pp. 14-15 and references cited therein.) However these tabulations are based in whole or in part on market definitions (universe figures) which include inter-plant production and consumption of industrial gases by establishments that are not classified as industrial gases establishments. Since we have determined that such production and consumption are not within the relevant market (*infra*), these calculations do not have any probative force.

There are instances of backward integration into industrial gases, primarily by steel companies supplying their own oxygen from air separation plants. It is true that to the extent that such vertical integration occurs, the demand for oxygen from industrial gases firms is reduced pro tanto. But that is not equivalent to producing gases for sale in the marketplace. The vertically integrated firms utilize the gas they produce only for their internal manufacturing processes. Any excess gases which they do market are sold to the industrial gases firms, and not in competition with them or their distributors.

It is true that in *U.S.* v. *Aluminum Co. of America*, 148 F.2d 416, 424 (2d. Cir. 1945) the Court agreed with the government that the extent of Alcoa's "control of the aluminum market" could be measured by examining not only Alcoa's sale of ingot aluminum, but also the consumption of ingot in its fabricating plants. But the Court did not hold that such a broader market was the *only* appropriate market, as BOC contends. Alcoa was virtually the sole supplier of ingot to nonintegrated fabricators of products (sheet, foil, rod, bar), that Alcoa also produced. The fact that Alcoa was in competition with its customers and could impose, as it did at times, a cost-price squeeze was an important element of the monopolization case against it. The vertical integration of Alcoa played a qualitatively different role in aluminum industry compared with the backward integration of industrial gases users. The exclusion of "in-house" production and consumption from the relevant market was proper here and is in accordance with several prior Section 7 cases. See, *e.g., U.S.* v. *Greater Buffalo Press, Inc.*, 327 F. Supp. 305, 309 (W.D.N.Y. 1970), *dismissal reversed and remanded* 402 U.S. 549, 555 (1971); *Avnet, Inc.* 82 F.T.C. 391, 451-54 (1973), *aff'd.* 511 F.2d 70 (7th Cir.), *cert. denied* (Oct. 6, 1975). Even if such production were included within the relevant market, four-firm concentration would exceed sixty percent and Airco's share would approximate 14 percent (Finding 62). The change is not so substantial as to cause a different result in this case.

BOC argues that if production by backward-integrated steel firms is not to be included, then the initial decision should not have included any of the gases produced in tonnage plants owned by industrial gases companies since they are committed under long-term supply contracts and are not available for sale in the open market. It contends that as in

U.S. v. *General Dynamics Corp.*, 415 U.S. 486 (1974) market shares computed on such a basis "do not represent the exercise of [present] competitive power but rather the obligation to fulfill previously negotiated contracts at a previously fixed price." *Id.* at 501.

However we see no error in including gases produced in tonnage contracts pursuant to long-term contracts. Nor do we agree that it leads to a logical dilemma. Gases produced for both tonnage users and merchant users are often produced at the same plant using the same facilities. In *General Dynamics*, the acquired company had diminished ability to compete for new business because most of its coal deposits—a limited resource found only on certain lands—were previously committed. Past production figures were not indicative of future capability; hence it was error, the Court held, to use market shares based on past production rather than on what coal reserves were available for future contracts. In contrast, the industrial gases companies have virtually unlimited natural resources to produce gases. The principal gases are literally made out of thin air. Since an industrial gases firm is always able to compete for new business from an existing plant or by building a new plant, the past record of these firms in selling tonnage gases is a reasonable indicator of their future ability to compete for new accounts.

C. *Barriers to Entry*

The administrative law judge found, and BOC does not dispute, that there are substantial barriers for entry into the industrial gases business. To begin with, substantial capital is needed for production plants which cost $7 or $8 million to build. Larger plants cost up to $16 million. With costs of new plant construction being higher today than in previous years, a new entrant would suffer a cost disadvantage insofar as competing in areas (at the same geographical distance to principal customers) that are supplied by established plants.

Experience and a reputation for technical proficiency is undoubtedly a considerable advantage that established firms have over new entrants. Cryogenic facilities which produce atmospheric gases are operated at low temperatures and can be hazardous to employees and surrounding community if misoperated. Lack of familiarity with cryogenic technology has been suggested as a reason why many steel companies prefer to have onsite plants operated by industrial gases firms rather than by themselves. Entry on a multiplant basis is also viewed as desirable if one or more plants are to serve tonnage customers. If one gases plant should have to be closed down for repairs, the supplier would then have an emergency backup facility to provide bulk liquid gases to the tonnage customers.[7]

D. *Elimination of BOC as a Future Entrant*

As the principal basis for his decision that the acquisition will likely lessen competition in the U.S. industrial gases industry, the ALJ found that BOC was a potential entrant into the U.S. market and that by acquiring Airco—a leading firm already in the market-BOC eliminated the beneficial effects that would result from a competitive form of entry.[8]

We agree. Except for a toehold-acquisition entry by another large international industrial gases firm in 1968, in recent years there has been no significant entry into the U.S. market, which has been dominated by three firms, one of which is Airco. As to possible future entry, industry executives were of one of two views—either there will be no further substantial entry into the U.S. market, or there could be entry by BOC or possibly two or three other large international firms. Only these firms were viewed as having the know-how and experience to surmount the difficulties confronting a would-be entrant. Of those who adhered to the latter view—and this included executives of the two leading industrial gases firms in the United States—all agreed that BOC was the *most likely* of this small group to enter the U.S. market (Tr. 250, 335, 393, 445-46, 564-68, 594, 876-878). Testimony by BOC executives as well as BOC documents confirm these objective assessments as they show that BOC by 1969 believed it should be represented in the United States, particularly in industrial gases, its primary business. As BOC's chairman phrased it, only a strategy of what, how, when, and where was lacking (CX 47). By stepping into

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[7] To some extent independents may solve this problem in the merchant market by canvassing other gases companies for temporary supply, and it is common practice for the major firms to exchange gases among themselves when one lacks merchant supply (CX 44-Z-37; CX 232-T; BOC RX 62-1; Tr. 1984; Tr. 2011-12).

[8] The ALJ also found that BOC's position in the fringe of the U.S. industrial gases market itself exerted a procompetitive influence (I.D. pp. 95-96 [pp. 1321-1322, herein]). Presumably, the ALJ had in mind that firms in a concentrated market will sometimes limit their prices and profit margins to forestall new entry. See *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); Bain, *Barriers to New Competition* (1956). No showing of such effect was made here. In fact, several executives of leading firms testified that although they viewed BOC as the most likely firm to enter the market, BOC had no effect on their prior pricing decisions. Presumably during the time Federal price ceilings were in effect, BOC's position as a possible entrant would have had no additional restraining influence on prices in any event. The record is not clear, however, that the witnesses' testimony was limited to that period. In any event, the finding of actual influence on prices cannot stand.

The ALJ also found that the acquisition increased entry barriers (I.D. p. 103 [p. 1327, herein]). Although it is difficult to resist the thought that this acquisition—which created the world's largest consortium in industrial gases—may further deter new entry, there was no inquiry into such questions during the hearing. Consequently we will also vacate this finding. *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865-66 and n.32 (2d Cir. 1974); *Beatrice Foods Co.*, 81 F.T.C. 481, 534-35 (1972).

Airco's shoes, BOC virtually removed any prospect that any major future procompetitive entry would ever occur in this industry.[9]

Not only did the acquisition remove whatever prospects existed that BOC would eventually enter the U.S. market by internal expansion or its equivalent, *i.e.*, elimination of "actual entry" effects, but it removed BOC's presence on the fringe of the market which might *in the future* have had some disciplining effect on U.S. market prices. Although there is no evidence of such disciplining effect in the past, if present trends continue and supply becomes tight, leading firms may coordinate pricing decisions and areas of specialization (*infra* pp. 35-36 [p. 1365]). The possibility of entry by BOC may become a factor to be reckoned with. "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." *U.S.* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174 (1964). See also concurring opinions in *U.S.* v. *Falstaff, supra*, 410 U.S. at 538-39, 560 n.15.

BOC's Incentives for Entry into the U.S. Market. The acquisition of Airco was motivated primarily by a desire to expand BOC's ever-widening international operations and gain exposure to United States technology.[10] BOC's board chairman characterized the United States market as the "most powerful and largest in the world [which] must be of continuing interest to any company which has ambitions to act internationally" in the industrial gases business.[11]

Although BOC started its gases business in the British Isles, it has expanded into some 17 countries, including such industrialized nations as Australia, South Africa, Canada, India, Pakistan, Italy, and Brazil. All of these were either de novo or toehold acquisition entries. At the time of the acquisition, BOC was the second largest producer and marketer of industrial gases and related equipment in the world, with sales of those products estimated at nearly $400 million in 1973 (CX 76K). BOC regarded the United States as being the most important and most advanced industrial gases market in the world and one that still enjoys a respectable growth rate (CX 36 A-B, CX 47-A, Tr. 2000-01).

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[9] Cf. Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," 78 Harv. L. Rev. 1313, 1384-85 (1965):

"In this situation ['a market in which entry barriers for all but a small group of firms are too high'] the only significant hope for making the market in question more competitive, apart from radical technological changes or the development of new substitutes, lies in new entry by one or more of those firms for whom entry barriers are not prohibitive. Loss through merger of one of a limited group of potential entrants thus reduces the prospects of future deconcentration."

[10] There is no claim here that the acquisition was undertaken solely to effect "financial" relationships such as tax savings, earnings-per-share gains via favorable price-earnings differences, or "improved" performance through use of pooling-of-interest accounting methods—motives which have inspired many "conglomerate" mergers. See Bureau of Economics, Federal Trade Commission, *Economic Report on Corporate Mergers* ch. 2 (1969); Steiner, *Mergers: Motives, Effects, Policies* (1975).

[11] He stated:

"[T]he American market, partly as a result of its sine, is the source of much technology, much new development, and we [BOC] have to be in tune with that" (Tr. 1728).

"The first reason [for acquiring stock in Airco] is that we have always been interested in the industrial gas market of America. While there is no virtue attached to the claim of being an international company, there are nevertheless benefits which can be obtained by being an international company, and quite clearly, those benefits are diminished if we don't have a position in North America" (Tr. 1844).

The managing director of BOC also confirmed the general desire of BOC to enter the United States industrial gases market (Tr. 2658-59).

It is interesting to note that in 1969, when BOC management first commenced long range studies of U.S. market, it was emphasized that making profits from a U.S.-based operation was not the primary goal: "Despite the very large size of markets in the USA, the main purpose of a series of BOC ventures over the next, say, five to ten years would be commercial, managerial and technical 'exposure' rather than for the sake of the business itself" (CX 38-E). After the acquisition of controlling interest in Airco, BOC's chairman informed his company's shareholders that the acquisition enabled BOC to pursue its "long-term objectives." He viewed the Airco transaction as offering BOC the opportunity to enter on a national scale "in one jump" as compared to a series of slower, more expensive (and more procompetitive) steps (Tr. 1736).

Ability of BOC to Expand Into the U.S. Market. BOC does not dispute that it had the financial, technological and business ability to expand into the U.S. market (Tr. 237-38). BOC had an established world-wide reputation and had gained American business experience by participating in the manufacturing and selling of air separation plants in the United States through a joint venture with Airco from 1967 through 1971.

Uniqueness of BOC's Status as a Potential Entrant. Aside from BOC, the only other firms named by any members of the industrial gases industry as possible entrants into the U.S. market were Messer Greishiem and Linde A.G., both German firms, and AGA of Sweden. They were not, however, considered by American firms to be very strong candidates for entry, a view that BOC shared (CX 76L). Linde A.G. is primarily a manufacturer of industrial gases manufacturing equipment for sale to producers and lacks experience in the distribution end of the gases business.[12] Messer Greishiem does not have the reputation in the industry that BOC possesses (*e.g.* Tr. 721-22). AGA of Sweden was viewed by some as having the technological prerequisites for entry, but BOC and others felt this firm lacked the financial ability to enter the U.S. market (Tr. 1760, CX 76L).

Contrary to BOC's contentions, none of the companies in the United States which operate air separation plants for their own use, or buy large quantities, is considered a likely potential entrant into the business of selling industrial gases on the open market. None has successfully entered the market in the past and any excess oxygen or other gases they produce they sell to industrial gases firms. Industry witnesses who testified in this proceeding did not consider them to have the required marketing expertise and capability needed to make them likely prospects for distributing industrial gases in the merchant market (Tr. 346, 443-44, 564-65, 2743-44).[13]

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[12] Linde A.G. sells air separation equipment in the United States, but does not manufacture and distribute gases in this country. (Linde A.G. is not affiliated with the Linde division of Union Carbide). We have also examined the *in camera* material which BOC has requested us to consider (BOC RX 235 *in camera;* Tr. 2065-69) and do not find that it detracts from the evidence that BOC was the most likely entrant into the U.S. market.

That technical expertise and marketing experience in industrial gases are not easy to come by, but are prerequisites for successful entry, is demonstrated by the unsuccessful attempt of Standard Oil of New Jersey (now Exxon) to enter the market by acquiring American Cryogenics, a West Coast producer of industrial gases. Standard's experience was not in the industrial gases field and it eventually sold American Cryogenics to an affiliate of L'Air Liquide—a world-wide French industrial gases firm. At the time of the sale (1968), American Cryogenics was losing $4 million a year on sales of $20 million. L'Air Liquide has subsequently been able to turn the company (Liquid Air in its present name, see p. 10, *supra* [p. 1347]) into a profitable and aggressive operation—a fact of which BOC was aware.

BOC also argues that the initial decision ignores the potential competition represented by the smaller industrial gases firm already doing business in some, but not all, of the regional markets within the United States. The difficulty with this line of argument is that unlike BOC, these firms do not constitute major potential competition to the United States market as a whole and the "Big Three" national firms that dominate the U.S. industry.

Interests Shown by BOC Regarding Entry in the United States Industrial Gases Market Since 1970. Although BOC concedes that it had strong desires and incentives to enter the U.S. market, it contends that a study of the U.S. industrial gases market conducted in 1969 convinced its management that there was no feasible means to enter. It submits that the Commission should therefore find that BOC would not have entered the U.S. market but for the "unique opportunity" provided by Airco.

In 1969 BOC's directors decided to make an onsite study of the American industrial gases market to consider "whether there are any identifiable opportunities in USA which BOC might wish to exploit at some future date" (BOC RX 181 C). BOC assigned Allan Perham, chairman of Canox (BOC's Canadian industrial gases subsidiary) and I. Greenfield, a London staff man, to make the study. Together they interviewed people familiar with the U.S. industrial gases industry and completed a report in the early part of 1970.

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[13] BOC's own study of the U.S. market in 1970 confirmed this view in a section entitled "Customer Ownership of Plant:"

> "At one stage it was thought possible that the giant petrochemical complexes would own their own air separation units and perhaps sell surplus to the majors. We were informed that they were persuaded not to follow this route, largely by Linde Division who emphasized the need for back-up supplies, etc. A.D. Little do not believe that customer ownership will be of any significance in the future." (BOC RX 62-K).

BOC relies on the report's conclusion that "based on the BOC requirement of 15 percent pretax return on capital employed there is today no case for entering the USA industrial gas market as a producer for either onsite supply or merchant requirements" (BOC RX 62B).[14] Since there is testimony that the report was accepted by the BOC top management committees and board of directors, BOC contends that the Perham-Greenfield report virtually closed the door on the United States for BOC.

The contention that this report demonstrates that BOC decided not to seek entry into the U.S. market is not borne out by the record. To begin with, BOC has quoted only a portion of the Perham-Greenfield report. The report, completed in February 1970, based its recommendation on low profit margins existing in the U.S. gases industry but went on to caution that its "generally negative conclusion is in relation to the foreseeable future *and should not be considered final. Opportunities could rise in the future and a periodic review of the situation is recommended*" (BOC RX 62B) (emphasis added). Subsequent to the Perham-Greenfield report, BOC did in fact continue to take an active interest in examining entry possibilities into the U.S. industrial gases industry.

(1) In April 1970, an investment banker approached BOC and advised that a fifty percent interest in Burdett Oxygen Company of Cleveland ("Burdett-Cleveland") was available. Although he noted that profits of the firm were negligible and that it did not appear a very attractive proposition, BOC nevertheless responded there was a possibility that it would be interested, but that an essential precondition to further study would be that BOC could obtain control (CX 233-34). After learning that control was not available, BOC told the banker it was not interested but if the situation changed it could be interested (CX 243).

(2) In August 1971, BOC's managing director discussed with Charles Perkins, president of Burdett Oxygen Company of Norristown, Pa. (which has no present connection with Burdett of Cleveland) a proposal by Perkins that BOC enter the U.S. by acquiring Burdett and a number of other small independent gases companies. A memorandum of the conversation (which took place at BOC's offices in London) was made by the BOC official and copies were sent to other top BOC officials

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[14] The reference to a 15 percent pretax "requirement" return on capital was based on an "arbitrarily selected yardstick" of BOC management to set realistic limits to the study (BOC RX 181 C).

including the chairman of the board of BOC. Soon afterwards, BOC sent an executive to the United States to look over the company. The visit lasted three or four days during which the BOC representative made a thorough inspection of the books and records as well as the physical plant. Discussion and consideration was given to BOC's purchasing Burdett-Norristown with a group of other nonmajor industrial gases companies to effectuate a toehold entry into the U.S. market. The BOC official recommended to his superiors in a memorandum dated Oct. 4, 1971 that:

> If it is agreed both that BOC should make an entry into the industrial gases market in the USA and that this type of entry be adopted (from the small end upwards in the Canox manner)[15], then Perkins, Burdett, and the group he proposes would in principle be a likely route * * * The companies he runs, if not financially healthy, have a reasonable trading foothold and can probably be made healthy. The other independents may well agree to his plan and his claims are broadly borne out by first checks (CX 254-C).

Despite the visiting official's optimistic view of the company, BOC apparently regarded the company as too small to form the basis for long term expansion in the U.S. market. BOC informed the president of Burdett by letter that BOC had decided it was not then interested in acquiring the company. However the letter concluded that BOC was aware of the "sort of profits which can be made in the U.S. market and [we] are keenly interested to improve this awareness" (CX 117).[16]

Feasibility of Entry. BOC claims that it would never enter the U.S. market but on a national scale and that it would cost about $240 million for it to have entered the U.S. market on such a scale had the Airco opportunity not presented itself. BOC's chairman testified that he could not conceive any circumstances in which BOC would ever expend that amount of money for entry into the United States.

This argument depends, however, upon an acceptance of self-serving testimony that BOC would never enter except on such a large scale. No reasons are presented as to why BOC would have to enter on a national scale. L'Air Liquide—a leading French firm—successfully entered the U.S. market through the purchase of a small regional firm in 1968. Subsequent to that acquisition, it purchased additional small regional companies and has constructed an air separation plant in the Seattle-Tacoma area and an acetylene plant in Houston and one in Los Angeles (CX 335 V-W, Tr. 528-530). At the time of the hearing it was expanding production capabilities in three additional areas of the country (Tr. 528). We have difficulty in perceiving why this international firm (which was the world's largest industrial gases firm before BOC acquired Airco) was able to enter on such a modest scale, yet BOC could not.[17] The record indicates the existence of many small companies which could presumably be purchased in similar fashion.

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[15] Canox, as previously noted, is the name of BOC's industrial gases firm in Canada. BOC entered the Canadian market by toehold acquisitions after World War II and is now the third largest firm in that market.

[16] Another incident took place after the Perham-Greenfield report. Dr. Albert Muller, a former consultant to BOC called by complaint counsel, testified that in 1970, subsequent to the Perham-Greenfield report, he and Mr. Perham, at the request of BOC, had meetings with the owner of Gardner Cryogenics, an American helium firm, as to the possible acquisition of that company by BOC (Tr. 671-80). This followed a study previously made by BOC of the possibility of acquiring that company (CX 15, CX 17). Although BOC claims its interest was only in acquiring this firm's European business, Dr. Muller testified that BOC was also interested in Gardner's United States operations (Tr. 676, 679, 709). Although the firm was not acquired, this incident corroborates the view that BOC had not closed the door on possible entry into the U.S. market because of the Perham-Greenfield report.

We do agree with BOC, however, that the additional conversations referred to in Findings 101 and 102 of the initial decision are not probative on the issue at hand.

We reject BOC's contention that before toehold entry can be considered as a procompetitive means of entry it must be shown that any of these firms was available at a reasonable price as of the time of the acquisition of Airco. Such a burden would be unrealistic. Also the fact that some of these firms may have sizeable shares of a local market in sales of a particular gas or group of gases would not disqualify them as permissible toehold candidates since the target market—the sole "relevant market" in this potential competition case—is the national industrial gases market. Regional producers had sales substantially below 10 percent of industry sales and one or more small firms presumably could have been acquired for purposes of subsequent expansion into a national or semi-national operation. See *The Budd Co.*, F.T.C. Dkt. 8848, Commission opinion, Aug. 29, 1975 [86 F.T.C. 518].[18]

Industry experts suggested other ways by which entry could be achieved or an initial entry expanded. The chief executive officer for Air Products and Chemicals' gases operations who has been in the gases business for 22 years testified (Tr. 393-94):

> Q What method of entry do you believe the British Oxygen Company could have used to enter the United States market for industrial gases in late 1973?
>
> A * * * [T]hey have already chosen one method which we, of course, know about. Other methods available, of course, are the construction of an air separation plant capable of producing liquid gas products, to serve a particular market area of the United States within economic distribution radius from the facility. They could bid for a base load pipeline gas supply opportunity from one of the merging new markets and then add incremental capacity to that facility in order to serve not only the base load customer, but the surrounding industrial market, or they could acquire one of the smaller regional producers and add new capacity to that regional producer's production capabilities and expand their market penetration that way.

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[17] Noting that L'Air Liquide was expanding in the United States, a BOC official suggested (in 1969) that "despite the very large size of markets in the USA" there could be a "series of BOC ventures [entries] over the next, say, five to ten years * * *" He also suggested "some kind of joint venture, or series of joint ventures * * * if direct entry and acquisition are blocked." (CX 38 D, E).

[18] Over twenty small regional firms were identified by witnesses. (We do not agree, however, with complaint counsel that Chemetron should be classified as a toehold firm, since its business was nearly nationwide and it had 10 percent of the national market. Nor would we regard Liquid Air as a permissible toehold firm since it was a rapidly expanding firm which had the financial backing to become a national producer. Cf. *The Budd Co., supra.*) Additional independent manufacturers were listed in a 1969 BOC staff report on the U.S. market, which stated "We believe that in actual fact there are approximately between 60-100 across the USA" (CX 44-Z-97).

Similar views were stated by the head of the Gas Products Department of the Linde Division of Union Carbide (Tr. 259-60).

An important ingredient of feasibility of entry is, of course, whether reasonable profits could be anticipated which would justify the expenditures necessary for BOC to make a de novo or toehold entry. If, for instance, the American market had been plagued by chronic overcapacity and extremely low profit margins, little incentive would exist for new entry. Although excess capacity existed in the 1960's, by 1973 conditions had changed substantially and there were shortages in the supply of air gases. By 1974 the market was buoyant; prices had firmed and industry was anticipating a yearly growth rate of up to 10 percent compounded annually over the next 5 years (Tr. 239, 246, 256, 391, 403, 438, 1941, 2716, 2719, 2723).[19]

By 1974 new applications for industrial gases in the United States were contributing to increasing demand. This has in part been due to the rise in prices of petroleum products. Industrial gases are now being used in the production of synthetic natural gas that can be used for commercial purposes or in power generation. The elevated price of oil has also led to the production of gas for pipeline transmission by the combustion of coal with oxygen. Additionally, industrial gases are now being used to generate chemical feedstock for the manufacture of fertilizers and methanol. These new applications have created demand for large tonnage plants by public utilities and chemical companies. The scarcity of natural gas has also made economically prohibitive the use of ammonia for generating nitrogen for metallurgical processes. This has increased demand for nitrogen produced by air separation.

Other new applications in the United States have been the development of nitrogen food freezing and the use of industrial gases in sewage treatment. Also the high price of scrap metal has resulted in steel companies using liquid pig metals to produce more steel rather than melting scrap. This has increased the requirement of steel companies for oxygen.

According to the witnesses from Air Products and Chemicals, the demand for principal industrial gases products, particularly tonnage oxygen, has increased to such an extent that the engineering and manufacturing capacity of the industry today is insufficient to meet the demand for construction of new plants (Tr. 2727). At the time of the hearing his company had recently told customers that it was unable to supply their requirements for new industrial gases plants.[20] In addition, the witness from the Linde Division of Union Carbide testified that a number of industrial gases are in short supply and that Linde has had to allocate customers. Union Carbide announced that demand for industrial gases was "exceptionally strong in 1974, and exceeded Union Carbide's ability to supply even at capacity operation." Airco told its stockholders in 1974 that peak production had been maintained "to keep pace with developing tightness in the industrywide supply of bulk-liquid products," that there was "unprecedented demand" and record sales in 1973 were due to new uses of industrial gases. These companies are the three largest firms in the industry accounting for 60 percent of the nation's manufacturing capacity in industrial gases.

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[19] This is supported by the Department of Commerce which predicted industrial gases to be in a high demand through 1975 resulting in increased output and price rises. *United States Industrial Outlook 1975*, U.S. Department of Commerce (1974) pp. 98-99. (Official notice is taken of this publication).

Based on the fact that BOC had the clear incentive to enter the U.S. market; that it had the technological, and managerial expertise necessary to effectuate such entry as well as having large capital resources; that it earlier entered the Canadian market; that it in fact considered possible acquisitions of small American firms; and that demand for industrial gases in the U.S. was outstripping capacity in 1973-1974 with indications that this is a long-term trend—we cannot accept the testimony of BOC's executives that under no circumstances would BOC attempt an entry into the market other than Airco acquisition. Where objective considerations so clearly favor probable entry, contrary testimony by company officials as to future intent has little probative force. See *U.S.* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 563-569 (concurring opinion); President's Task Force Report on Productivity and Competition ("Stigler Report") 5 CCH Trade Reg. Rep. ¶50,250 (1969) at 55,521 ("The identity of potential entrants should not be established by introspection"). Even apart from the fact that such testimony is inherently self-serving, it would represent, at best, only the current views of present management. Circumstances change, as does management. Even a firm that has once firmly rejected de novo or toehold entry in a market, preferring (understandably) to enter by acquiring an established leader, may reconsider and enter if the latter route is blocked by antitrust action.[21] Clearly the ALJ was correct in basing his findings on objective evidence and other facts of record rather than the testimony as to BOC's future intent.

Also we perceive no error in approaching the question of potential competition in this industry on the basis of assessing future probabilities and market trends. The Act contemplates this. "[C]ourts should look also to the size and growth prospects of the target market * * *" *U.S.* v. *Marine Bancorporation,* 418 U.S. 602, 642 (1974). "[R]ational rules applying to mergers that involve the possible loss of a new entrant should take the trend of demand into account." Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," 78 Harv. L. Rev. 1313, 1385 (1965).

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[20] BOC contends that this testimony was designedly misleading. However the witness' view of industry conditions is supported by a recent Department of Commerce report (publication cited in the preceding footnote) which states: "Shipments of all industrial gases will be limited because of lack of production capacity. New plants are being built, but completions scheduled for 1975 probably will not satisfy the rising demand for industrial gases."

[21] Such entry occurred after *U.S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958) was decided. See discussion *infra*.

If, despite the generally negative Perham-Greenfield report in early 1970, BOC still examined possible entry candidates later, there is every reason to believe that at the time of the acquisition, when the market had firmed up and major U.S. firms were not able to construct new plants at a pace to keep up with demand, BOC would be interested in entry. Simply because no entry had been effectuated at the time the Airco opportunity presented itself did not mean that BOC would not have eventually realized its "long-term objectives" of entering the U.S. market—by growth rather than by this major acquisition. The "premise of an antimerger statute such as §7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." *U.S.* v. *Philadelphia National Bank,* 374 U.S. 321, 370 (1963).

We conclude that as of December 1973, there was a "reasonable probability" that BOC would have eventually entered the U.S. industrial gases market by internal expansion, or its equivalent, but for the acquisition of Airco, *U.S.* v. *Penn-Olin Co.,* 378 U.S. 158, 175 (1964); *Ekco Products Co.* v. *FTC,* 347 F.2d 745, 752-753 (7th Cir. 1965). In view of the trends in the market existing at the time of the hearings in 1974, and attested to by witnesses, the probability that BOC would enter the U.S. market in the future, if divestiture is ordered, has even increased.

E. *The Question Reserved in Falstaff and Marine Bancorporation*

Respondents contend that in the absence of BOC exerting any present fringe effect on the U.S. gases market, the possibility that BOC might have entered the market by some more procompetitive means is legally irrelevant.

The Supreme Court has expressly reserved decision on the question of whether an acquisition which has no immediate market effects except for the elimination of a future entrant can violate Section 7 of the Clayton Act. In *U.S.* v. *Marine Bancorporation, supra* at 625 (1974) the Court stated:

> The Court has not previously resolved whether the potential-competition doctrine

> proscribes a market extension merger solely on the ground that such a merger eliminates the prospect for long-term deconcentration of an oligopolistic market that in theory might result if the acquiring firm were forbidden to enter except through a de novo undertaking or through the acquisition of a small existing entrant (a so-called foothold or toehold acquisition).

See also *id.* at 639; and *U.S.* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973).[22]

BOC urges that the Commission answer the question reserved in *Marine Bancorporation* and *Falstaff* by holding this acquisition to be lawful irrespective of whether BOC would have been likely to enter the U.S. market.

The Commission and lower courts have on several occasions expressed the view that foreclosure of likely or probably future competition between two merging firms can be the type of "effect" which "may be substantially to lessen competition" with the meaning of Section 7 of the Clayton Act.[23]

We find no persuasive reasons to depart from that line of authority. It is true that unlike a horizontal merger between actual competitors, a merger between potential competitors does not increase concentration, or reduce the number of firms, in a market. There would, however, be a decrease in concentration, and increased pressures for competition, if the potential entrant entered by internal growth or its equivalent.[24] Section 7 is as concerned with "preserving the possibility of eventual

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[22] Previous "potential competition" cases which have reached the Court have involved acquisitions which arguably reduced the premerger level of competition or raised entry barriers. See *U.S.* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 659 (1964); *U.S.* v. *Penn-Olin Chemical Co.* 378 U.S. 158, 174 (1964); *U.S.* v. *Continental Can Co.*, 378 U.S. 441, 462-63 (1964); *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967). There is, however, dictum in several of those opinions suggesting that elimination of a future entry by the acquiring corporation into the acquired company's market is a type of foreclosure that is covered by Section 7 of the Clayton Act. See, *e.g.*, *FTC* v. *Procter & Gamble*, *supra* at 575 ("If Procter had actually entered, Clorox's dominant position would have been eroded and the concentration of the industry reduced").

[23] Commission decisions: *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1084 (1962); *Beatrice Foods Co.*, 67 F.T.C. 473, 717-722 (1965); *The Bendix Corp.*, 77 F.T.C. 731, 817 (1970) *reversed and remanded on other grounds*, 450 F.2d 534 (6th Cir. 1971); *Beatrice Foods Co.*, 81 F.T.C. 481, 528 (1972); *General Mills, Inc.*, Dkt. 8836 (Oct. 5, 1973 [83 F.T.C. 696]); *Beatrice Foods Co.*, Dkt. 8864 (July 1, 1975 [86 F.T.C. 1]); *The Budd Co.*, Dkt. 8848 (Aug. 29, 1975 [86 F.T.C. 518]).

Court decisions: *U.S.* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1234 (C.D. Cal. 1973) *aff'd without opinion*, 418 U.S. 906 (1974); *U.S.* v. *Joseph Schlitz Brewing Co.*, 253 F. Supp. 129, 147 (N.D. Cal. 1966), *aff'd without opinion*, 385 U.S. 37 (1966); *U.S.* v. *Wilson Sporting Goods*, 288 F. Supp. 543, 562 (N.D. Ill. 1968); *U.S.* v. *Standard Oil Co.*, 253 F. Supp. 196, 227 (D.N.J. 1966); *Ekco Products* v. *FTC*, 347 F.2d 745, 752-53 (7th Cir. 1965). See also *U.S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 615 (S.D.N.Y. 1958).

[24] Respondents contend that the legislative history shows that Section 7 was designed only to prevent increases in concentration, citing from the Senate Report on H.R. 2734 (which upon passage amended Section 7 of the Clayton Act in 1950 to read in its present form) the statement that the purpose of the proposed bill was "to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions." The reference to "economic concentration" was to national aggregate concentration in the industrial sector which Congress feared was on the rise. It was not a statement that mergers which only raise concentration in a particular line of commerce were to be covered by the legislation. The 1950 amendment in fact removed language in Section 7 that appeared to limit its scope to acquisition of an existing competitor (the so-called "acquiring-acquired" test). *U.S.* v. *Brown Shoe Co.*, *supra*, 370 U.S. at 317. See Narver, *Conglomerate Mergers and Market Competition* ch. 3 (1967) for evolution of the 1950 amendment with regard to conglomerate mergers.

It is certainly settled by Supreme Court decisions that Section 7 can be violated in ways that do not necessarily increase concentration in the relevant market. In addition to cases recognizing that Section 7 applies to mergers that make it difficult for new competitors to enter (*e.g.*, *Procter & Gamble*, referred to in the above text), the Court's holding

(Continued)

deconcentration" of oligopolistic markets as it is with preventing increases of concentration. *U.S.* v. *Aluminum Co. of America*, 377 U.S. 271, 279 (1964); *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321, 365N.42 (1963). It is now settled that enforcement policy under Section 7 should be concerned not only with immediate effects on the market, but also with market conditions over the long term so as to preserve opportunities for future entry and competition. This was clearly the import of the Court's decision in *Procter [Gamble, supra*, where the Court held the merger to be anticompetitive because it had the effect of deterring future entry. Although we have dismissed for want of evidence the charge that the BOC-Airco merger has further raised existing entry barriers, the removal of BOC as the most likely of a limited group of possible entrants into the market has the same, if not greater, adverse effect on prospects for future competition as the raising of entry barriers. Both effects reduce the likelihood that future entry will occur, thus entrenching the existing firms already in the market.

BOC contends that if the "actual potential entrant" doctrine is to be applied it should be confined to cases where "subjective" proof exists that the acquiring firm would have entered but for the acquisition. It is true that in giving weight to "objective" factors in determining whether a firm is likely to expand into a new geographical market, there is the possibility that the deciding tribunal will err. But "if justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try." O. Holmes, The Common Law 48 (1881). "Potential competition cannot be put to a subjective test. It is not 'susceptible of a ready and precise answer.' " *U.S.* v. *Penn-Olin Co.*, 378 U.S. 158, 174 (1964). To follow BOC's suggestion and simply refuse to make any objective determination of the probabilities would leave the resolution of the legality of many large mergers to the self-serving testimony or documentation of company officials who stand to gain if the merger is permitted. A "wrong" decision, *i.e.* dismissal of the proceeding on the basis of erroneous statements as to the firm's ability and incentives to enter by internal rather than external growth, would mean the permanent loss of the firm as a future major competitive force in the market.

On the other hand, if objective considerations of the firm (its capability, incentives, and nearness to the market) and feasibility of entry sufficiently indicate that it would probably enter at some point

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in *U.S.* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), that elimination by merger of a perceived potential entrant may violate Section 7, in no way depended upon a likely increase in market concentration resulting from such a merger. Nor is a resulting "increase in concentration" the basis upon which vertical mergers have been held to violate Section 7. See, *e.g.*, *Brown Shoe Co.*, *supra*, 370 U.S. at 323-334; *Antitrust Law Developments* 76-78 (1975).

by internal growth or a toehold acquisition—and the decision is made on that basis—an erroneous decision will be far less apt to have any substantial adverse consequences on the marketplace.

That the antitrust laws should be concerned with elimination of "objective probable entrants" was demonstrated in the aftermath of *U.S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958), one of the first merger cases brought under Section 7 after it was amended in 1950. Bethlehem Steel, which was located primarily in the East, argued that it needed the ingot facilities of Youngstown's Chicago plant as a prerequisite to building new plate and structural shape mills in the Chicago area. Contending that the construction of an entirely new integrated plant in Chicago of the desired scale was not economically feasible, it presented figures showing the costs of a new plant greatly exceeded the cost of expanding Youngstown's existing plant. The District Court recognized that "it is undoubtedly easier and cheaper to acquire and develop existing plant capacity than to build entirely anew," and acknowledged both Youngstown's and Bethlehem's avowals that absent the merger neither would be able to build an integrated plant in the Chicago market. However, the Court found that the contentions, "which, of course, involve matters of business judgment and, in a sense, matters of preference," were "not persuasive in the light of their prior activities and history, their financial resources, their growth and demonstrated capacity through the years to meet the challenge of a constantly growing economy." *Id.* at 616. A few years after the decision disallowing the merger, Bethlehem built in that area what has been described as one of the country's most efficient steel plants.[25]

F. *Prospects for Future Competition in the Industrial Gases Industry*

In *U.S.* v. *Marine Bancorporation, supra,* the Court held that by introducing evidence of high concentration ratios the Government established a prima facie case that the market was a candidate for the potential competition doctrine and that the burden was on the defending company to show that the concentration ratios do not accurately depict the competitive characteristics of the market, *id.* at 631.

Complaint counsel has clearly made such a prima facie case here. The industry is dominated by the three national companies-the Linde Division of Union Carbide, Air Products and Chemicals, and Airco. Together these three firms share 60 percent of production. Four-firm concentration is 70 percent and eight-firm over 85 percent with concentration being on the upswing in recent years (*supra* pp. 10-11 [p. 1347-1348 herein]). The industrial gases industry has been classified as "highly concentrated," and is very close to being among the relatively few "extremely high concentrated" industries in the American economy. Adams, "Public Policy in a Free Enterprise Economy," *The Structure of American Industry* 467-69 (4th ed. 1971).

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[25] Singer, *Antitrust Economics* 133 (1968):

"Bethlehem may have accomplished, even more effectively than by merger, both the potential for vigorous upward competition against U.S. Steel, as well as the ability for strong downward competition against the smaller, less efficient steel producers. The District Court, by finding illegal the proposed merger between Bethlehem and Youngstown, encouraged the independent entry of new capacity in the Chicago area by Bethlehem."

BOC argues that despite any prima facie case based on concentration ratios, the industry is competitive. In support of this it points to the fact that the "unit value" of many of the major industrial gases have dropped over the past several years as demonstrated from calculations derived from Census data. For example, the average unit value of shipments of oxygen dropped from $1,100 per million cubic feet in 1963 to $720 per million cubic feet in 1972, with the unit value of pipeline oxygen gas dropping from $700 per million cubic feet in 1963 to $480 per million cubic feet in 1972. Similarly, the average unit value of nitrogen dropped almost 20 percent from 1963 through 1972. The average unit value of carbon dioxide declined nearly 50 percent in that period and the unit value of argon dropped over 50 percent. BOC asserts that only for hydrogen has the unit value risen since 1963.

In contrast, BOC points out that the wholesale price index for all industrial commodities rose from 94.7 in 1963 to 117.9 in 1972. U.S. Bureau of the Census, Statistical Abstract of the United States 1973, Table No. 570, at 348.

For a number of reasons this argument, which has some superficial appeal, must be rejected. To begin with, the record shows that BOC is incorrect in stating that the unit value has risen only for hydrogen. The unit value of acetylene, an important industrial gas, increased 25 percent from 1963 to 1972 (BOC RX 190). The unit value of solid carbon dioxide has increased over that period (BOC RX 193). The unit value for cylinder and bulk oxygen in both gas and liquid form increased over that period (BOC RX 199). The unit value for nitrogen pipeline gas increased 13 percent between 1963 and 1972 (BOC RX 196). Thus, the unit value trend is quite a mixed picture.

But there is a more basic problem with BOC's argument. There are very decisive economies of scale in the production of gases from a tonnage plant. The record shows that in recent years the size of new air separation plants has increased substantially and BOC admits that as a result "there is no question that economies of scale in tonnage plants have led to lower unit cost." Thus, insofar as gases which are produced in large part from tonnage plants (oxygen, hydrogen, argon, and nitrogen), there has been a reduction of the unit value due to the declining unit *costs* in production. There is also an "averaging down" effect on measurements of average unit value of these gases.

BOC responds, however, that the lower unit costs have been passed on to customers in the form of lower prices. Although this is true for pipeline nitrogen (since 1966), pipeline oxygen, and argon—since the unit value for shipments of these particular gases has declined—there is no way of knowing from the record whether all or what portion of reduction in production costs has been passed on.

Respondents also rely on testimony by witnesses that competition was and has remained "vigorous" and "strong" in the industry. Although there is evidence of price competition during the 1960's, when the industry was plagued by over-capacity due to circumstances unforeseen by the industry, general and vague statements cited by respondent are too equivocal to be probative on the degree and scope of competition existing during the time of the acquisition.[26] No actual price data were put in record by respondent and the evidence that is in the record indicates that demand has caught up with supply (and has exceeded supply in some areas). "Prices have gradually firmed up," one executive testified, "because the industry's practice back in the early 1970s was that they had excess capacity and they were using a kind of a marginal pricing philosophy * * *. As demand firmed up, marginal costing and marginal pricing disappeared and full costing and full pricing became the standard * * *." (Tr. 2723). Other witnesses agreed that air gases such as oxygen and nitrogen have been in short supply since 1971 and, as previously noted (*supra* p. 25 [p. 1357-58 herein]) this trend is expected to continue.

Economists teach us that in a high fixed-cost industry, leading firms are prone to avoid overt price competition. Scherer, *Industrial Market Structure and Economic Performance* 195 (1970); Neal, *Industrial Concentration and Price Inflexibility* 77 (1942). The record supports this view with respect to the instant case. A BOC document reveals that at a private meeting on Sept. 6, 1973, a representative from one of the three dominant U.S. industrial gases firms told BOC's chairman that with respect to the U.S. industrial gases market, "the U.S. gas market has stabilized and that the three main competitors no longer encroach on each other's area of domination" (CX 95D).

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[26] Respondent, for instance, quotes the testimony by the president of Liquid Air, Inc. that there has been "vigorous" price competition in the industry. When asked what "vigorous" meant, he replied "High enough to make a profit"—clearly a non-sequitur (Tr. 556). The witness from Union Carbide testified "I would say there is a *fair amount* of vigorous price competition" (Tr. 305, emphasis added). These and other general expressions of subjective opinions by industry witnesses cannot be given much weight, particularly in view of the rarity with which industry witnesses, in our experience, ever acknowledge the absence of vigorous competition in any form.

There is documentary evidence in the record that supports a finding that in 1966-1967 Union Carbide lost sales and market share because it raised prices but other firms did not follow (CX 232-Z-24, CX 232-S). Also the 1970 Perham-Greenfield study reported that industrial gases had become a commodity in the U.S.A. "and as a result are sold essentially on price" with the result being a depressed industry at that time or earlier. Although the study observed that there were current attempts to increase prices, the authors did not believe the increases would keep pace with inflation. However, as the above text indicates, by 1973 prices had firmed up and in June 1973 BOC started laying the groundwork for a takeover of BOC.

There are also indications that the industry may tend towards parallel pricing practices. Thus, during the hearings in April 1974 Linde Division increased prices 10 to 15 percent. Airco immediately followed within a day or so with a price increase (Tr. 314).

Although current profit figures were not put in the record by BOC, indications are that profits have been rising.[27] In a statement to shareholders, Airco announced that the "1972 earnings performance of our Industrial Gases, Welding Products and Electronics Divisions was Outstanding" (CX 85X). Airco also stated to BOC during their July 1973 discussions that their "after tax return is better than AP [Air Products] or Linde: [for example] CO-2 is estimated to give a 10% after tax return" (CX 93E). A BOC staff document drafted in June 1973 for consideration by the BOC chairman and managing directors advised that although "* * * the general level of profitability in the leading industrial gases firms in the USA was poor throughout the 1960's, there is evidence that it is improving now and likely to establish a better plateau for the middle/later 1970's;" and that "skilful managements earned acceptable returns." It noted instances of two United States industrial gases firms having relatively high profit returns according to data published in *Fortune* (CX 76B-C).

BOC contends, however, that the threat of backward integration of tonnage users, *e.g.*, steel and chemical companies, will cause industrial gases suppliers to perform in a competitive manner. It argues that when a gases company bids on a tonnage supply contract it knows that the customer may consider purchasing his own plant as an alternative and this fact prevents the bidder from charging more than a reasonable rate of return. While there may be some check placed on profit margins on tonnage supply contracts as a result of the threat of vertical integration, this would not assure that prices and profits will not exceed a competitive level. To begin with, it is only for certain gases, particularly oxygen, where a single customer consumes quantities justifying an onsite tonnage plant that there is any real economic impetus for some customers to consider owning their own captive source of supply. Furthermore, any company that decided to integrate backward to produce its own oxygen would undoubtedly incur higher unit costs than an industrial gases company since the latter is frequently able to recoup a portion of costs by sale in the merchant market of nitrogen and argon which can be produced simultaneously in the air separation plant. Large users of gases historically have not found it feasible to enter into the industrial gases business. See also discussion of entry barriers, *supra*, pp. 14, 19 and n.13 [pp.1350, 1353, herein]. Finally, as the ALJ pointed out, any restraining effect on prices by the threat of backward integration would have little effect on prices in the merchant market. Prices for oxygen in the merchant market, for instance, are in the order of five to ten times the price of tonnage oxygen. The marginal potential contribution to the supply side of the merchant market, which is apt to be limited in geographic availability depending on the location of such customer, is unlikely to have a significant impact on that price level.

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[27] A composite average of three firms' profit margin on sales between 1970 and 1972 placed in the record by BOC reveals there was a 46 percent gain from 4.92 percent to 7.17 percent (BOC RX 254). Although the consolidated rate of *return on investment* never exceeded 3 percent during that period, investment was calculated on the basis of "gross fixed plants and equipment" not taking into account depreciation (*ibid.*). Exclusion of such an important reduction of the capital base in a capital-intensive industry would result in a substantial understatement of return compared to commonly accepted rates of return.

In sum, we fail to find convincing reasons to view entry by BOC as lacking competitive significance for this industry. Entry by BOC by internal growth (or expansion of toehold firm) would add a new competitor and decision-maker to an industry that is already highly concentrated and becoming more so. New entry into another geographical market by a strong, proven-and-tried competitor frequently has the effect of shaking up established industry leaders and sets in motion pressures on them to compete more vigorously in price or services in order to retain their existing market shares.

We conclude that that Section 7 has been violated and BOC should be ordered to divest itself of Airco.

II. INHALATION ANESTHETIC EQUIPMENT

The complaint also alleges that one of the effects of the acquisition of Airco stock may be substantially to lessen competition in the manufacture and sale of inhalation anesthetic equipment, or any submarket thereof, in the United States. "Inhalation anesthetic equipment" was defined by complaint counsel during the proceedings as equipment and accessories used in the administration of gas for anesthetic purposes. It is to be distinguished from equipment designed to aid patients in breathing ("inhalation therapy equipment"). The principal items of anesthetic equipment are anesthesia machines, vaporizers, face masks, ventilators, flow meters, and various connecting tubes. Many of these items are similar to "inhalation therapy equipment," except that they must be semi-conductive to prevent accidental electrocution or explosions in the operating room. This results in prices being higher than on corresponding therapy equipment.

At the time of the acquisition, Airco, through its Ohio Medical Products Division, was the leading seller of inhalation anesthetic equipment in the United States. BOC, through two U.S. subsidiaries, Fraser Sweatman, Inc. and Harris Lake, Inc.,[28] also marketed certain types of inhalation anesthetic equipment.

The ALJ found that total sales of inhalation anesthetic equipment in the United States in 1972 was $24,305,611. Airco's share of those was approximately 31 percent ($7,616,338). The share collectively held by firms acquired by BOC amounted to 8 percent ($2,013,362). The ALJ also found that sales were highly concentrated, the four largest manufacturers in 1972 having captured 64.5 percent of total sales and the eight largest, 88 percent. The ALJ found that the manufacture and sale of inhalation anesthetic equipment constituted a separate product market and the acquisition of Airco stock by BOC substantially lessened competition in that line of commerce.

BOC's threshold challenge to this portion of the initial decision is with respect to the definition of the product market and the completeness of sales data placed in the record.

A. *Inhalation Anesthetic Equipment and Accessories as a Line of Commerce*

Both here and before the ALJ, BOC has objected to the market definition as being too broad. A review of the specific items encompassed within the asserted market demonstrates that there is lack of interchangeability, and therefore lack of competition between or among the items.[29]

The ALJ responded that (1) the principal item, the *anesthesia machine*, "consists of nearly every product" in the asserted market; and (2) the remaining items in the asserted market are necessary in order for the patient to effectively receive the anesthetic vapors.[30]

While these facts may be true, they do not establish that production and sale of all inhalation anesthetic equipment are in a single economic market. Automobiles "consist of" tires, mufflers, spark plugs, etc., but this does not mean that the production of automobiles may be lumped with the production of all tires, mufflers, etc., into a single product market. Automotive parts that are sold separate and apart from the sale of automobiles (aftermarket sales) obviously are not in the same market as assembled automobiles. So it is with inhalation equipment. A purchaser may buy a completed "anesthesia machine" from one manufacturer but purchasers also buy separate components from different manufacturers. Table I of the ALJ's findings disclose that only eight of the 23 firms whose output is included in the total market manufacture and sell anesthesia machines; and anesthesia machine sales represent only 22 percent of total inhalation anesthetic equipment sales. The ALJ's second point—complementarity in end use among the products—does not establish that the products belong in the same economic market. Automobiles need oil and gasoline to be operable, but no one would surely contend that automobiles, oil, and gasoline are all in the same product market.

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[28] Fraser Sweatman was the U.S. subsidiary of Cyprane, Ltd. a United Kingdom company which was acquired by BOC in 1972. Harris Lake, Inc. was the subsidiary of Harris Calorific Company, a United States company, full control of which was acquired by BOC in November 1973.

[29] Included in the initial decision's market are the following items: (1) "Anesthesia machines" (the essential elements of which are a cart, regulators, flow meters, vaporizers, conducting tubes, masks, CO2 absorption canisters, and rebreathing reservoir bags); (2) anesthesia vaporizers (containers that convert a liquid anesthetic into a vapor); (3) rebreathing reservoir bags; (4) anesthesia conducting tubes that carry the gas from the anesthesia machine to the patient; (5) anesthesia airways (curved tubes inserted into a patient's mouth); (6) anesthesia face masks; (7) connecting Y-pieces; (8) adapters and fittings; (9) carbon dioxide absorption canisters; (10) flow meters; (11) yokes, handscrews, and valves; (12) anesthesia ventilators (devices which mechanically assist a patient's breathing during anesthesia); (13) anesthesia respirometers (measures volume of breathing); (14) endotracheal tubes and cuffs; (15) laryngoscopes for anesthesia; (16) forceps for anesthesia; (17) disposable breathing circuits; (18) other miscellaneous anesthesia accessories. The market as defined encompasses equipment whether sold for use in hospitals, by the veterinary profession, or the dental profession.

[30] The ALJ found that there is a degree of interchangeability, both in the supply side (technological similarity leading to production flexibility) and the demand side among surgical, veterinary, and dental anesthesia machines. Although BOC disputes this finding, we find the record supports the inclusion of veterinary and dental machine production output capacity in the same market with surgical machines. The machines are very similar in their makeup and the principles of producing them are the same. Many of the components are identical. Cf. *The Budd Co.*, Dkt. 8848, Commission Opinion, Aug. 29, 1975 [supra]; *Beatrice Foods Co.*, Dkt. 8864, Commission Opinion, July 1, 1975 [supra].

On appeal complaint counsel seek to bolster the ALJ's finding on the ground that inhalation anesthetic equipment is a "cluster" market within the meaning of *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321, 356-7 (1963); *A.G. Spalding* [*Bros., Inc.*, 56 F.T.C. 1125 (1960), *aff'd*, 301 F.2d 585 (3d Cir. 1962) and *U.S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958). But as we pointed out in *Sterling Drug, Inc.* 80 F.T.C. 477, 595 n.19 (1972) in "those cases it was established or undisputed that resource flexibility existed or that the product groupings were sold as a full line by most firms." See also *U.S.* v. *Grinnell Corp.*, 384 U.S. 563, 572 (1966). It is not asserted by complaint counsel that there is ease of production flexibility such that any manufacturer of one item within the product grouping can readily manufacture any of the other items from existing facilities.[31] And unlike the "industrial gases", which we found to constitute a single line of commerce, there is no evidence that manufacturers offer a full or nearly full line of such products. Only 4 of the 23 companies in the asserted inhalation anesthetic equipment market produce as many as half of the items making up the asserted market and none of the companies make all of them. Even among the four companies having the greatest volume of overall sales, two made less than half of the items. Although some manufacturers apparently serve as primary suppliers of certain equipment to other firms which resell them as part of a broader line of inhalation equipment, the record does not show the extent this occurs and complaint counsel's market is limited to sales at the manufacturing and import level. Also unlike the record with respect to the industrial gases industry, there is no evidence that the manufacture of "inhalation anesthetic equipment" is viewed as a distinct industry. On the basis of this record, we cannot agree that the manufacture of all inhalation anesthetic equipment constitutes a single economic market.

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[31] It appears that the products can be grouped into three types of production processes; production of rubber goods, production of plastic goods, and production of metal goods by machine shop tools and foundry castings. BOC's contention that there is no cross-elasticity of production facilities across these categories is not challenged by complaint counsel.

The ALJ based his decision on the existence of such an overall market and apparently did not deem it necessary to consider whether competition was substantially lessened in submarkets of the asserted overall market, although this was pleaded in the complaint. Sales data on a product-by-product basis were placed in the record and we have calculated the following market shares of BOC and Airco in the three product lines in which both competed to a significant degree, measured in terms of dollar sales at the manufacturing level in 1972.

	Sales ($)	*Market Share*
	Anesthesia Machines	
All	5,229,834	100%
Airco	2,413,231	46%
BOC	822,888	16%
	Anesthesia Vaporizers	
All	1,109,951	100%
Airco	273,712	25%
BOC	579,495	52%
	Anesthesia Face Masks	
All	1,170,623	100%
Airco	1,035,901	88%
BOC	36,275[32]	3%

Although BOC maintains that the market share data with regard to inhalation equipment are incomplete, we are satisfied that they are a sufficiently reliable basis for measuring concentration and market shares with regard to the above product lines. For instance, in its own analysis of the anesthesia machine market BOC placed Airco as dominating sales "with approximately 55-60% of the market" (CX 169B). Testimony by knowledgeable industry witnesses indicated that at least 90 percent of industry sales were accounted for by the 23 firms listed by complaint counsel as selling inhalation anesthetic equipment. Recognizing that "the development of precise market data could be 'prohibitively expensive and burdensome to obtain' in industries characterized by a central core of firms surrounded by a fringe of much smaller competitors," the Commission has accepted the Supreme Court's teaching in *Brown Shoe* that "precision in detail is less important than the accuracy of the broad picture." *Avnet*, 82 F.T.C. 391, 465, *aff'd*, 511 F.2d 70 (7th Cir. 1975); *Papercraft Corp.*, 78 F.T.C. 1352, 1405-06 (1971), *aff'd*, 472 F.2d 927 (7th Cir. 1973); see *Brown Shoe Co.*, v. *U.S.*, 370 U.S. 294, 342 n.69 (1962). We find that the above tabulations reflect the approximate size of these product markets.

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[32] $36,275 is the figure listed in the initial decision. However it understates the degree of actual competition between BOC and Airco since Harris Lake (BOC) reported sales of face masks of $76,942 in 1972 although they were manufactured for them by another firm.

Clearly in these three product lines the challenged acquisition has substantially lessened competition. In addition to being the two largest manufacturers of anesthesia machines, BOC and Airco are number one and number two, respectively, in the manufacture and sale of anesthesia vaporizers. Although BOC challenges the ALJ's findings that entry barriers in inhalation anesthetic equipment are high, when such substantial market shares are held by participants in a horizontal merger, lack of high entry barriers is not a defense in any event. Absence of substantial entry barriers does not itself ensure that lost competition will be restored. *Ekco Product Co.*, 65 F.T.C. 1163, 1208-09 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965); *American Brake Shoe Co.*, 73 F.T.C. 610, 684-85 (1968), *aff'd*, 420 F.2d 928 (6th Cir.). See also Brodley, "Oligopoly Power Under the Sherman and Clayton Acts" 19 Stan. L. Rev. 285, 349 (1967). Furthermore the record amply supports the ALJ's findings that significant entry barriers exist.

III. INHALATION THERAPY EQUIPMENT

The complaint also alleges that competition may be substantially foreclosed in the manufacture or sale of "inhalation therapy equipment" or submarkets thereof. Inhalation therapy equipment is defined by complaint counsel as equipment used to *aid* patients to breathe, rather than to anesthetize them.

As in the case on inhalation anesthetic equipment, the alleged product market consists of a wide variety of equipment which are mostly nonsubstitutable and are generally made by different production methods.[33] Production of the various equipment is fragmented among many different companies. The initial decision lists some 30 firms in the field and one witness stated that his company had identified some 59 companies making one or more pieces of such equipment. The majority of firms have sales under $1 million. None of the companies manufactures all items of inhalation therapy equipment. Among the four firms having the greatest aggregate sales, only two manufacture as many as half the items. Although Airco manufactures 10 out of the 16 types of equipment comprising the market, the BOC firms manufactured at most only two types. As in the case of inhalation anesthetic equipment there is a failure to demonstrate that the leading firms manufacture a full or nearly full line of inhalation equipment.[34] Accordingly, we conclude that it has not been established that the manufacture of inhalation therapy equipment constitutes a single, overall market.[35]

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[33] The ALJ found the following items as comprising the inhalation therapy equipment market: (1) ventilators (sometimes called respirators) which force air or oxygen into the patients lungs; (2) humidifiers and nebulizers, which humidify the air or oxygen; (3) resuscitators (emergency devices); (4) delivery tubing; (5) face masks; (6) flow meters; (7) nasopharyngeal catheters and cannulae; (8) oropharyngeal airways; (9) drain and condensation bottles; (10) adapters and fittings; (11) yokes, handscrews and valves; (12) respirometers; (13) bacteria filters; (14) tracheotomy tubes; (15) incubators used to control or assist in breathing; (16) oxygen tents; (17) IPPB (intermittent positive pressure breathing devices).

Turning to the individual product lines comprising inhalation therapy equipment, there is no evidence of any significant competition between Airco and BOC. BOC's sales in this field were virtually limited to respirometers and Airco did not manufacture this item. As to the possibility that potential competition may have been eliminated or lessened, complaint counsel stated during the hearing that they were basing their case in inhalation therapy equipment solely on the foreclosure of "actual" competition between the firms, not on any charge that BOC's importance to the market was due to future entry on a much grander scale. Respondent's counsel clearly relied on complaint counsel's statement and refrained from eliciting testimony relating to any issue of potential entry.

Accordingly, the allegation that both actual and potential competition in inhalation therapy equipment or submarkets thereof have been substantially diminished as a result of the BOC acquisition of Airco stock must be dismissed.

IV. AIRCO

Although Airco did not enter into an agreement to sell its assets to BOC (*compare Dean Foods Co.*, 70 F.T.C. 1146, 1292 (1966)), by certain actions and agreements detailed above, *supra* p. 4 [p. 1342-43 herein], Airco's board of directors facilitated BOC's acquisition of Airco stock. Thus Airco's board, in exchange for Airco's representation on BOC's board of directors, consented to BOC's tender offer for Airco shares and advised Airco's shareholders of their consent and that a closer association of Airco and BOC would be beneficial to Airco. These actions technically constituted violations of the Federal Trade Commission Act since they were intended to, and did, facilitate an acquisition of stock that violated Section 7 of the Clayton Act. Were it not for the fact that Airco should be subject to certain provisions of the order to restore Airco's independence from BOC control, it would probably not be necessary to retain Airco as a respondent in this proceeding. Nevertheless the joinder appears desirable for purposes of assuring that certain preacquisition agreements between Airco and BOC are rescinded,[36] and we shall not disturb the ALJ's findings that Airco violated the Federal Trade Commission Act with respect to the acquisition.

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[34] Therefore the so-called "cluster market" cases cited by complaint counsel are unavailing. In *Philadelphia National Bank*, *supra*, there was no dispute that commercial banks offered the various services that make up "commercial banking." In *Bethlehem Steel*, *supra*, the major producers, including the two merging firms, produced the cluster of iron and steel products accepted as an alternative market in that case. In *Spalding*, *supra*, the leading firms, including the two merging firms, sold athletic equipment as a full line to retail distributors. See also *U.S.* v. *Grinnell Corp.*, 384 U.S. at 572 n.6, where the Court in holding that a "cluster of services" market had been demonstrated cited the fact that 24 out of the 38 firms offered a full line of the four types of central service station protection services, and nearly all the remaining firms offered three out of four of the services.

[35] Even if such a market definition were accepted, we would probably have difficulty upholding a violation in that line of The BOC firms, however, accounted for about one-half of one percent of sales.

V. RELIEF

The ALJ ordered BOC to divest its stock in Airco within one year. In addition he required BOC to assign its stock to a voting trustee who would vote the Airco stock pending divestiture. This latter provision, which was not sought by complaint counsel, is not necessary in our estimation unless future events dictate the need for such trusteeship to accomplish divestiture. Cf. *U.S.* v. *Kennecott Copper Corp.*, 249 F. Supp. 154, 165 (S.D.N.Y. 1965). Accordingly, it will be deleted. We do not agree with BOC that the one-year period for divestiture is too short.

The ALJ's order also prohibits BOC from acquiring, directly or indirectly, during the next 10 years, the business of any firm engaged in the business of industrial gases without approval of the Federal Trade Commission. Since requirement of advance Commission approval of acquisitions in this field might make it difficult for BOC to compete for the acquisition of a toehold firm as a basis for future entry should an occasion arise where the owner is attempting to sell his company quickly, we shall permit the acquisition of a firm selling less than $25 million a year in industrial gases without the requirement of obtaining Commission approval.[37] We will, however, require BOC to obtain Commission approval before acquiring any company engaged in the manufacture or sale of anesthesia machines, anesthesia vaporizers, or anesthesia face masks since BOC is already engaged in those lines of commerce in the United States.

The ALJ's order also appropriately requires BOC and Airco to cease any representation on each other's respective boards of directors. In addition the order requires Airco to cease and desist from taking any steps to implement any provision of the agreements between Airco and BOC of July 25, 1973, and of Dec. 10, 1973. We think the latter provision is unnecessarily broad in one respect. Airco's "right of first refusal" allows Airco to purchase or designate a purchaser for such shares in whole for cash in an amount equivalent in value to the consideration for which BOC proposes to sell such shares to a transferee (CX 108 B). If the Airco corporation itself should purchase back the acquired stock, the ownership of Airco would be in approximately the same status as prior to the BOC takeover. On the other hand, if Airco should seek to designate a purchaser, there should be no objection provided sale to the designee does not raise antitrust problems. No reasons have been presented by complaint counsel as to why Airco should not have an opportunity to exercise this right subject to Commission approval of the designee.

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[36] Had Airco *not* been joined as a respondent in this proceeding, a finding of violation of Section 7 and an order of divestiture against BOC might nevertheless supercede and render unenforceable these agreements between Airco and BOC. However, we need not reach this question.

[37] Based on 1972 Census data, shipments totaling $25 million would represent approximately 4 percent of the national market.

As to a second point raised by Airco—the desirability of retaining the provision contained in the July 25 agreement that restricts BOC from disseminating certain confidential Airco business information—complaint counsel has offered no objection to this suggested change and we cannot perceive any. Accordingly the order will be modified in this respect also.

An appropriate order accompanies this opinion.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint in this matter on Feb. 26, 1974, charging that respondents, The British Oxygen Company Limited, BOC Financial Corporation, BOC Holdings Limited, and British Oxygen Investments Limited had violated Section 7 of the amended Clayton Act (15 U.S.C. §18) in acquiring 4 million shares of the stock of Airco, Incorporated and further charging these respondents and Airco, Incorporated with violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45). Testimony and other evidence in support of and in opposition to the allegations of the complaint were received in evidentiary hearings and in an initial decision of Oct. 18, 1974, the administrative law judge concluded that the principal charges were supported by the evidence and entered an order that would require divestiture of the acquired firm and other relief.

The Commission, having considered the appeal filed by the respondents and the entire record, and having determined that the law judge's findings of fact and conclusions, as modified herein and as supplemented by the attached Commission opinion, should be adopted as the findings and conclusions of the Commission, now makes its findings as to the facts, its conclusions drawn therefrom and its order.

1. through 35. With the exception of Finding 18, the Commission adopts the Preliminary Statement and Findings 1 through 36 of the initial decision.

36. Finding of Fact 36 of the initial decision is revised to read:

The Bureau of the Census classifies the production and marketing of industrial gases as a separate and distinct industry under Standard Industrial Classification (SIC) 2813 (CX 296A-F, CX 312A-K). The United States industrial gases industry has been defined by Census from at least 1945 through the present as those establishments primarily engaged in manufacturing gases for sale in compressed, liquid and solid forms (CX 340A-B, CX 336A-B, CX 338A-B; CX 339A-B, CX 296A). The gases classified by Census as industrial gases are acetylene, carbon dioxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other elemental gases, and compressed and liquified gases (CX 299D, CX 300A-D, CX 312C-D). The same group of gases have been classified as industrial gases by Census since at least 1954 (CX 337A-C).

37. through 52. The Commission adopts Findings 37 through 52 of the initial decision.

53. Finding of Fact 53 of the initial decision is revised to read:

There is no price data in the record as such. BOC respondents contend that price competition in the industry is extremely rigorous, and reference is made to testimony of industry executives (Dempster 556; Baker 436-37; Flamm 305). This testimony is, however, somewhat equivocal. Mr. Flamm of Linde stated that between Linde, Air Products and Airco—"they argue their service is equal, I would say a fair amount of vigorous price competition" (Flamm 305). Further, this testimony, which is of the most general nature, must be viewed in perspective with the supply-demand situation existing during the past 2 years, and testimony that prices have firmed, marginal pricing has disappeared and full pricing has become the standard. Respondents also rely upon the observations in the Perham-Greenfield (BOC) report on the United States industrial gases market as of 1969-1970 (BOC RX 62). The report also covers the period 1969-early 1970. The supply-demand situation and industry pricing practices changed substantially from early 1970 to the end of 1973 when the challenged acquisition occurred (Findings of Fact 50-52).

54. Finding of Fact 54 of the initial decision is revised to read:

BOC respondents placed several charts in evidence which demonstrate that average unit value of major industrial gases has declined in recent years (BOC RX 246; BOC PF 123). Conclusions regarding prices have been drawn from data compiled by the Bureau of the Census on the total value and quantity of shipments of the various gases, f.o.b.

plant, with the unit value (*i.e.*, the ratio of total value of shipments to total quantity of shipments) used as an approximation of price. Declining unit value has little significance in establishing that the marketplace is highly competitive. The basic pattern in the industry has been an increase in volume purchased by individual customers and a trend toward pipeline delivery. Thus, the increasing use of tonnage oxygen with low delivery costs has had an averaging-down effect on the unit value of shipments. Economies of scale in production and delivery has also effected lower unit costs (Baker 2745-46).

55. through 65. The Commission adopts Findings 55 through 65 of the initial decision with the exception that the reference to "BOC RX 254" in the second sentence of Finding 58 should read: "*Id.* Figures 20 and 21."

66. The Commission adopts Finding 66 of the initial decision except for the first two sentences thereof.

67. through 80. The Commission adopts Findings 67 through 80 of the initial decision.

81. Finding 81 of the initial decision is revised to read:

Industry witnesses testified that their pricing and marketing decisions had not been affected by the perceived potential entry of BOC (Flamm 336-37; Dempster 567-68; Kimmerling 881-82; Baker 446).

82. through 91. The Commission adopts Findings 82 through 91 of the initial decision, striking the word "Bangladesh" in Finding 85 and changing "19 countries" in Finding 89 to read "17 countries."

92. Finding 92 of the initial decision is revised to read:

In October 1969, Dr. Muller was told by the chairman of BOC to terminate all activities other than searching for opportunities for BOC in the U.S. industrial gases field (CX 42, CX 248A-B). In December 1969, the chairman of BOC informed Dr. Muller that BOC should be represented in the United States; the only questions were what, how, when and where (CX 47A).

93. and 94. The Commission adopts Findings 93 and 94 of the initial decision, revising the last sentence of Finding 94 to read:

Throughout Dr. Muller's association with BOC, BOC continually stressed its interest in entering the U.S. industrial gases market (CX 42, 47A; Muller 668).

95. The Commission adopts Finding 95 of the initial decision, revising the first sentence to read:

By 1969, BOC had made a definite decision to investigate possible entry into a number of U.S. markets, with first priority to be given to the U.S. industrial gases market (CX 40A, CX 246).

96. Finding 96 of the initial decision is revised to read:

[Delete subtitle]

In November 1969, Mr. Johnson of Loeb, Rhodes and Company, an investment banking firm, was told by BOC executives that BOC was interested in making an acquisition of some consequence in the United States in the industrial gases line of business.

Mr. Johnson indicated that he had earlier relations with Chemetron that involved negotiations for the acquisition of Chemetron by another company. BOC executives expressed an interest in pursuing possible acquisition of Chemetron. In January 1970, a meeting was arranged between BOC and Chemetron officials. Chemetron's management made it clear that they were interested in permitting BOC to acquire only a minority interest, enough to protect against a takeover by other companies. The BOC representative in turn indicated that he doubted that his board of directors would be interested in anything less than a majority interest. BOC later informed Johnson that it was not interested in pursuing the matter further (CX 223, 224, 225; Tr. 832-35).

97. Finding 97 of the initial decision is adopted, deleting the subtitle.

98. Finding 98 of the initial decision is revised to read:

[Delete subtitle]

BOC considered Burdett Oxygen Company of Cleveland (Burdett-Cleveland) a possible acquisition candidate in 1969 (CX 40A). In 1969, BOC told Burdett-Cleveland that it might be interested if the company ever wished to dispose of its operations (CX 216). Mr. Perham and Mr. Greenfield of BOC visited Burdett-Cleveland during BOC's 1970 study of the U.S. industrial gases market. Although the authors of the report considered the company to have management problems and to be in financial trouble, they expressed the view that "possibly their strategy in obtaining three tonnage supply schemes could be made to work if the business ever is available at a realistic price * * * We recommend we watch and wait with only a minor possibility it could be of interest to us" (CX 232 D-E, in camera).

99. Finding 99 of the initial decision is revised to read:

Early in 1970, an investment banker told BOC that 50 percent of the stock of Burdett-Cleveland could be purchased for $4-5 million. In April 1970, BOC informed the banker that there was a possibility that BOC could be interested in a majority position in Burdett-Cleveland (CX 233A, CX 234). After BOC was told it was then impossible to obtain control, BOC told the banker that if the situation changed it should be alerted as it might still be interested (CX 243). In September-October 1970, BOC told Burdett-Cleveland and its bankers that it was interested in buying Burdett's Niagara Falls, N.Y., industrial gases plant for its Canadian operation across the border. However nothing came of the matter (CX 244A, CX 245).

100.-102. The Commission adopts Finding 100 of the initial decision, but vacates Findings 101 and 102.

103.-111. The Commission adopts Findings 103 through 111 of the initial decision, but deletes the sentence in Finding 110: "The Brazilian market has a growth rate comparable to the U.S. market."

112. The Commission adopts Finding 112 of the initial decision, revising the last sentence to read: "At the time BOC acquired Airco stock, there were a number of small regional U.S. industrial gases producers, some of which presumably were available for acquisition (see, *e.g.* Tr. 736, 788, 876, 393, 2734-35, 2750, 2781, 260).

113.-121. The Commission adopts Findings 113 through 121 of the initial decision, deleting the first sentence of Finding 121.

122. The Commission adopts Finding 122 of the initial decision but substituting the following for the first two sentences thereof: "The Z-79 Committee of the American National Institute consists of the leading manufacturers of IAE, representatives of the medical professional societies in the United States and representatives of the Federal Government (Hedley-Whyte 1212-13).

123.-127. The Commission adopts Findings 123 and 124 of the initial decision, deleting the first sentence of Finding 124. Findings 125-127 are vacated.

128.-140. Findings 128 through 138 and Finding 140 of the initial decision are adopted except for characterizations of sales of IAE as constituting a single market. Finding 139 is vacated.

141.-149. Findings 141 through 149 of the initial decision are adopted, except for Finding 143 which is vacated.

Tables I and II *in camera* of the initial decision are adopted by the Commission.

150.-153. Findings 150 through 153 of the initial decision are vacated and the following findings are entered in lieu thereof:

Prior to the acquisition of Airco, BOC competed with Airco in the manufacture or sale of anesthesia machines, anesthesia vaporizers and anesthesia face masks. (CX 135-141, 146, 147; 150; Physical Exhibit A, Table I *in camera*). The manufacture and sale of anesthesia machines, anesthesia vaporizers, and anesthesia face masks is in each of these product lines a line of commerce for purposes of Section 7 of the Clayton Act. BOC's stock acquisition has substantially lessened competition in these lines of commerce.

154.-174. The Commission adopts Findings 154 through 174 of the initial decision except to the extent they characterize sales of ITE as constituting a single market.

175.-182. Findings 175 through 182 of the initial decision are vacated.

The following Conclusions of the initial decision are adopted except as indicated:

Conclusion IA

Conclusion IB

Conclusion IC, except for the last sentence of the first paragraph.

Conclusion ID

Conclusion IE

Conclusion IF (entitled "BOC Exerted Beneficial Influence etc. * * *" at pp. 93-96 [pp. 1320-1321, herein]) is vacated.

Conclusion IG (entitled "The Acquisition of Airco etc. * * *" at pp. 96-102 [pp. 1322-1327 herein]) is adopted, except that in the first paragraph on p. 100 [p. 1325 herein] "17 different countries" is substituted for "19 different countries" and the final sentence is deleted. Further, the third sentence in the second paragraph on p. 101 [p. 1326, herein] is deleted and "See Finding 112" is substituted therefor.

Conclusion IH is vacated.

Conclusion II is adopted.

Conclusion IIA is vacated.

Conclusion IIB is adopted.

Conclusion IIC is vacated.

Conclusion III is vacated and the following is entered therefor: There is insufficient evidence that competition has been lessened in the sale of inhalation therapy equipment as the result of the acquisition.

Conclusion IV is adopted to the extent it is not inconsistent with the final order and opinion of the Commission.

Conclusions of Law at pp. 114-116 [pp. 1336-1337 herein] are adopted to the extent they are not inconsistent with the findings and opinion of the Commission.

The following final order is hereby entered:

FINAL ORDER

For the purpose of this order, "BOC" shall include all subsidiary or related corporations and all successor corporations of The British Oxygen Company Limited; BOC Financial Corporation; BOC Holdings Limited; and British Oxygen Investments Limited; and "Airco" shall include all subsidiary or related corporations and all successor corporations of Airco, Inc.

I

It is ordered, That BOC, its officers, directors, agents, representatives and employees, shall within one (1) year from the date this order becomes final, divest itself absolutely and in good faith, subject to the prior approval of the Federal Trade Commission, of all rights, title and interest including without limitation all shares of stock and all assets, properties, rights and privileges, tangible or intangible, including without limitation all plant, equipment, machinery, raw material reserves, inventory, customer lists, trade names, trademarks, good will, and other property of whatever description acquired by BOC as a result of its acquisition of the stock of Airco.

II

It is further ordered, That none of the stock, assets, properties, rights and privileges, tangible or intangible, required to be divested by BOC pursuant to Paragraph I above, shall be divested directly or indirectly to anyone who is, at the time of the divestiture, an officer, director, employee, or agent of, or under the control, direction or influence of BOC, or who owns or controls more than one percent of the capital stock of BOC.

III

It is further ordered, That respondent BOC shall cease and desist for a period of ten (10) years from the date this order becomes final from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the normal course of business) of any concern, corporate or noncorporate, engaged at the time of acquisition in any State of the United States in any or all of the business of (1) industrial gases, or (2) anesthesia machines, or (3) anesthesia vaporizers, or (4) anesthesia face masks, without the prior approval of the Federal Trade Commission. The foregoing restriction (1) shall not apply to the acquisition of a concern which in the two most recent reporting years prior to the acquisition has reported value of shipments of industrial gases (SIC 2813) to the Bureau of Census not in excess of $25 million in the aggregate in each of the two years; *Provided, however,* That BOC has not already acquired any interest in a concern engaged in any portion of the business of manufacturing or selling industrial gases in the United States and no longer retains an ownership interest in Airco at the time of such acquisition.

The prohibited acquisitions in the above paragraph shall include but not be limited to the entering into of any arrangement between BOC, and any concern engaged in any or all of the aforesaid businesses pursuant to which BOC obtains the market share of any such concern (a) through such concern discontinuing its participation in the industries mentioned in this paragraph, or any segment thereof, under its own trade name or labels and thereafter manufacturing or distributing any of said products under the BOC trade name, or (b) by reasons of such concern discontinuing its participation in the industries mentioned in this paragraph, or any segment thereof, and thereafter transferring to BOC its customer lists, or in any other way making available to BOC access to its customers or its customer accounts.

IV

It is further ordered, That BOC notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any change in the corporation which may affect compliance obligations arising out of the order.

V

It is further ordered, That BOC cease any and all representation on the board of directors of Airco, and cease and desist from taking any steps to nominate, seat, or admit any representatives of Airco to the board of directors of BOC.

VI

It is further ordered, That BOC shall within sixty (60) days from the date this order becomes final, and every sixty (60) days thereafter until BOC has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which BOC intends to comply or has complied with this order. All compliance reports shall include, among other things that are from time to time required, a summary of contacts or negotiations with anyone for the specified stock, assets, properties, rights, and privileges, tangible or intangible, the identity of all such persons, and copies of all written communications to and from such persons.

VII

It is further ordered, That Airco cease and desist from taking any steps toward achieving union of interest between Airco and BOC, including but not limited to merger, acquisition, consolidation or joint venture in any market referenced herein.

VIII

It is further ordered, That Airco cease and desist from taking any steps to implement any provision of the agreements between Airco and BOC of July 25, 1973, and of Dec. 10, 1973. The foregoing provision shall not apply (1) to Airco's right of first refusal as set forth in paragraph 4 of the Dec. 10, 1973 agreement, subject, however, to Commission final approval of the exercise of that right; (2) to the restrictions on dissemination of information contained in the July 25, 1973 agreement.

IX

It is further ordered, That Airco cease any and all representation on the board of directors of BOC, and cease and desist from taking any steps to nominate, seat, or admit any representative of BOC to the board of directors of Airco.

X

It is further ordered, That Airco shall within sixty (60) days from the date this order becomes final, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Airco has complied with this order.

IN THE MATTER OF

MICHAEL MILEA/PETER SINCLAIR, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, TEXTILE FIBER PRODUCTS IDENTIFICATION AND WOOL PRODUCTS LABELING ACTS

Docket C-2764. Complaint, Dec. 8, 1975—Decision, Dec. 8, 1975

Consent order requiring a New York City importer of wearing apparel, among other things to cease mislabeling the fiber content of wool and textile products; failing to disclose on labels manufacturer identification; falsely invoicing textile fiber products; and furnishing false guaranties.

Appearances

For the Commission: *Charles Peterson.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, the Wool Products Labeling Act of 1939, and the Textile Fiber Products Identification Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Michael Milea/Peter Sinclair, Ltd., a corporation, and Bernard Rein, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Michael Milea/Peter Sinclair, Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida with its main office and principal place of business located at 475 Park Ave., South, New York, N.Y. The firm also maintains warehousing and distribution facilities at 3240 W. 16th Ave., Hialeah, Fla., where the firm maintained its principal place of business under the name Imperial Imports, Inc., until October 1973. In October 1973, Imperial Imports, Inc., a Florida corporation, merged with its wholly-owned subsidiary Michael Milea/Peter Sinclair, Ltd., a New York corporation, to form the corporate respondent.

Respondent Bernard Rein is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent's Hialeah, Fla., facility, including the acts and practices hereinafter set forth. His address is 3240 W. 16th Ave., Hialeah, Fla.

Respondents are now, and for some time last past have been, engaged in the importation of wearing apparel for sale to retailers throughout the United States.

COUNT I

Alleging violation of the Wool Products Labeling Act of 1939 and the implementing rules and regulations promulgated thereunder, and the Federal Trade Commission Act, as amended, the allegations of Paragraph One hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 2. Respondents, now and for some time last past, have imported for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products, as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were sweaters identified by respondents as "50% acrylic, 30% wool, 20% cotton" whereas in truth and in fact, said wool products contained substantially different amounts of fibers than as represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, labeled, tagged or otherwise identified as required under the provisions of Section 4(a)(2)(A) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely sweaters, with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool, where said percentage by weight of such fiber was five percentum or more; and (5) the aggregate of all fibers.

PAR. 5. Certain of said wool products were further misbranded by respondents in that they were not stamped, labeled, tagged or otherwise identified as required under the provisions of Section 4(a)(2)(C) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by Rule 13 promulgated under said Act.

Among such wool products, but not limited thereto, were sweaters whose labels failed to disclose the name, or other identification issued and registered by the Commission, of the manufacturer of the wool product or one or more persons subject to Section 3 of the Act with respect to such product.

PAR. 6. The acts and practices as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce, under the Federal Trade Commission Act, as amended.

COUNT II

Alleging violation of the Textile Fiber Products Identification Act and the implementing rules and regulations promulgated thereunder and of the Federal Trade Commission Act, as amended, the allegations of Paragraph One hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 7. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising and offering for sale in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported textile fiber products which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported after shipment in commerce textile fiber products either in their original State or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 8. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely ladies knitted blouses, which contained substantially different amounts and types of fibers than as represented.

PAR. 9. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels which failed:

1. To disclose the true generic names of the fibers present;
2. To disclose the percentages of such fibers by weight;
3. To disclose the name, or other identification issued and registered by the Commission, of the manufacturer of the product or one or more persons subject to Section 3 of said Act with respect to such products.

PAR. 10. Respondents have furnished their customers with false guaranties that certain textile fiber products were not misbranded or falsely invoiced by falsely representing in writing on invoices that respondents have filed a continuing guaranty under the Textile Fiber Products Identification Act with the Federal Trade Commission in violation of Section 10(b) of said Act and Rule 38(d) of the rules and regulations promulgated thereunder.

PAR. 11. The aforesaid acts and practices of respondents as set forth in Paragraphs Seven through Ten above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce under the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Michael Milea/Peter Sinclair, Ltd. is a corporation

organized, existing and doing business under and by virtue of the laws of the State of Florida, with its main office and principal place of business located at 475 Park Ave., South, New York, N.Y. The firm also maintains warehousing and distribution facilities at 3240 W. 16th Ave., Hialeah, Fla., where the firm maintained its principal place of business under the name Imperial Imports, Inc., until October 1973. In October 1973, Imperial Imports, Inc., a Florida corporation, merged with its wholly-owned subsidiary Michael Milea/Peter Sinclair, Ltd., a New York corporation, to form the corporate respondent.

Respondent Bernard Rein is an officer of said corporation. He formulates, directs and controls the acts and practices of said corporation's Hialeah facility, including the acts and practices hereinafter set forth. His address is 3240 W. 16th Ave., Hialeah, Fla.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

COUNT I

It is ordered, That Michael Milea/Peter Sinclair, Ltd., a corporation, its successors and assigns and its officers, and Bernard Rein, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction or manufacture for introduction into commerce or the offering for sale, transportation, distribution, delivery for shipment or shipment in commerce of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the name or amount of the constituent fibers contained therein;

2. Failing to securely affix to or place on each product a stamp, tag, label or other means of identification showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

COUNT II

It is further ordered, That respondents Michael Milea/Peter Sinclair, Ltd., a corporation, its successors and assigns and its officers, and Bernard Rein, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising or offering for sale in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported of any textile fiber product which has been advertised for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported after shipment in commerce of any textile fiber product whether in its original State or contained in any other textile fiber product, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

1. Misbranding textile fiber products by:

(a) falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein;

(b) failing to affix a stamp, label, tag, or other means of identification to such textile fiber products showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondents Michael Milea/Peter Sinclair, Ltd., a corporation, its successors and assigns and its officers, and Bernard Rein, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device do forthwith cease and desist from furnishing a false guaranty that any textile fiber product is not misbranded or falsely invoiced or advertised under the provisions of the Textile Fiber Products Identification Act.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or

employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

LEESIN INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2765. Complaint, Dec. 8, 1975—Decision, Dec. 8, 1975

Consent order requiring a Croton-On-Hudson, N.Y., importer and distributor of fabrics, among other things to cease misrepresenting the wool content of their wool blend fabrics and further, that respondents notify their customers that the fabrics they have purchased were misbranded.

Appearances

For the Commission: *Jerry R. McDonald.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Leesin International, Inc., a corporation, and Leon Sinder, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Leesin International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Quaker Bridge Road E., Croton-On-Hudson, N.Y.

Respondent Leon Sinder is an officer of Leesin International, Inc. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

Respondents are engaged in the importation and sale of fabrics including but not limited to wool products.

PAR. 2. Respondents, now and for some time past, have imported for introduction into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, and sold in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain wool fabrics stamped, tagged, labeled, or otherwise identified by respondents as 40 percent wool, 60 percent polyester; whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4 (a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely wool fabrics, with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act, as amended.

PAR. 6. Respondents are now and for some time past have been engaged in the importation, offering for sale, sale, and distribution of certain products, namely fabrics. In the course and conduct of their business as aforesaid, respondents now cause and for some time last past, have caused their said products, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 7. Respondents in the course and conduct of their business have made statements on invoices to their customers misrepresenting the fiber content of certain of their products.

Among such misrepresentations, but not limited thereto, were statements setting forth the fiber content thereof as 40 percent wool, 60 percent polyester; whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 8. The acts and practices set out in Paragraph Seven have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content thereof.

PAR. 9. The aforesaid acts and practices of the respondents as herein alleged in Paragraph Seven were, and are, all to the prejudice and injury of the public, and constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce, within the intent and meaning of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939 and;

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Leesin International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Quaker Bridge Road E., Croton-On-Hudson, N.Y.

Respondent Leon Sinder is an officer of said corporation. He formulates, directs and controls the acts, practices and policies of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Leesin International, Inc., a corporation, its successors and assigns, and its officers, and Leon Sinder, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the introduction, or importing for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products.

2. Failing to securely affix to or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Leesin International, Inc., a corporation, its successors and assigns, and its officers, and Leon Sinder, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the importing, advertising, offering for sale, sale or distribution of fabrics in or affecting commerce, as "commerce" is defined in the Federal

Trade Commission Act, as amended, do forthwith cease and desist from misrepresenting the amount or character of constituent fibers contained in such products on invoices or shipping memoranda applicable thereto, or in any other manner.

It is further ordered, That respondents notify, by registered mail, each of their customers that purchased the wool products which gave rise to this complaint of the fact that such products were misbranded.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

MR. MARTINEZ OF MIAMI, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-2766. Complaint, Dec. 8, 1975—Decision, Dec. 8, 1975

Consent order requiring a Miami, Fla., manufacturer of women's wearing apparel, among other things to cease furnishing customers with false guaranties that certain textile fiber products were not misbranded, mislabeling products as to their constituent fibers, failing to maintain and preserve proper records, and failing to disclose on labels all information required by the Textile Fiber Products Identification Act.

Appearances

For the Commission: *Charles Peterson.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mr. Martinez of Miami, Inc., a corporation, and Leonel Martinez, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and rules and regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mr. Martinez of Miami, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 525 N.W. 29th St., Miami, Fla.

Respondent Leonel Martinez is an individual and an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

Respondents are manufacturers of textile fiber products, including, but not limited to, wearing apparel in the form of women's suits, dresses, blouses and slacks.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising and offering for sale, in commerce, and in the transportation and causing to be transported in commerce, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported textile fiber products which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products either in their original State or contained in other textile fiber products, as the term "commerce" and "textile fiber products" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the

Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely women's suits, dresses, blouses and slacks, which contained substantially different amounts and types of fibers than as represented.

PAR. 4. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the rules and regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels which failed:

a. To disclose the true generic names of the fibers present in the order of predominance by weight; and

b. To disclose the percentages of such fibers by weight.

PAR. 5. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the rules and regulations promulgated thereunder in the following respects:

a. Fiber trademarks were placed on labels without the generic names of the fibers appearing on such labels in immediate conjunction therewith as required by Rule 17(a) of the aforesaid rules and regulations; and

b. Required information as to fiber content was not set forth in a manner that would separately show the fiber content of the separate units of textile fiber products containing two or more units, each of which was of different fiber composition as required by Rule 29 of the aforesaid rules and regulations.

PAR. 6. Respondents have failed to maintain proper records showing the fiber content of the textile fiber products manufactured by them in violation of Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the rules and regulations promulgated thereunder.

PAR. 7. Respondents have furnished their customers with false guaranties that certain of the textile fiber products were not misbranded or falsely invoiced by falsely representing in writing on invoices that respondents have filed a continuing guaranty under the Textile Fiber Products Identification Act with the Federal Trade Commission in violation of Rule 38(d) of the rules and regulations under said Act and Section 10(b) of such Act.

PAR. 8. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Textile Fiber Products Identification Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mr. Martinez of Miami, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 525 N.W. 29th St., Miami, Fla.

Respondent Leonel Martinez is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Mr. Martinez of Miami, Inc., a corporation, its successors and assigns, and its officers and Leonel Martinez, individually and as an officer of said corporation and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale in commerce, or the importation into the United States, of any textile fiber product, or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original State or contained in other textile fiber products, as the terms "commerce" and "textile fiber products" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

2. Failing to affix a stamp, tag, label or other means of identification to each such product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

3. Failing to separately set forth the required information as to fiber content in such a manner as to show the fiber content of the separate units of textile fiber products containing two or more units which are of different fiber composition where such form of marking is necessary to avoid deception as required by Rule 29 of the rules and regulations promulgated under authority of the Textile Fiber Products Identification Act.

B. Failing to maintain and preserve proper records of fiber content of textile fiber products manufactured by respondents as required by Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the rules and regulations promulgated thereunder.

It is further ordered, That respondents Mr. Martinez of Miami, Inc., a corporation, and its officers, and Leonel Martinez, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any textile fiber product is not misbranded or falsely invoiced under the provisions of the Textile Fiber Products Identification Act.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

WARNER-LAMBERT COMPANY

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8891. Complaint, June 27, 1972—Order, Dec. 9, 1975

Order requiring a Morris Plains, N.J., manufacturer and distributor of "Listerine" mouthwash preparation, among other things to cease misrepresenting the medicinal, therapeutic qualities, beneficial effects, and germicidal nature of its product. Respondent is further required to include a corrective advertising disclosure in its advertisements. The order dismisses the complaint allegation regarding the effects of "Listerine" on children who gargle with it twice a day.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Warner-Lambert Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Warner-Lambert Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 201 Tabor Rd., Morris Plains, N.J.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of a mouthwash preparation designated "Listerine" to retailers for resale to the consuming public.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now causes, and for some time last past has caused the said Listerine, when sold, to be shipped from its plants and facilities to purchasers thereof located in various States other than the State of origination, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said Listerine in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business and for the purpose of inducing the sale of its said Listerine, respondent has made, and is now making numerous statements and representations in print advertisements, including product packaging and labels, and in television broadcasts transmitted by television stations located in various States of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines, respecting the effects of said product in the prevention, cure, treatment and mitigation of colds.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

On packages or labels:

LISTERINE
Antiseptic
Kills Germs
By Millions
On Contact
For Bad Breath, Colds and
Resultant Sore Throats

* * * * * * *

For Colds and Resultant Sore Throats—Gargle with Listerine Antiseptic Full Strength at the First Sign of Your Cold.

In print advertisements:

FIGHT BACK—The colds-catching season is here again! Nothing can cold-proof you * * * but Listerine Antiseptic gives you a chance to fight back!

* * * * * * *

Fight back with Listerine Antiseptic. Gargle twice a day—starting now—before you get a cold. You may find the colds you do get will be milder, less severe. That's why more people use Listerine during the colds-catching season than any other oral antiseptic. Why don't you?

* * * * * * *

Colds-catching season is here again! Nothing can cold-proof you—but Listerine Antiseptic gives you a fighting chance! For fewer colds, milder colds, try this:
Get plenty of rest.
Watch your diet.
Gargle twice a day with full-strength Listerine.

* * * * * * *

Want to write fewer of these this winter?

Dear Miss Bell,

Johnny's absence from school last
week was due to *another* cold.

Yours truly,

Mrs. C. Ryan

Nothing can cold-proof Johnny but for a fewer colds, milder colds, have him try this:
Get plenty of rest.
The right diet.
Gargle twice a day with full-strength Listerine.

Tests over a 12-year period proved that people who gargle with Listerine twice a day had fewer colds, milder colds than those who did not.

Have your family try it.

In television commercials:

Those statements and representations appearing in Attachments "A" and "B" hereto and incorporated herein.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not expressly set out herein, respondent has represented, and is now representing, directly or by implication that the use of Listerine:

1. Will cure colds and sore throats.

2. Will prevent colds and sore throats.

3. Will cause colds and sore throats to be less severe than they otherwise would be.

PAR. 6. In truth and in fact, the use of Listerine:

1. Will not cure colds or sore throats.

2. Will not prevent colds or sore throats.

3. Will not cause colds or sore throats to be less severe than they otherwise would be.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof and in Attachments "A" and "B" hereto were and are false, misleading and deceptive.

PAR. 7. The severity of a cold is judged or measured by the severity of its accompanying symptoms. Therefore, when respondent represented that the use of Listerine would make colds milder or less severe as aforesaid it thereby represented, directly or by implication, that such use of Listerine would relieve or lessen the severity of cold symptoms to a significant degree.

PAR. 8. In truth and in fact the use of Listerine as directed will not have a significant beneficial effect on cold symptoms.

Therefore the representation set forth in Paragraph Seven hereof is and was false, misleading and deceptive.

PAR. 9. In the further course and conduct of its business as aforesaid respondent has represented, directly or by implication, that the latest or most recent tests conducted by or for it, or available to it, prove that children who gargle with Listerine twice a day have fewer and milder colds and miss fewer days of school because of colds than do those children who do not so use Listerine.

PAR. 10. In truth and in fact the most recent studies or tests conducted by or for respondent, do not prove or support the representation that children who gargle with Listerine twice a day have fewer and milder colds and miss fewer days of school because of colds than do those children who do not gargle with Listerine twice a day.

Therefore, the representations set forth in Paragraph Nine hereof are false, misleading and deceptive.

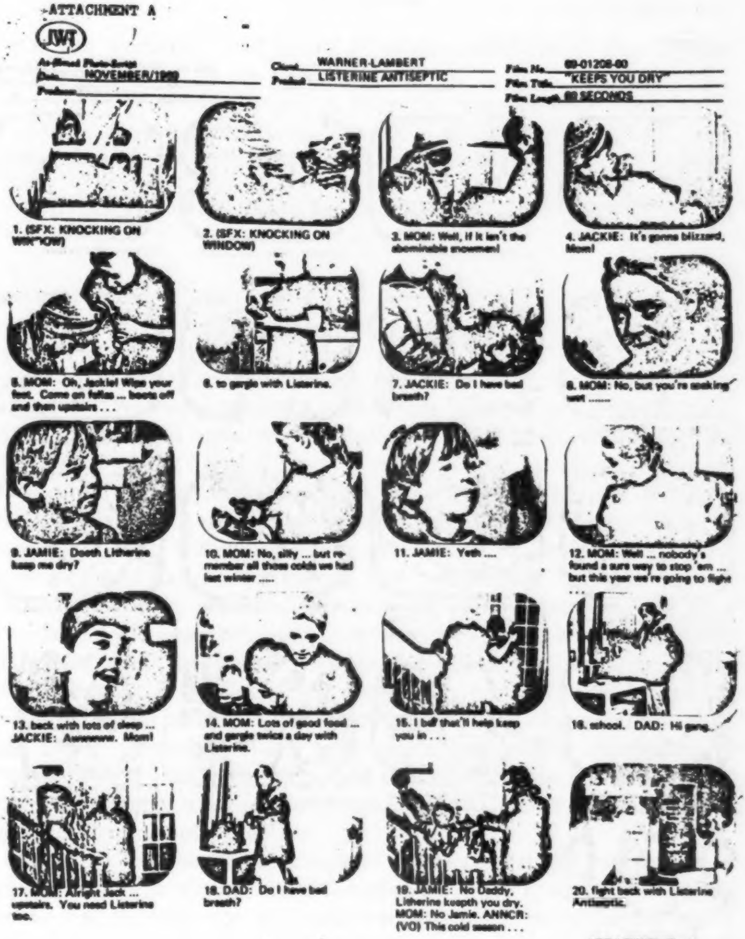
PAR. 11. In the further course and conduct of its business, through the use of the statement, "Kills Germs By Millions On Contact," respondent has represented, and now represents, directly or by implication, contrary to the fact, that the ability of Listerine to kill germs is of medical significance in the prevention, cure or treatment of colds and sore throats.

PAR. 12. In the course and conduct of its business, and at all times mentioned herein respondent has been, and now is, in substantial competition with corporations, firms and individuals in the sale in commerce of mouthwashes.

PAR. 13. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of Listerine by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ATTACHMENT A



JWT

As-Aired Photo-Script
Date NOVEMBER/1969
Producer

Client WARNER-LAMBERT
Product LISTERINE ANTISEPTIC

Film No. 69-01208-00
Film Title "KEEPS YOU DRY"
Film Length 60 SECONDS

1. (SFX: KNOCKING ON WINDOW)

2. (SFX: KNOCKING ON WINDOW)

3. MOM: Well, if it isn't the abominable snowman!

4. JACKIE: It's gonna blizzard, Mom!

5. MOM: Oh, Jackie! Wipe your feet. Come on fellas ... boots off and then upstairs . . .

6. to gargle with Listerine.

7. JACKIE: Do I have bad breath?

8. MOM: No, but you're soaking wet ......

9. JAMIE: Doeth Litherine keep me dry?

10. MOM: No, silly ... but remember all those colds we had last winter .....

11. JAMIE: Yeth ....

12. MOM: Well ... nobody's found a sure way to stop 'em ... but this year we're going to fight . . .

13. back with lots of sleep ... JACKIE: Awwwww. Mom!

14. MOM: Lots of good food ... and gargle twice a day with Listerine.

15. I bet that'll help keep you in . . .

16. school. DAD: Hi gang.

17. MOM: Alright Jack ... upstairs. You need Listerine too.

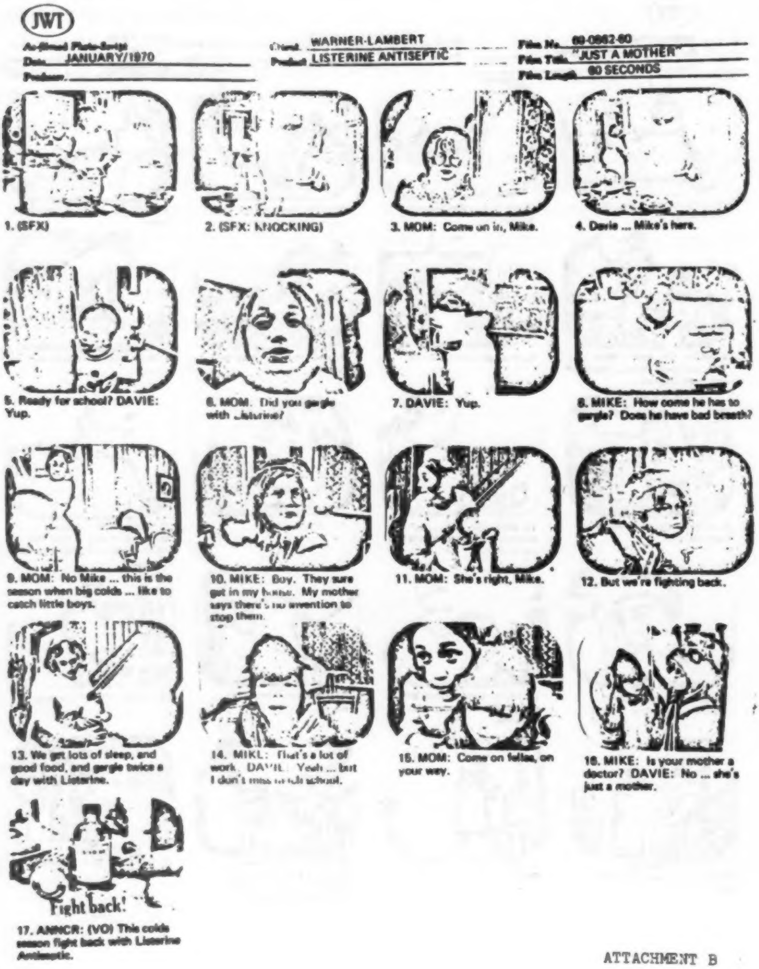
18. DAD: Do I have bad breath?

19. JAMIE: No Daddy, Litherine keepth you dry. MOM: No Jamie. ANNCR: (VO) This cold season . . .

20. fight back with Listerine Antiseptic.

ATTACHMENT A

ATTACHMENT B



JWT

As-filmed Photo-Script
Date JANUARY/1970
Producer
Client WARNER-LAMBERT
Product LISTERINE ANTISEPTIC
Film No. 69-0862-60
Film Title "JUST A MOTHER"
Film Length 60 SECONDS

1. (SFX)

2. (SFX: KNOCKING)

3. MOM: Come on in, Mike.

4. Davie ... Mike's here.

5. Ready for school? DAVIE: Yup.

6. MOM: Did you gargle with Listerine?

7. DAVIE: Yup.

8. MIKE: How come he has to gargle? Does he have bad breath?

9. MOM: No Mike ... this is the season when big colds ... like to catch little boys.

10. MIKE: Boy. They sure get in my house. My mother says there's no invention to stop them.

11. MOM: She's right, Mike.

12. But we're fighting back.

13. We get lots of sleep, and good food, and gargle twice a day with Listerine.

14. MIKE: That's a lot of work. DAVIE: Yeah ... but I don't miss much school.

15. MOM: Come on fellas, on your way.

16. MIKE: Is your mother a doctor? DAVIE: No ... she's just a mother.

17. ANNCR: (VO) This colds season fight back with Listerine Antiseptic.

ATTACHMENT B

Appearances

For the Commission: *Edward F. Downs, Wallace S. Snyder* and *William S. Busker.*

For the respondents: *Herbert A. Bergson, James H. Kelley* and *Larry D. Sharp, Bergson, Borkland, Margolis & Adler,* Wash., D.C. and *Mudge, Rose, Guthrie & Alexander,* New York City.

INITIAL DECISION BY ALVIN L. BERMAN, ADMINISTRATIVE LAW JUDGE

NOVEMBER 25, 1974

PRELIMINARY STATEMENT

The Commission's complaint charges respondent Warner-Lambert Company ("Warner-Lambert") with having engaged in unfair methods of competition and unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act by virtue of various statements and representations made in connection with, and to induce the sale of, its "Listerine" mouthwash preparation. More specifically, it is charged that, through various advertisements, including product packaging and labels, respondent has represented that the use of Listerine will cure colds and sore throats, will prevent colds and sore throats and will cause colds and sore throats to be less severe than they otherwise would be; that these representations are false, misleading and deceptive. It is alleged that the severity of a cold is judged or measured by its accompanying symptoms, that the representation that the use of Listerine would make colds less severe constituted a representation that such use would relieve or lessen the severity of cold symptoms to a significant degree, and that this representation is false, misleading and deceptive.

Another allegation of the complaint is that respondent misrepresented that the most recent tests conducted by or for it, or available to it, prove that children who use Listerine have fewer or milder colds and miss fewer days of school than children who do not use Listerine. Still another allegation is that respondent has misrepresented that the ability of Listerine to kill germs is of medical significance in the prevention, cure or treatment of colds and sore throats.

Respondent, by its answer, admitted that it has represented that the use of Listerine as directed, in conjunction with a regimen of proper rest and diet, will cause fewer colds and will help reduce the severity of colds. It denied representing that the use of Listerine would cure or would totally prevent colds or sore throats. It admitted that Listerine would not cure colds or totally prevent colds or sore throats, but averred that the use of Listerine as directed, in conjunction with a regimen of proper diet and rest, had been demonstrated to result in fewer colds, milder colds and milder symptoms thereof and less severe colds and sore throats.

Respondent admitted that the severity of a cold is judged or measured by its accompanying symptoms, and that the representation that the use of Listerine would make colds less severe constituted a representation that such use would relieve or lessen the severity of cold symptoms to a significant degree. It denied, however, that the use of Listerine as directed will not have a significant beneficial effect on cold symptoms. Respondent denied other material allegations of the complaint.

Subsequent to its answer, respondent moved for partial summary decision dismissing all allegations of the complaint which are related to the labeling of Listerine. It contended that the Federal Trade Commission lacks jurisdiction over the labeling of drugs—that such jurisdiction rests solely with the Food and Drug Administration. Administrative Law Judge Allard, on Dec. 14, 1972, held that labeling can be considered as advertising under Section 5 of the Federal Trade Commission Act and so denied the motion. Permission to apply to the Commission for review of the order pursuant to Section 3.23(b) of the Commission's Rules was denied by Judge Allard and, on Mar. 2, 1973, the Commission refused to consider an application for review in the absence of a Section 3.23(b) type ruling by the administrative law judge. The undersigned was assigned to hear this matter in place of Judge Allard following Judge Allard's departure from the Federal Trade Commission. After a review of all of the various pleadings and papers filed by the parties with respect to this issue, and upon consideration of this matter, the undersigned finds himself in agreement with Judge Allard's order and it remains the ruling on this issue.

Extensive hearings were held during which a large volume of testimony and documentary evidence was received. Among the evidence received or officially noticed was some from the record in a prior matter entitled *Lambert Pharmacal Co.*, 38 F.T.C. 726 (1944) [Dkt. 4232].[1]

This initial decision is based upon the entire record including proposed findings of fact and conclusions of law and briefs and supporting memoranda filed by the parties, as well as their responses. The undersigned has also taken into account his observation of the witnesses who appeared before him and their demeanor. Proposed findings not herein adopted, either in the form submitted or in substance, are rejected either as not supported by the evidence or as involving immaterial matters.

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[1] The significance of this prior case to the instant matter will be discussed *infra*, as appropriate.

FINDINGS OF FACT[2]

1. Respondent Warner-Lambert is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 201 Tabor Rd., Morris Plains, N.J. (Admitted, Ans. par. 1).

2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of a mouthwash preparation designated "Listerine" to retailers for resale to the consuming public (Admitted, Ans. par. 2).

3. In the course and conduct of its business respondent now causes, and for some time past has caused, Listerine, when sold, to be shipped from its plants and facilities to purchasers thereof located in various States other than the States of origination, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said Listerine in commerce, as "commerce" is defined in the Federal Trade Commission Act. The advertisements which are the subject of this proceeding have been disseminated by respondent in "commerce" within the meaning of the Federal Trade Commission Act (Admitted, Ans. pars. 3, 4).

4. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition with corporations, firms and individuals in the sale, in commerce, of mouthwashes (Admitted, Ans. par. 12). For the years 1964 through the first six months of 1972, Listerine's annual share of the mouthwash market was, respectively, 43.3 percent, 45.6 percent, 44.5 percent, 39.4 percent, 42.7 percent, 45.7 percent, 47.5 percent, 51.2 percent and 51.4 percent (CX 139-O).[3]

5. Listerine antiseptic was first marketed by the Lambert Pharmacal Company, now respondent Warner-Lambert, in 1879, and has been continuously marketed across State lines by respondent or its predecessors since that time. The Listerine formula (CX 48, *in camera*) has been unchanged since 1879. Its essential ingredients include thymol, eucalyptol, methyl salicylate and menthol. These ingredients are present in amounts within the limits for the internal doses of such ingredients generally recognized as safe (CX 139A).

6. Throughout its history, Listerine has been presented as being,

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[2] Findings of fact, for the most part, are made in numbered paragraphs which appear on pages 3-71, 75-77 and 80-95 [pp. 1406-1459, 1463-1465, 1467-1480 herein]. Discussions and applications of findings, as well as consideration of legal and other matters, appear where deemed appropriate. Some follow particular findings which pertain thereto; others follow all of the numbered findings. Findings which appear in unnumbered paragraphs are, nevertheless, findings.

[3] The following are among the abbreviations used herein: CX—Commission exhibit; RX—Respondent exhibit; Tr.—Transcript of hearings; CPF—Proposed finding of complaint counsel; RPF—Proposed finding of respondent.

inter alia, beneficial in certain respects for colds, cold symptoms and sore throats and to be beneficial for certain antiseptic purposes (CX 139B).

7. Since prior to 1938, Listerine labeling has included the claims regarding colds and sore throats as set forth in CX 49 and 50 (See Finding 25, *infra*). These claims have been made continuously since prior to the effective date of the Federal Food, Drug and Cosmetic Act of 1938, and up to and including the date of the issuance of the complaint herein (CX 139B).

8. From April 1965 to June 1973, respondent spent several million dollars on its Listerine "colds" advertising (CX 45, 46; RX 100, all *in camera*).

9. In the course and conduct of its business, and for the purpose of inducing the sale of Listerine, respondent has made, and is now making, numerous statements and representations concerning the efficacy of Listerine in print advertisements and in television broadcasts transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across State lines (Admitted, Ans. par. 4).

Representative Advertisements

The first major issue to be resolved is as to what representations have been made by respondent. Following is a description of some representative advertisements.

A. Print Advertisements

10. A number of advertisements depict a Listerine bottle showing the label on which appears, "Listerine Antiseptic Kills Germs By Millions On Contact. For Bad Breath, Colds and resultant Sore Throats." (CX 1, 5, 7, 11, 13, 15, 28, 30).

11. An advertisement widely disseminated in many newspapers in January 1968 (CX 21) shows a man with a handkerchief held against his nose and reads, "This man has something to give you—a rotten cold! Fight back with Listerine! Nothing can make you cold-proof. * * * But-for fewer colds, milder colds, try this:—Get plenty of rest.—Watch your diet.—Gargle twice a day with full-strength Listerine. Tests made over a twelve-year period proved that people who gargled with Listerine full strength twice a day, every day, had fewer colds and milder colds than those who did not. With a fighting chance like that * * * it's no wonder more people use Listerine during the colds-catching season than any other oral antiseptic. Why don't you?" (CX 20).

12. "Want to write fewer of these this winter? 'Dear Miss Bell, Johnny's absence from school last week was due to *another* cold. Yours truly, Mrs. Ryan.' Nothing can cold-proof Johnny but for fewer colds, milder colds, have him try this:—Get plenty of rest.—The right diet.—Gargle twice a day with full-strength Listerine. Tests over a 12-year period proved that people who gargle with Listerine twice a day had fewer colds, milder colds than those who did not. Have your family try it." (Emphasis in original) (CX 9, 25). This advertisement was widely disseminated from December 1968 through February 1969 and in September 1969 (CX 10, 26).

13. "FIGHT BACK. The colds-catching season is here again! Nothing can cold-proof you. * * * but Listerine Antiseptic gives you a chance to fight back! Try this:

1. Get plenty of rest. 2. Watch your diet. 3. Gargle twice a day with full-strength Listerine. Fight back with Listerine Antiseptic. Gargle twice a day—starting now—before you get a cold. You may find the colds you do get will be milder, less severe. That's why more people use Listerine during the colds-catching season than any other oral antiseptic. Why don't you?"

Featured in the middle of the advertisement is a hand in a boxing glove holding a bottle of Listerine with the statement on the label, "Listerine Antiseptic Kills Germs By Millions On Contact. For Bad Breath, Colds and resultant Sore Throats." (CX 27). This advertisement was widely disseminated in many newspapers in November 1969 (CX 29).

14. In an advertisement placed in a number of newspapers in December 1970 (CX 33), the following appears, "COLDS SEASON SPECIAL. Here comes the colds-catching season again, and nothing's going to stop it. But at least this year you can give your family a fighting chance. Make sure they get lots of sleep, good food, and gargle with Listerine Antiseptic, twice a day. * * * 7 OFF ON THE COLD FIGHTER." (CX 32).

15. "Fight Back. You Can't Stop Colds, But You Don't Have To Give Up. The colds-catching season is now in full swing and there is no way to keep your kids warm and dry all the time. So what do you do? Give up? No! You fight back. You make sure your family gets plenty of rest, dresses properly and eats lots of good food. And you make them gargle twice a day with Listerine Antiseptic. You can't stop colds, but at least this way you have a fighting chance. This colds season, fight back with Listerine Antiseptic." At the top of this advertisement, there is depicted an inverted bottle of Listerine with the words on the label, "Listerine Antiseptic Kills Germs By Millions On Contact" (CX 17). This advertisement was run in February 1972 (CX 18).

B. Television Commercials

16. In a commercial entitled "Rubber Stamp-Boy," a woman and young boy (obviously mother and son) are shown. The words "Cold Proof" appear on the boy's forehead. The following announcement covers the action that takes place: "Wouldn't it be great if you could make him cold-proof? Well, you can't. Nothing can do that (boy sneezes). But there is something you can do that may help. Have him gargle with Listerine Antiseptic. Listerine can't promise to keep him cold-free, but it may help fight off colds. During the cold-catching season, have him gargle twice a day with full-strength Listerine. Watch his diet, see he gets plenty of sleep, and there's a good chance he'll have fewer colds, milder colds this year (the words "Fewer Colds, Milder Colds" are superimposed on the picture). It's a fact that more families use Listerine during these cold-catching months than any other oral antiseptic. So be sure your family gargles regularly with Listerine Antiseptic. We can't promise to keep your family cold-free, but Listerine may help you fight off colds" (the words "Fight Colds" are shown with a bottle of Listerine) (CX 34A, 140A). This type commercial was run in March and April 1967 (CX 39).

17. In a commercial entitled "Boxer," a boy wearing boxing gloves is shown as the announcer says, "Can a 12 year old boy * * * wage a one-boy fight against the common cold? Well, he can give it a good try if right behind him there's a mother armed with Listerine Antiseptic (Mother appears). We can't promise that Listerine will keep him cold-free, no product can do that. But Listerine may help him fight off colds (the words "Fight Colds" are superimposed on the picture). If you have him gargle twice a day with full-strength Listerine, if you watch his diet and see that he gets plenty of sleep, there's a good chance that he'll have fewer colds, milder colds this year (the words "Fewer Colds, Milder Colds" are superimposed on the picture while the boy gargles). Many mothers see that their families gargle regularly with Listerine. In fact, during the cold-catching season, more people use Listerine than any other oral antiseptic. We can't promise to keep your family cold-free, but Listerine may help you fight off colds." (The words "Fight Colds" are superimposed on the picture.) (CX 34C, 140C). This type commercial was run in March and April 1967 (CX 39).

18. In a cartoon commercial entitled "Survival Kit," one character designated Mrs. Smith says, "Betsy gets a cold, Dad gets a cold and so does Junior!" A second female character says, "Well, nothing can guarantee to keep colds away see, but my Winter Survival Kit may help." Mrs. Smith, "What's that?" Second character, "My three-way way to ward off colds. Plenty of sleep * * * a balanced diet * * * and

gargle twice a day with full-strength Listerine Antiseptic. * * *" The announcer concludes with, "Try it, your family may have fewer colds, milder colds this season." (A pillow, pitcher of orange juice and a bottle of Listerine are depicted with the words "Fewer Colds, Milder Colds.") (CX 34E, 140E). This type commercial was run from November 1967 through March 1968 (CX 39).

19. In a commercial entitled "School Bus," two mothers are standing in the rain near a school bus. First mother, "Muriel, where's Davey and Sue?" Second mother, "Ah, down with colds again." First mother, "Again?"-Second mother, "Oh, yes, and your family always seems fine." First mother, "I've got a theory." Second mother, "A theory? Nothing can prevent colds." First mother, "You can help. * * * I watch their rest and diet and have them gargle twice a day with Listerine. * * * I think we've cut down on colds, and those we do catch, don't seem to last as long." The announcer concludes, "For fewer colds, milder colds, more people use Listerine than any other mouthwash" (the words "Fewer Colds, Milder Colds" are superimposed on the picture) (CX 34F, 140F). This type commercial was run from October 1967 through March 1968 (CX 39).

20. In a commercial entitled "Keeps You Dry," two small boys are shown coming into the house. The following dialogue occurs: Mom, "Okay kids. Upstairs and gargle with Listerine, you're soaking wet." Jamie, "Doeth Litherine (sic) keep me dry?" Mom, "No silly, it's colds I'm worried about. We can't really stop 'em, but this year we're gonna gets lots of sleep * * * and good food and gargle twice a day with Listerine. I bet that'll help keep colds away." Jamie, "Do grownups do this too?" Jackie, "Of course we do." Announcer, "Listerine Antiseptic. Try it. And your family may have fewer colds, milder colds this season" (the words "Fewer Colds, Milder Colds" are superimposed on the picture) (CX 35C, 141B). This type commercial was run during the 1968-1969 period (RPF 274).

21. In a commercial entitled "Just A Mother," Mike comes out of the snow into Davie's house to go with him to school. Mom, "Did you gargle with Listerine?" Davie, "Yup." Mike, "How come he has to gargle? Does he have bad breath?" Mom, "No, Mike, this is the season when big colds like to catch little boys." Mike, "Boy. They sure get in my house. My mother says there's no invention to stop them." Mom, "She's right, Mike. But we're fighting back. We get lots of sleep and good food and gargle twice a day with Listerine." Mike, "That's a lot of work." Davie, "Yeah, but I don't miss much school." * * * Mike, "Is your mother a doctor?" Davie, "No, she's just a mother." The announcer closes, "This colds season, fight back with Listerine Antiseptic" (a bottle of Listerine

is shown above the words "Fight Back!") (CX 35B, CX 142A). This type commercial was run from November 1969 through March 1970 (CX 39).

22. In a commercial entitled "Rain," a mother is shown at home. She speaks, "My oldest son is somewhere out there in the rain. He's supposed to be coming home from school and I can tell you right now he isn't wearing his hat or galoshes. Oh, I made sure he had them on when he left this morning. But this afternoon I found them in the front yard. That's my son. I know you're thinking how can I sit here so calmly while he's out getting wet and cold. Well, I'll tell you worrying won't keep him dry and as for colds? Nothing's going to stop 'em. But at least this year, I have a system. Plenty of sleep and good food, of course. And this cold-season, he gargles twice a day, everyday, with Listerine Antiseptic. Look, I'm not asking for miracles * * * but if it'll help keep him in school, I'll be happy." The announcer concludes, "This cold-season, fight back with Listerine Antiseptic." (CX 37C, 143C). This type commercial was run from October 1970 through March 1971 (CX 39).

23. In a commercial entitled "Snow," two boys are looking out of a window. The following dialogue takes place: Pete, "Look, Ma, it's snowing." Rick, "Last one outside's a big ape." Mother, "Hold it, before you guys go anywhere, you're gonna gargle with Listerine." Pete, "I haven't got bad breath." Mother, "I know. I know. But everytime it snows, it seems you guys catch colds." Rick, "Yeah, but so do you and Dad." Mother, "And we can't stop 'em, but this year we're gonna fight back with lots of sleep, good food and Listerine twice a day." Pete, "That means I can't stay home from school." Mother, "Exactly, that's the whole idea. Now, last one to the bathroom is a big ape." * * * The announcer concludes, "This cold-season fight back with Listerine Antiseptic" (the words "Fight Back" are superimposed on the picture with a bottle of Listerine) (CX 37E, 143E). This type commercial was run from October 1970 through March 1971 (CX 39).

24. In a commercial entitled "Rain" (Rev.), a mother is shown at home. She speaks, "This morning I told my son please keep your hat and galoshes on. I should know better. I just can't keep him dry. Oh I still worry about the colds. Because nothing is going to stop them. But this year, I have a system * * * plenty of sleep and good food, of course. And this cold season he gargles twice a day every day with Listerine Antiseptic. Look, I'm not looking for miracles. All I want is a fighting chance." The announcer concludes, "This cold season, fight back with Listerine Antiseptic." (the words "Fight Back" are superimposed on the picture with a bottle of Listerine) (CX 38, 144A). This type commercial was run from October 1971 through March 1972 (CX 39).

C. Labels

25. Listerine labels have read, "Listerine Antiseptic Kills Germs By Millions On Contact. For Bad Breath, Colds and resultant Sore Throats" and

"For colds and resultant sore throats, gargle with Listerine Antiseptic full strength at the first sign of your cold." (CX 49, 50).

26. Since December 1972, following issuance of the complaint in this matter, the label claims have read, "Listerine Antiseptic Kills Germs By Millions On Contact * * * For Relief of Colds Symptoms and Minor Sore Throats due to Colds" (CX 139-O, P).

Representations Made by Respondent

In evaluating what representations have been made, "[t]he important criterion is the net impression which the advertisement is likely to make upon the general populace." *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676, 679 (2d Cir. 1944). When an advertisement is susceptible of two or more meanings, one of which is false, the advertisement is misleading under Section 5 of the Federal Trade Commission Act. *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1962); *Rhodes Pharmacal Co., Inc.* v. *FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955). With these principles in mind, the following findings are made relative to the representations that have been made by respondent as to the efficacy of Listerine for colds and sore throats.

27. The statement that Listerine is "for colds and resultant sore throats" clearly implies that the use of Listerine will cure colds. This is a reasonable understanding of the import of the statement. See, *Positive Products Co.* v. *FTC*, 132 F.2d 165, 168 (7th Cir. 1942); *D.D.D. Corp.* v. *FTC*, 125 F.2d 679, 681 (7th Cir. 1942). The statement in CX 34 (140F) that "those [colds] we do catch, don't seem to last so long" is a clear claim of termination or cure of colds by the use of Listerine.

28. In addition, those advertisements that state that you can help with Listerine or that Listerine provides a fighting chance or a means of fighting off colds or fighting back are reasonably subject to the construction that a cure is represented. All that such words could be understood to be directed at are the prevention or cure of colds or the amelioration of cold symptoms. To the extent that the advertisements containing such statements may be understood by some not to claim cold prevention, the representations as to cure or amelioration come through that much more strongly.

29. The complaint charges respondent with having represented that the use of Listerine will prevent colds and sore throats. Respondent

admitted representing that the use of Listerine, as directed, will cause fewer colds, but denied representing that its use would totally prevent colds or sore throats. Further, respondent contends that, starting in November 1969, its advertisements no longer represented that the use of Listerine would result in fewer colds. The charge here considered encompasses the prevention of some colds and sore throats and representations as to total prevention need not be shown. Respondent's answer, therefore, constitutes an admission that the representation alleged was made.

30. While a representation of total prevention need not be shown, respondent's advertisements may well be understood to represent total prevention or prevention to a substantial degree—even to a degree approaching total.

31. The statement that Listerine kills germs by millions on contact and that it is for colds and resultant sore throats, together with the directive to gargle with Listerine twice a day (even in the absence of cold symptoms) is a representation that Listerine will prevent colds and resultant sore throats.

32. Statements to the effect that Listerine will not cold-proof (CX 10, 20, 26, 27, 140A), you can't stop or prevent colds (CX 17, 32, 140F, 141B, 142A, 143C, 143E, 144A), we can't promise to keep your family cold free (CX 140A, 140C), there is no guarantee to keep colds away (CX 140E) are *pro forma* statements of no absolute prevention followed by promises of fewer colds (CX 10, 20, 26, 140A, 140C, 140E, 140F, 141B). The message that gets across is that Listerine will prevent colds. Perhaps it won't prevent all in the sense of cold-proofing or being an absolute guarantee, but it will, for all practical purposes, prevent colds. Perhaps in the reader's own family, it will prevent all colds.

33. The instructions to fight off colds or fight back with Listerine, since the user has a fighting chance with Listerine (see, *e.g.*, CX 20, 29, 140A, 140C), help buttress the belief that the particular reader can put up the good fight and prevent colds in her family. In CX 140F, it is stated to the mother who uses Listerine, "Oh, yes, and your family always seems fine." This is deemed an absolute cold prevention representation.

34. The advertisements run after November 1969, while they no longer specifically promise fewer colds, also represent that Listerine will prevent colds to a significant, if not total, extent. As in advertisements placed prior to November 1969, the *pro forma* statements to the effect that nothing will stop colds imply that nothing will stop all colds. However, the instruction remains to use Listerine daily in the absence of a cold, thus representing that Listerine should be used to prevent colds.

35. In CX 17 and CX 144A, the representation is made that the reader has a fighting chance by using Listerine. In CX 142A and CX 144A, Listerine is represented as a means of fighting back. In CX 143C and 144A Listerine, in conjunction with proper sleep and good food, is represented as a system and a means of fighting back. In CX 143E, Listerine is represented as a means of fighting back. In none of these advertisements is the representation limited to a claim with regard to the severity of colds. Hence, the representation is made that Listerine offers a system, a fighting chance or a means of fighting back against getting colds.

36. In CX 32, it is stated that nothing is going to stop the *colds-catching season*, but that the reader by using Listerine, "can give [her] family a fighting chance." It is thus represented that the use of Listerine affords a fighting chance against catching any colds despite the advent of the colds catching season.

37. In CX 143E, after being told that he is going to fight back with Listerine twice a day, the boy states, "That means I can't stay home from school." And the mother replies, "Exactly, that's the whole idea." This is another total prevention representation.

38. Despite respondent's position that it intended the advertisements after November 1969 to constitute only mildness claims, they come through loud and clear as representing, in addition, that Listerine, to some appreciable extent, will prevent colds. Even if respondent had no intent to make prevention claims, that does not change the fact that such claims were made.[4]

39. Respondent has admitted representing that the use of Listerine as directed will cause colds and sore throats to be less severe than they otherwise would be and that such a representation encompasses the representation that such use of Listerine will relieve or lessen the severity of cold symptoms to a significant degree.

40. It is also found that, by use of the statement "Kills Germs By Millions On Contact" in conjunction with "for * * * Colds and resultant Sore Throats," as well as in conjunction with the other statements described above, respondent has represented that the ability of Listerine to kill germs is of medical significance in the prevention, cure and treatment of colds and sore throats.

41. The above findings as to what representations have been made

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[4] One of respondent's officials who was directly responsible for Listerine advertising testified (Tr. 3475-78) that a basic difference between pre-November 1969 and subsequent advertising is the change from "I bet that will keep colds away" in CX 141A to "I bet that will keep you in school" in CX 142C; that the former was a fewer colds claim while the substitute is a mildness claim. It is doubted that the average listener would draw the distinction and would reason that the child would stay in school, not because he didn't have a cold, but only because the cold was more moderate. Similarly rejected is the witness' explanation that listeners would perceive "fight off" as a fewer colds claim, but would understand "fighting chance" and "fight back" used since November 1969 as mildness claims (Tr. 3481). The purported distinctions are much too sophisticated to be realistic.

by respondent are based upon the pleadings and the undersigned's own evaluation of the advertisements in question. Such evaluations are also supported by other evidence in the record.

42. The J. Walter Thompson Company, respondent's advertising agency, in analyzing advertising techniques to be used for Listerine, reported in April 1969 that the public recognizes germs, followed by virus/bacteria, as the cause of colds, and that mouthwash is considered by most people as a means of obtaining symptomatic relief and as a germ killer (CX 97A, B). Respondent has capitalized on these beliefs. The advertising agency evaluated then current Listerine advertising as depicting "a need to prevent colds and sore throats." (CX 97B). The same analysis, of course, would equally apply to similar representations made after November 1969.

43. In reporting a so-called "Burke Test" study on the effect of the use of the phrase "fights back" as a substitute for "fewer colds," a Warner-Lambert interdepartmental memorandum prepared in January 1970, stated (CX 98C):

> "Fight back" is apparently an effective device for inducing consumer perception of Listerine as a colds preventive.

44. A Burke Test is a telephonic survey of 250 female heads of households in each of several selected representative cities to ascertain, on the day after a one-time test commercial is run on television, just what message has been perceived. The viewers are asked what they recall and verbatim answers are taken. These tests have been shown to be reliable by extended use and reliance upon them by respondent and other major package goods manufacturers. Standard procedures are utilized to insure the validity of reports based upon the interviews (Tr. 1110-43).

45. Burke Tests in evidence (CX 82-89) report on the following advertisements: "Boxer," "Rubber Stamp," "School Bus" (CX 34, 140A, C, F); "Relentless" (CX 1), "Survival Kit" (CX 34, 35); "Keeps You Dry" (CX 35, 141A), "Just A Mother" (CX 36, 142A); and "Rain" (CX 37, 143C). These tests show that of those contacted and who were deemed to have had an opportunity to view the test commercials, substantial percentages perceived the general message that Listerine was effective against colds and sore throats and, more specifically, prevented colds and sore throats and caused fewer colds and sore throats. This high recall is even more significant in view of the fact that the surveys were made on the basis of a one-time showing of the commercial, and the percentages were of individuals who had an opportunity to view the commercial, but who, in fact, may not have watched or listened to it. With repeated exposure, it is to be anticipated

that respondent's message would get across to more listeners and viewers. Commission exhibits 82L, M, Q, 83J, 85-O, P, 86I, 87M, N, O, P, Q, 88I, K, L, and 89I contain examples of verbatim responses to Burke Test interviews that show the viewers' understandings that the Listerine commercials make cold and sore throat prevention claims.

46. Respondent has relied heavily on Burke Test results in evaluating the effectiveness of relaying messages or copy points to the public (Tr. 3488, 3507, 3519; CX 93C, 95A). "Use to prevent colds" was such a copy point of the commercial "Keeps You Dry" (CX 141B) and this copy point got across at a high level (CX 141B, 92D).

47. In summary, the findings as to what respondent has represented are based upon the pleadings and the undersigned's own evaluation of the advertisements in question. They are also found upon the basis of the facts recited in Findings 42-46.

Respondent (RPF 253) asserts that a company's intent in presenting an advertisement is probative of the actual meaning of, and the impression conveyed by, that advertisement, and that it exercised good faith to insure the truthfulness of its advertising. To the contrary, here, where the issue is the truth or falsity of respondent's representations, good faith and lack of intent to deceive is irrelevant. *National Dynamics Corp.*, 82 F.T.C. 488, 553 (1973). An unintentional misrepresentation and lack of knowledge as to the falsity of a representation is no defense to a charge of misleading advertising. *Gimbel Bros. Inc.* v. *FTC*, 116 F.2d 578, 579 (2d Cir. 1941). As stated in *Ford Motor Co.* v. *FTC*, 120 F.2d 175, 181 (6th Cir. 1941), "The question [of whether an advertisement is false or has the capacity or tendency to mislead] does not depend upon the purpose of the advertisement nor upon the good or bad faith of the advertiser."

The Truth of Warner-Lambert's Representations as to the Efficacy of Using Listerine as Directed for the Prevention, Cure and Relief of Colds and Sore Throats and Cold Symptoms

For the reasons and on the basis of the findings stated below, the undersigned finds that the use of Listerine will not prevent or result in fewer colds or sore throats, will not cure colds or sore throats and will not cause colds or their symptoms, including sore throats, to be less severe than they otherwise would be; and that the ability of Listerine to kill germs is of no medical significance in the prevention, cure or treatment of colds and sore throats.

In support of the allegations of the complaint, Commission counsel produced highly qualified and eminent physicians and pharmacologists who stated their opinions as to the efficacy of Listerine and gave sound bases therefor. This is in contrast with the opinions given by respondent's experts which were founded on weak and unreliable bases. Some of their tenuous and unfounded theories reflect, in part, long-standing connections these witnesses have had with respondent. Respondent, and some of its expert witnesses, in large part, rely upon the results of the Reddish and St. Barnabas tests or studies that were conducted on behalf of respondent. These tests are inadequate to constitute probative evidence in support of respondent's cold claims as to Listerine. Consequently, to the extent respondent's experts have relied upon these tests for their expert opinions, their opinions are of little or no weight. Other tests and matters relied upon by respondent provide little of probative value in this case.

48. The common cold is caused by virus particles being inhaled into the nose. These virus particles become attached to cells in the nasal pharynx. They enter the cells where they multiply. Some viruses cause the cells to rupture allowing the viruses to spread to other cells. Other types of viruses spread directly from cell to cell by a budding process. Thus, the cells are damaged causing the patient to perceive that he has a cold. Cold viruses do not involve the oral cavity (Gwaltney 384-86; Hornick 477-78; Seal 546-48, 591; Proctor 606-07, 654; Parrott 898-99; Sanders 852-53, Kilbourne 1053-54, 1089-90).

49. Whether or not one gets a cold is not affected by diet, rest or exposure to the elements (Gwaltney 394, 396; Hornick 479, 481; Proctor 631; Parrott 907).

50. A common cold is a viral infection of the upper respiratory tract which manifests itself as a combination of symptoms including, to varying degrees, stuffy nose, runny nose, postnasal drip, burning sensation in the nose, sore throat, sneezing, coughing, burning eyes, fever, general malaise, muscle ache, and mild headache. Not all symptoms are always present (Gwaltney 380; Hornick 475; Seal 544-45; Sanders 836; Parrott 894; Kilbourne 1054; Knight 1095; Sadusk 3201).

51. Bacteria play very little part in the common cold. Apart from viruses, cold type symptoms may be caused by the bacteria called Beta Hemolytic Streptococci or Group A Hemolytic Streptococci, more commonly referred to as a strep throat, and another organism somewhere in between a virus and a bacteria called microplasma pneumonia. These agents may cause at most 5 to 10 percent of the occurrences of cold-like symptoms. These ailments, however, must be treated with specific medicinal agents. In the case of strep throat, failure to treat properly may result in rheumatic fever, valvular heart disease and kidney infections, which are very serious to the point of being life-threatening. Microplasma pneumonia is a lingering ailment if antibiotics are not used. It would be inappropriate to treat patients

with strep throat or microplasma pneumonia with Listerine or with anything other than the specific medications that should be prescribed (Gwaltney 380-81, 384-85, 438, 453-54, 486, 493-94; Proctor 610; Rammelkamp 767-71, 799-800; Sanders 836-40, 870; Parrott 896-97, 900-01, 918-19; Knight 1925-26, 2037-40, 2048).

52. The foregoing finding buttresses all of the other evidence to the effect that common colds are caused by viruses and those other agents which cause cold-like symptoms should be ignored in this case.

53. The duration of a cold is the same whether it is treated or untreated. It is self-limiting in the sense that if you do nothing for it, it will go away on its own (Hornick 476; Seal 549-50; Haggie 1810-11).

54. The use of Listerine will not prevent or result in fewer colds or sore throats (Gwaltney 391; Hornick 479; Seal 556; Proctor 617; Schwartz 642; Rammelkamp 781-82; Sanders 832-38; Parrott 901; Modell 1011; Kilbourne 1057). Respondent has admitted that Listerine will not totally prevent colds (Ans., par. 6).

55. The use of Listerine will not cure colds or sore throats (Ans., par. 6; Gwaltney 389; Hornick 479; Proctor 618; Parrott 905).

56. The use of Listerine will not cause colds or sore throats to be milder nor will it relieve or have a beneficial effect on cold symptoms (Gwaltney 392, 448, 451; Hornick 483-85; Seal 556-57; Proctor 618; Schwartz 692-93; Rammelkamp 782; Sanders 859-60; Parrott 906-07; Modell 1005-12; Kilbourne 1057-58).

57. Gargling may give transient relief to a sore throat to the extent that it may remove the debris that has accumulated. It also may provide a soothing effect for a short period of time. Gargling, however, may reach only the forward portion of the throat, but not the posterior pharynx. Any type of material removed would soon be replaced. This relief, however, is provided by any type gargle, warm for soothing effect, and Listerine does not add to these transient benefits (Gwaltney 395, 446-47; Hornick 483; Seal 557, 566; Proctor 616-17; Schwartz 682-83; Rammelkamp 777, 781-83; Sanders 860, 862; Parrott 906-07; Modell 1011, 1038-39). Thus, any relief to a sore throat by gargling with Listerine is not peculiarly attributable to Listerine. Further, the relief so afforded is not to any significant degree.

58. Colds are not caused by bacteria. Bacteria in the oral cavity play no role in cold symptoms. The ability of Listerine to kill millions of germs on contact, therefore, is of no medical significance in the prevention, cure or treatment of colds or sore throats (Gwaltney 397, 453; Hornick 486, 488-89; Seal 551-53; Proctor 609, 616-18; Rammelkamp 776-77; Sanders 836; Parrott 918-19; Kilbourne 1058; see also Knight 2048).

The above findings, to the extent not grounded on admissions, are based primarily upon the opinions of physicians who have spent most of their medical careers in the field of respiratory diseases, who have achieved high positions and eminence in that field, both in research and practice, and who have maintained a current and thorough knowledge of what is known and what has transpired in this field. Also relied upon are the opinions of two highly qualified pharmacologists. As previously indicated, the undersigned has observed and been impressed with the demeanor and forthrightness of these experts and the sound bases for their opinions. To the extent not already incorporated in the above findings, some of these factual bases are as follows:

59. Dr. Sanders' explanation, in part, as to the factual bases of his opinion of the lack of efficacy of Listerine in the prevention, cure or treatment of colds and sore throats is illustrative:

> * * * Obviously, I have been taught, I have read a great deal. I have had a lot of experience with patients and patient care. We have been very, very concerned about viral and bacterial respiratory infections. * * * We have been through any number of decades of attempts to prevent or treat these kinds of infections by topical applications of preventive agents to surfaces of highly active microbial agents like the penicillins or the tepacillins or the various other highly potent anti-microbial agents. In addition, a variety of other agents with known anti-bacterial activity of high potency have been applied topically and have just been not effective in preventing infections (Tr. 838).

* * * * * * *

> I begin with my teaching wherein I hear these things taught in lectures and so forth as I go through medical school, internship, residency—I continue to read—I am involved in patient care. I inquire of patients what they have done, what they have not done in attempts to prevent, treat, and so forth, and with this kind of information, you formulate an opinion, and the opinion, as well as the weight of scientific evidence, says that topically applied agents have no role in prevention or treatment of colds. My colleagues, my peers, patient experience, it is a combination of those things (Tr. 850-51).

60. There is no acceptable rationale for the gargling of Listerine to be of any benefit in curing or ameliorating a cold (Gwaltney 393; Proctor 621-23; Kilbourne 1058).

61. Cold viruses enter through the nose, sometimes through the eye. They do not enter through the mouth. Experiments attempting to infect people through the mouth have been unsuccessful (Gwaltney 385-86; Seal 546-47; Proctor 618, 654, 660).

62. The site of a cold infection is confined to the nose and nasopharynx (Gwaltney 384; Hornick 477; Seal 568-69).

63. Viruses penetrate cells very quickly once they contact the cell walls. Viruses live in and do damage to cells. Viruses propagate rapidly within cells and spread almost immediately to other cells as they are released upon killing the cells they have invaded (Seal 576, 578; Proctor 607, 655; Sanders 853).

64. Children have six to eight colds a year. Adults have two to three. Viruses may be distinguished as lipids (which include influenzas, parainfluenzas and coronas) and nonlipids (which include rhinoviruses, adenoviruses and enteroviruses). Rhinoviruses account for some 30 percent of adults' colds (Gwaltney 383, 432-33). The ingredients of Listerine have little or no virucidal effect on rhinoviruses (Gwaltney 393).

65. There is no known compound taken orally that will alter the natural history of a cold. There are no drugs which will cure the common cold (Rammelkamp 781-82; Parrott 902). Only two agents are known to prevent colds—a rhinovirus vaccine administered in the nose which acts against the particular strain involved and an antiviral substance made from the body called interferon. There is also a drug called amantadine which is limited in its effect to certain influenza viruses. It is not commonly used because its efficacy is questionable (Hornick 474; Seal 550; Parrott 901, 922).

66. In order for a product to be efficacious with respect to a cold it must be able to interfere with the activities of the virus. This is much more complex than merely trying to kill a bacteria or a virus. Hence, over the past 10 to 15 years, experiments with various substances known to be capable of killing viruses in solutions have been found ineffective (Hornick 516-17). There is no known way a cold can be aborted or the course of the infection changed. There is no known substance, certainly not those in Listerine, capable of affecting the pathogenesis of a cold. Gargling with Listerine offers no mechanism for affecting the course of a cold or lessening its duration (Proctor 618; Kilbourne 1055, 1057-58).

67. Antibodies have been shown by studies to be valueless against viruses that cause colds. This includes antiviral and antibiotic agents. Penicillin and sulfanomides breathed directly into the nose, the nasopharynx and the lungs proved valueless, even though taken systemically, they are helpful in killing off pathogenic material. The use of antibiotics is useless in the prevention or treatment of a cold in any respect (Hornick 480, 516-17; Proctor 619-20; Sanders 838, 852-53, 872-73).

68. Not only have antibiotics been found valueless, but their indiscriminate use should be avoided because it disturbs the ecological balance and may cause the regrowth and spread of resistant microorganisms. Also it may cause the disappearance of impeding ones. Thus, there may be the overgrowing and invasion of undesirable bacteria which may become resistant to antibiotics when they are subsequently required. Secondary infections thus may be incurred by

the indiscriminate use of antibiotics (Sanders 872-73). Antibiotics are not used to treat colds (Seal 590).

69. The mechanism of gargling makes it virtually impossible for the gargle to reach the nasal passages or the lower respiratory tract. When gargling, the palate closes off the nasal passage and nasopharynx and the glottis closes off the entrance to the lower respiratory tract. The gargle is confined to the mouth chamber. Hence, Listerine would not reach the site of infection or manifestation of symptoms in any medically significant concentration. Any vapors that might reach the site where the action is would not be in therapeutic concentration and, in any event, would soon be swept away. Thus, the gargling with Listerine would be ineffective in preventing or producing fewer cold infections or in relieving or reducing the severity of cold symptoms (Gwaltney 393, 448; Hornick 483; Seal 554-56, 571, 573; Proctor 616-19; Rammelkamp 787; Sanders 854; Parrott 904).

70. Even if gargling with Listerine caused its ingredients to reach the nose and nasopharynx, they would not penetrate the cells where the action of the viruses would be taking place. Hence, Listerine would still be ineffective in this regard (Hornick 481-82; Parrott 904). If Listerine's ingredients were in a concentration strong enough to be effective and reached the infected cells in therapeutic strength and did and could penetrate the cells, the cells would be killed. This would be undesirable as it would destroy the protective covering of the lining of the nose and throat and so provide portals of entry for various bacteria (Hornick 482-83).

71. Colds are sometimes followed by secondary infections caused by bacteria known as secondary invaders. Instances are sinusitis and otitis media (middle ear infection) where drainage from the sinuses or middle ear is impaired by the cold, and bacteria which are already in those sites get the opportunity, because of the lack of drainage, to cause trouble. Another secondary infection is peritonsillar cellulitis. The ingredients of Listerine, however, would not reach the resting places of the secondary invaders. Listerine could not reach the sinuses, the middle ear or the deep crypts of the tonsils or adenoids or other deep-seated places where such bacteria might be. Listerine, therefore, would be ineffective to prevent, cure or alleviate such secondary infections (Seal 552-54, 572; Proctor 614-15, 618; Rammelkamp 772-74, 811-12; Sanders 842, 844).

72. While Listerine kills millions of bacteria in the mouth, it also leaves millions. It is impossible to sterilize any area of the mouth, let alone the entire mouth. There are significant numbers of bacteria in various tissues, tissue folds and crypts which Listerine can't reach. For example, there is more flora in the crevices of the teeth than on the

roof of the mouth. The bacteria grow back quickly or the voids are quickly replaced by other bacteria. The use of Listerine has only a transient effect on the flora (Hornick 488-89, 523-24; Seal 554; Proctor 620; Sanders 847, 881-83).

73. To the extent that Listerine may kill millions of bacteria in the mouth, it would do so only ahead of the soft palate. This would have nothing to do with the throat, nose or the posterior pharynx. Consequently, the killing of germs in the mouth would have nothing to do with preventing, curing or relieving colds or coughs or cold symptoms (Hornick 483; Seal 554; Rammelkamp 777). The bacteria in the normal flora of the mouth play no role in the causation of colds or in the symptoms of colds. Thus, killing some of those bacteria would have no effect on the prevention, cure or symptoms of colds or coughs (Sanders 846-47, 879-80; And see Findings 48, 51, 52, 58 and 62, *supra*).

74. Methyl salicylate is a derivative of salicylic acid, which is used as a systemic analgesic (Schwartz 682). Methyl salicylate is generally used in a liniment for analgesic purposes, but it must be in sufficient quantity so it can be absorbed. Even when used topically as a rub-on, there would have to be up to five times as much methyl salicylate as there is in Listerine to be effective as an analgesic. Used as part of a gargle, the amount of methyl salicylate is insufficient and the time of the gargle is too brief to be of any analgesic benefit. After the gargle, the amount left in vapor form would be insignificant and would soon be washed away (Modell 1004-07, 1014-18; Schwartz 683-84).

75. Methyl salicylate acts as a counter-irritant by increasing the blood flow. Even if the methyl salicylate in Listerine were in a high enough concentration and reached the area of the sore throat, which it does not (other than for a very small portion thereof), it would increase the blood flow. This would be counter-soothing because a sore throat, in large part, is the result of too much blood flow (Schwartz 682-83).

76. Menthol, when inhaled as a vapor in high concentration, would act as a coolant and decongestant. The relief, however, would be transient, ceasing almost immediately after the stopping of the inhalation. The amount of menthol in Listerine, however, is so low that any quantity that might reach the cold-affected areas would be insufficient to have any significant effect (Schwartz 684-86, 712-13; Modell 1009, 1028). Menthol, can also have an anesthetic effect if applied in sufficient concentration to the mucous membrane. Even when applied directly to the affected area, as contrasted to what might reach that area by gargling, there would have to be a concentration of from two to five times as much menthol as there is in Listerine (Modell 1009, 1025-26).

77. Thymol has been used as an expectorant, but is not now

recognized as being effective for that purpose. It has also been used as an antibacterial agent (Schwartz 678, 690). Thymol has also been used to relieve congestion of the respiratory tract. When so used, however, it is generally applied directly as a steam vapor. Any relief is transient. Even when so applied directly for nasal congestion and inflammation, to be effective, two to five times as much thymol as there is in Listerine is required. The amount present in Listerine is insufficient, particularly since the gargle is for a relatively short period of time and gargling does not afford the direct application to the affected parts (Schwartz 678-79; Modell 1008, 1029).

78. Eucalyptol is related to thymol. It too has been discredited as an expectorant agent. Eucalyptol and thymol have been applied directly to the nose to relieve nasal congestion. Eucalyptol could act as a topical analgesic if applied directly and if about five times as much were used as is found in Listerine. Dentists use eucalyptol as a topical anesthetic but, when so used, the product is placed directly in the tooth cavity. Again, to relieve nasal congestion, a direct steam vapor application would be required in concentrations two to five times that of Listerine. Application by means of a gargle is too brief and the concentration of what is being gargled is too weak, even if all of it were to reach the desired site (Schwartz 688-90; Modell 1010, 1029-30).

79. Respondent contends that the pharmacologists called by complaint counsel, Drs. Schwartz and Modell, testified as to the effects of the individual active ingredients in Listerine but failed to take into account the cumulative effects of such ingredients. To the contrary, Dr. Schwartz made it clear that everything he testified to with respect to the individual ingredients applies collectively to the entire preparation and that if all of the Listerine gargled could vaporize, it would still not be an effective dosage (Tr. 710, 712). Dr. Modell similarly had in mind the cumulative effects of the various active ingredients of Listerine when he testified to its lack of efficacy (Tr. 1010-11, 1023, 1037).

80. This record does not establish the percentage of the active ingredients of Listerine that vaporize when that product is gargled and what portion of such vapors reach the nose and nasopharynx. Taking into account, however, the insufficient concentration to start with and the loss of ingredients by such normal activities as smoking, drinking and eating, it is obvious that only a small percentage of such insufficient quantities would vaporize and reach the nose and nasopharynx.

Clinical Studies

Before discussing the opinion testimony of the experts produced by respondent, it would be well to consider the clinical studies conducted on behalf of respondent. This is because much of respondent's experts' opinions were based upon their results, particularly the results of the St. Barnabas study. Preliminary to discussing the studies, it is important to understand what has been termed the placebo effect of medicines on users and the bias that is built into a study if the control group, those who are not taking the agent being tested and who are being compared with those being tested, is not provided with a "placebo" agent that simulates the product being tested. Another built-in bias to be considered is that of the investigator if he knows which of the persons he is examining are receiving the tested medication and which are not.

81. People who are given medication for an ailment frequently feel better because they think they should, even though the product has no therapeutic value. There are very few people who are not susceptible to this phenomenon (Seal 562, 566; Proctor 659; Rammelkamp 785). As Dr. Proctor testified, "Even with severe pain, you can substitute sugar for morphine and about 30 percent of the people will be relieved of their pain." (Tr. 659). And as Dr. Rammelkamp explained, "[Y]ou see paralysis even stopped where you just give an injection of salt water." (Tr. 783). This is known as the placebo effect. The placebo effect is always present when medication is taken (Shirkey 2635).

82. Because of the placebo effect, it is important, when attempting to conduct a meaningful clinical study, that the control group be given a placebo which simulates in appearance and taste the product being given to the test group. By this procedure, no one in the study group knows whether he is taking the medication in question or the placebo. In this manner, the placebo effect is neutralized between the test and control groups, and any recorded difference between the two groups can more reliably be attributed to the medication being tested. The importance of utilizing a placebo and of the subjects not knowing whether they are taking the tested medication or the placebo is extremely critical when conducting a cold test. This is because colds are subjective ailments, being related in terms of relative degrees of severity by the subjects, and the ailment is self-limiting and improves even without medication. Narrative descriptions of cold symptoms are not too reliable, particularly when the subject must recall the severity of symptoms for any past period. Also, the differences to be measured are very small. This makes a cold study a very difficult and tricky one to conduct and calls for rigid controls including the use of a proper

placebo and lack of knowledge on the part of the subjects as to whether they are in the test or control groups.[5] (Gwaltney 407, 408; Hornick 476, 497, 499, 502; Seal 549-50, 562; Rammelkamp 783-84; Haggie 1794, 1808-11; Knight 2051; Shirkey 2637, 2655-56; Nitzberg 2816-20, 2823; Lamm 2935; Carson 3055-56, 3585-86, 3589; Bogarty 3072-73, 3115-16; Sadusk 3206, 3209, 3217-26, 3277; Jawetz 3698-99, 3742; Charache 3838-39; Wehrle 3995, 4011, 4013-15, 4037-39; Lasagna 4108, 4126, 4130-31, 4134, 4160, 4162; CX 162G-T). Without such precautions, it is clear that the test results will reflect bias in favor of the tested agent.

83. Another bias that must be avoided is that of the investigator who is recording the results as narrated to him by the subjects or as observed by him when he conducts his examination. Every investigator has his own biases. It is important that the investigator not know whether the subjects are taking the test agent or are in the control group. Otherwise, he will subconsciously try to give his employer the answers the employer wants (Gwaltney 407; Haggie 1794; Knight 2051; Lamm 2934, 2937; Sadusk 3206; Carson 3589, 3601; Jawetz 3698-3701; Wehrle 3995, 4013-15, 4037-39; Lasagna 4126, 4133-34; CX 162G-I). As Dr. Knight reported to respondent (CX 162G-H):

> * * * In the absence of double blind controls, however, there is no way to exclude the possibility of some bias. There is a tendency of both patients and experimentalists to see a favorable effect of medication in any experiment.

As respondent's statistical expert testified (Lamm 2934):

> * * * [T]he important thing in this type of study is that your investigator be blind.

And, as one of respondent's expert medical witnesses testified (Sadusk 3228-29):

> If the doctor knew [which subject that came to him was a control and which was a test]—and this would indicate that the doctor was dishonest because he would actually ask each person—the experiment, of course, would not be valid.

With these basic requirements in mind, we now consider the two major studies conducted on behalf of the respondent and upon which the respondent relies.

(1) The St. Barnabas Test

84. A clinical study purporting to show the efficacy of Listerine on the common cold was conducted at the St. Barnabas Catholic School, Bronx, N.Y., during the four year period 1967-1971. The purpose of this

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[5] For example, investigators at the National Institutes of Health have questioned a cold study they conducted regarding the use of Vitamin C because they discovered that a significant number of subjects guessed correctly whether they were in the placebo group or the group taking Vitamin C (Hornick 501).

study was to determine the effect of twice daily rinsing and gargling with Listerine on the incidence, duration and severity of the common cold and its symptoms. It was conducted during the 26-week cold season of each year, *i.e.*, November to April. Four 26-week interim reports were compiled which include statistical analyses (CX 51; RX 81, 83, 84).

85. The St. Barnabas School administration and parents of the students agreed to participate in the test. The St. Barnabas School consisted of an all girl high school (grades 9 to 12) and an elementary school, with boys and girls from grades 3 to 8 participating in the study. The two schools were in separate buildings. Two medical practitioners participated, one assigned to the elementary school and one to the high school. Dr. Benjamin W. Nitzberg, a board certified pediatrician with an active pediatrics practice in Roslyn Heights, N.Y., served as the elementary school examining physician. Dr. David Granger, another pediatrician, served as examining physician in the high school (CX 51D; RX 81C, 83P; Haggie 1792; Baron 2708-09; Nitzberg 2784-88, 2804). Prior to the fourth year of the study, the high school population was dropped. For that year, Dr. Nitzberg continued as the examining physician in the elementary school, and Dr. Granger served as "back-up" in the event of Dr. Nitzberg's absence (RX 84H).

86(a). The study was conducted in a coded and randomized fashion. The subjects were re-randomized each year. Randomization was in accord with a standard statistical procedure based on the Rand Table of Random Numbers. Each year, about 750 elementary school children participated so that there were some 3,000 elementary school subjects over the four-year period. Counting the high school students, there were about 4,000 subjects. Many students participated more than one year and so could be subjects a multiple number of years up to four. Such children could have been in the control group some years and in the test group in other years.

86(b). During the first two years of the study the subjects, both elementary and high school students, were randomly assigned to either a treatment group which rinsed twice daily with Listerine antiseptic or to a control group which used no mouthwash at all. In the second two years, the control group gargled with a water rinse colored to be similar to the color of Listerine (Nitzberg 2789-90, 2796-97; Lamm 2870-73, 2924, 2949).

87. The gargling by the control group during the third and fourth years of a water rinse colored the same as Listerine did not afford the study a true placebo. It did not keep the subjects unaware of which were gargling with the test material. The placebo did not at all match the strong and unique taste and smell of Listerine. It cannot be

considered an acceptable placebo (Sadusk 3205-06, 3226-27, 3276; Bogarty 3115-16; Carson 3055-56; Baron 2748; Lamm 2935, 2971).

88(a). During the first two years of the study, when the control group was given nothing, those in the test group knew that the effect on colds of the gargled substance was being tested. Many complaints were received from parents because their children were not placed in the gargle group (Nitzberg 2828, 2830-31). This is an example of the bias in favor of using a medication. This bias was also carried over into the third and fourth years of the study, particularly since many of the same students participated in multiple years and would carry their biases with them.

88(b). It is also obvious that many of the children knew what product was being tested. The school "smelled of Listerine. It was like walking into a Listerine factory. As you opened the door it permeated the school" (Nitzberg 2802). When the children gargled at home during the first two years, and on weekends and holidays throughout the study, their parents would certainly examine what was being used and would smell the product. The bottle contained the identification, "Warner-Lambert Research Institute" (RX 79D; Baron 2707). Also, it is likely that Listerine was being or had been used in many of the subjects' homes, so the children and their parents could identify the test product furnished to them. Further, many of the children and their parents had been subjected to Listerine colds advertising claims on television and elsewhere (Charache 3839), so they were further biased in favor of expecting favorable results as represented.

89. It is unlikely that this knowledge acquired by many of the subjects about the test product would not have been passed on to their fellow students. Thus, it must have been common knowledge throughout the entire four years of the study that Listerine was being tested as a cold remedy and who was using Listerine and who was not.

90. It is clear, therefore, that the St. Barnabas study results lack probative value to show that the use of Listerine is efficacious for colds and cold symptoms; that the results were heavily biased in favor of the product being tested since the subjects knew whether or not they were in the test group and indeed appear to have known the identity of the product being tested and what results were expected (Charache 3839; Jawetz 3719).[6]

91. All subjects assigned to the Listerine regimen were instructed to rinse and gargle with 20 ml. of Listerine for 30 seconds, twice daily throughout the study. In the first two years of the study, on each school

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[6] Dr. Lasagna, an expert called by respondent, rejected the first two years of the study because of the lack of a placebo (Tr. 4108, 4130-31, 4160, 4162). His testimony is also given weight in rejecting test results purportedly in favor of Listerine for the third and fourth years of the study since no effective placebo was used in those years and the subjects were not blinded.

day, students in the test group gargled under supervision in their respective classrooms in the morning and were instructed to gargle at home during the evening. During the third and fourth years, both the morning and afternoon gargles were performed in the school during school hours. On days when school was not in session, the students were instructed to gargle at home twice daily, once in the morning and once in the evening (RX 82B-C, 83D; Baron 2704-06, 2710-11; Nitzberg 2790, 2812, 2855-56).

92. All subjects, whether members of the test or control group, were instructed to report to the medical office at the first sign of a cold episode. Either the teacher or the child could decide whether the child was to see the doctor. Upon reporting to the medical office, the subjects received their "Monthly Report Forms," which were pre-printed with each student's name, identification number, class and room number. These forms were presented to the examining physician for recording the cold symptoms, their severity, and any concomitant medication the child was taking. The child returned to the physician to be examined each day for the duration of that particular cold episode (RX 81D-E; CX 51E; Nitzberg 2790-91, 2802, 2812, 2814, 2819-21).

93. Initially, the common cold was defined as an acute, self-limiting, upper respiratory infection of from three to seven days duration, accompanied by any or all of the following signs and symptoms: sneezing, nasal discharge, nasal congestion, postnasal drip, cough, watery eyes, minor sore throat, headache, fever and chest congestion. Subjects who presented themselves with symptoms which, in the opinion of the examining physician, were suggestive of a complicated cold were excluded from the study during that period in which the complications persisted and were referred to their own family physician for specific treatment. Symptoms not indicative of a cold were also excluded, including ear infections, allergic rhinitis, tonsilitis, septic sore throat, pronounced cough, chronic bronchitis, otitis media and diarrhea (RX 82D; CX 51D; Nitzberg 2792, 2797, 2839, 2843-44, 2847-48).

94. Although the definition of cold for purposes of the study was limited initially to episodes of from three to seven days duration, the physician collected and reported the indicated information for each day the subject reported to him with a cold. Thus data was collected from the first day until the subject no longer reported (Baron 2719; Nitzberg 2801-02). In addition to recording on a daily basis an estimate of the overall severity of the cold, in each of the first two years the examining physician also evaluated and recorded the severity of the following cold-related symptoms: 1. Nasal Discharge 2. Nasal Congestion 3.

Postnasal Drip 4. Watery Eyes 5. Sneezing 6. Sore Throat 7. Headache 8. Cough

Records also were kept to indicate various types of concomitant medication taken by the subjects, *e.g.*, nosedrops, aspirin, cough drops, etc. (RX 78, 81J, 83W, 84U).

95. Those subjects reporting with a cold on Mondays or the day after a holiday were queried by the physician regarding the extent and intensity of the cold and symptoms present on Saturday and Sunday or the holiday, and these data were recorded on the report forms. Absent students were asked about their absence to determine if it was due to a cold. The investigation always went back 48 hours to ascertain when the cold had started. The incidence of cold episodes was not recorded during extended vacations, such as the Christmas holidays (RX 81; CX 51; Nitzberg 2792, 2799, 2800-01, 2835, 2853).

96. Cold episodes occurring in the same subject more than 48 hours following cessation of previous symptoms were considered as new cold episodes (RX 81E, 83S, 84A; CX 51E).

97. Starting with the third year, six additional symptoms (ear infection, sinusitis, malaise, conjunctival erythema, hoarseness and muscle aches) were added. This meant that the examining doctor had to examine for, request information about, evaluate and then record the estimated severity of fourteen symptoms rather than eight. During the first two years, the rating scale for the overall severity of a cold and the various symptoms ran from 0-3 (0 = no symptoms; 1 = mild; 2 = moderate; 3 = severe). Starting with the third year, the scale was expanded to 0-6 (0 = no symptoms; 1 = mild; 2 = mild to moderate; 3 = moderate; 4 = moderate to severe; 5 = severe; 6 = extremely severe). The common cold was redefined as having a 1-10 day duration (RX 83D-E, 84N-Q; Baron 2718-19, 2723-25; Bogarty 3072-73, 3075).

98. In preparing a report on the four years of study, the conversion of the 0-3 scale used during the first two years to the 0-6 scale used in the last two years was made as follows:

	1967-1969		*1969-1971*
Extremely Severe	(no rating)		6
Severe	3	=	5
Moderate to Severe	(no rating)		4
Moderate	2	=	3
Mild to Moderate	(no rating)		2
Mild	1	=	1
None	0	=	0

(RX 85B; Lamm 2890, 2932)

99. The children gargled at 9:00 a.m. (RX 81D; CX 51D). Dr.

Nitzberg began his examination of the children, including an examination of their throats, at 10:00 a.m. During the first two years, this took about one hour. During the last two years, because of the increased number of symptoms to check, this took about an hour and one half. Dr. Nitzberg examined about 30 children a day. On Mondays, he would see more (Nitzberg 2811, 2826). Listerine can be smelled on the breath for one and one half to two hours after gargling (Sadusk 3215; Krantz 1867, 1879, 1901).[7] As respondent's medical expert Dr. Sadusk testified, if the doctor examined the subjects within an hour or two of their having gargled, he would know which ones had gargled with Listerine (Tr. 3228-29). It is thus obvious that Dr. Nitzberg, who knew that Listerine was being tested for its value with regard to colds (Nitzberg 2809), also knew which of the subjects he was examining had been gargling with Listerine.

100. Since the examining physician was not "blind" as to which subjects had been using Listerine, the test results reflect bias in favor of the use of Listerine. The necessity to avoid such bias has been recognized both by experts presented by complaint counsel and by those presented by respondent (Finding 83). Here, neither the subjects nor the investigator were "blind" and the test results are biased in favor of Listerine on both counts.

Respondent has argued that the test results should be accepted, contending that the test was the best that could be conducted in light of the peculiar characteristics of Listerine which make it impossible to prepare a true placebo. Without passing upon what more reliable tests could be developed, suffice it to say that merely because an unbiased study cannot be conducted, the results of a patently biased one has little or no probative value.

101. There are still other factors that detract from the St. Barnabas test's reliability. For example, Dr. Nitzberg's practice of recording the scores for the subject on the same sheet that contained prior days' recordings (Nitzberg 2824) would tend to bias his scores by the knowledge of what he had done previously. He would not be making an independent judgment each day as he should (Hornick 500; Wehrle 4045-46).

102. Dr. Nitzberg spent only one and one half to two minutes with each child to record the scores on eight to fourteen observed and related symptoms as well as the severity of the overall cold itself. This included the requirement to examine and question the child with regard to each pertinent symptom (Nitzberg 2820). Dr. Shirkey, one of respondent's experts, estimated, "You might be able to do it nicely in five minutes" (Tr. 2670). Dr. Wehrle, an expert introduced by complaint

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[7] Respondent advertises that Listerine lasts for hours (CX 1, 7, 11, 13, 15, 28, 30).

counsel, estimated that it would take at least 15 minutes as of the third year of the study (Wehrle 4041-44). Upon consideration of the testimony, a study of the form to be filled out and an evaluation of the scope of information to be elicited from the subjects and the examination to be conducted by the doctor, it is found that the time spent by Dr. Nitzberg on each subject was inadequate.

103. Recognizing that the St. Barnabas test results are biased in favor of Listerine, even those results do not substantiate respondent's claims for the product and, indeed, discredit some of them.

104. Based upon the 0-6 rating schedule, a comparison of the average overall severity of colds and symptoms recorded over the entire four year period of the study, shows the following differences that are statistically significant (RX 85C, 93A):

	Listerine Group	*Control Group*
Overall Severity	2.191	2.305
Symptom Severity		
Nasal Discharge	2.341	2.457
Nasal Congestion	2.657	2.787
Postnasal Drip	2.015	2.178
Sneezing	1.811	1.946
Sore Throat	1.321	1.466
Cough	1.920	2.112

The differences for the following symptoms or factors were found to be either in favor of the control group or not of statistical significance in favor of Listerine: ear infection, sinusitis, malaise, watery eyes, headache, conjunctival erythema, hoarseness, muscle ache, *duration of colds, number of colds and days absent from school* (RX 85C).

105. Statistical significance, or the standard of statistical reliability, refers to a mathematical computation whereby it is determined that a difference found between two groups is not caused by chance—that there is indeed a difference. This does not indicate the size of the difference or how much benefit is to be expected because of the difference. If a large enough sample is used a very, very small difference can be found to be statistically significant (Lamm 2881, 2885-86, 4315-16; Sadusk 3162-63; Lasagna 4151, 4163). In the St. Barnabas test, a large sample was used, over 3,000 subjects, and, as previously found, to the extent the differences were not caused by chance they were, at least in large part, caused by the biases of the subjects and the medical investigator. Therefore, the statistically significant differences found may not be held attributable to gargling with Listerine.

106. In any event, the existence of a *statistically* significant difference does not mean that the difference is *medically* significant or meaningful. There is a difference between statistical significance and

medical significance (Bogarty 3132-33; Sadusk 3261-62; Jawetz 3707; Lasagna 4095, 4127, 4151).[8]

107. Statistical differences developed by respondent's St. Barnabas test cannot be read as evidencing therapeutic or medical significance. The differences cannot be evaluated to show such a medical result (Sadusk 3264[9]; Wehrle 4018-21, 4067-68; Lasagna 4116-17, 4139, 4148-49; Gittelsohn 4183-85). In fact, the small differences indicate that there is no therapeutic or medical significance (Wehrle 4018-21, 4067-68; Jawetz 3706-07, 3711-12; Charache 3848-49; Lasagna 4116-17, 4148-49). One could not differentiate between a person suffering from a cold at the average level of severity reported for the Listerine test group and a person suffering a cold at the average level of severity reported for the control group (Sadusk 3258-59, 3262-63; Lasagna 4116-17, 4129).

108(a). The meaninglessness of the differences developed between the test and control subjects is demonstrated by the minimal differences claimed by respondent. Bearing in mind that the average cold symptom severities are in terms of a 0-6 scale, it is observed that the averages for both the Listerine and the control groups for overall severity, nasal discharge, nasal congestion, and postnasal drip fall between 2 and 3, making them all fall in the mild to moderate range. For sneezing and sore throat, the averages for both groups are between 1 and 2, making them fall in the mild to mild to moderate range. For cough they are both essentially a 2, giving both groups an average severity of mild to moderate.

108(b). The minimal nature of the alleged differences is further demonstrated by the specific differences developed by the test: Overall severity—.114; nasal discharge—.116; nasal congestion—.130; postnasal drip—.163; sneezing—.135; sore throat—.145; cough—.192. Thus, on a rating scale of 0-6, not one of the alleged improvements is as much as two tenths of a point. Indeed, the results in most of the categories are closer to the one tenth of a point differential. It is obvious that these claimed differentials for milder cold symptoms do not begin to approach significant levels.

109. As already noted, any difference, if a large enough number of subjects is studied, can be found to be statistically significant. On the other hand, it is not common for a medicinal preparation to work sometimes and not at other times. If a product is capable of relieving symptoms, it should do so year after year (Parrott 921; Jawetz 3718;

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[8] Dr. Lasagna referred to a study he had conducted for the Federal Trade Commission comparing five proprietary analgesic compounds wherein he found that differences "although sometimes statistically significant were not terribly important." (Tr. 4096).

[9] Dr. Sadusk would interpret the study as indicating that three or five people of 100 would have less severe symptoms by taking Listerine, but he was unable to tell from the test results how much less severe the symptoms would be. Hence, there is no showing that even the few people claimed to be helped were helped significantly.

Charache 3878-79; Wehrle 4034-45). However, as of the end of the first year of the St. Barnabas study, there were no statistically reliable or significant differences with regard to the severity of colds overall or for any symptoms (Lamm 2880). For the fourth year, only one symptom (sneezing) showed a statistical significance in favor of Listerine (Lamm 2971; RX 84). Indeed, in no two years of the study was there a statistically significant difference in favor of Listerine users with respect to the same symptom (Lamm 2972). This in itself demonstrates the lack of medically significant differences.

110. Over the four years of the St. Barnabas study, Listerine users had slightly more colds than the control group (RX 85D; Lamm 2950). This confirms the opinion evidence of experts produced by complaint counsel that gargling with Listerine will not prevent or result in fewer colds (Carson 3053, 3057-58; Sadusk 3265-66). Such a finding has been previously made and is reaffirmed at this point as supported by respondent's own St. Barnabas test.

111. Over the four years of the St. Barnabas study, the colds of Listerine users lasted slightly longer than those in the control group (RX 85D; Lamm 2950-51). This result from a study so biased in favor of Listerine in itself establishes as a fact that the colds of Listerine garglers do not last a shorter period of time than the colds of non-users. There were also more days of total cold symptoms in the Listerine group than in the control group (Charache 3894) and, based on records kept only for the first two years of the study, students in the Listerine group were absent more days than students in the control group (RX 85D).

112. Of all the elements measured, the duration of a cold, the number of colds and the number of days absent reflect the least subjective matters and, hence, are more reliable. In none of these aspects was Listerine reported to be of any benefit (Gittlesohn 4204).

113. The results narrated above pertain to the elementary school subjects who participated in the St. Barnabas test. It is to be recalled that students in the St. Barnabas all girls high school were also included in the test for the first three years, but were dropped after the third year. It is significant that the results of the third year for the high schools girls did not show a single element in which there was a statistically significant result in favor of the group using Listerine. Indeed, on overall severity, ear infection, nasal discharge, nasal congestion, postnasal drip, headache, sneezing, conjunctival erythema, hoarseness, muscle ache, cough, number of colds and days absent, the results favored those in the control group (RX 83N).

114. In an effort to salvage something out of the St. Barnabas

study, respondent has analyzed the symptom days under the 0-6 unit ratings as follows:

Combined 4-year Data (1967-71); Elementary School

Number of Days of Overall Severity and Symptom Scores at Different Levels

Element Measured	*Group*	*Severity Scores**						
		0	*1*	*2*	*3*	*4*	*5*	*6*
Overall Severity	Listerine	-	4339	1570	4876	1046	433	0
	Control	-	3743	1569	5015	1079	593	3
Nasal Discharge	Listerine	452	4071	1335	3833	266	2307	0
	Control	358	3561	1402	3881	293	2507	0
Nasal Congestion	Listerine	55	3460	1306	4443	337	2663	0
	Control	47	2871	1371	4426	362	2922	3
Postnasal Drip	Listerine	1340	4074	1396	3519	208	1727	0
	Control	1126	3382	1483	3912	204	1895	0
Sneezing	Listerine	3697	3111	955	2438	111	1952	0
	Control	3369	2783	898	2596	166	2190	0
Sore Throat	Listerine	5546	2612	736	1891	157	1322	0
	Control	5130	2407	807	1950	204	1501	3
Cough	Listerine	3188	3473	823	2463	153	2163	1
	Control	2941	2926	820	2549	180	2582	4

* The higher number is the greater severity.

(Taken from RX 86.)

115(a). This analysis shows that more Listerine users had mild cold days (rating of 1) than did non-Listerine users, while less Listerine users had severe cold days (rating of 5) than did non-Listerine users. This analysis of the results of the St. Barnabas study, however, reflects the same biases in favor of the Listerine group that have already been found. The results, therefore, cannot be attributed to the use of Listerine. Also, when non concomitant medication was taken, Listerine users had more severe cold days than did those in the control group (RX 88D). Further, even under these biased results, Listerine users had 435 days of number 5 rated colds compared to 593 days for non-Listerine users in that category; and under categories 4, 3 and 2, the number for both groups are substantially the same. Even in category 1, the figures favor Listerine users only by 4,339 to 3,743.

115(b). As respondent's expert witness Dr. Lasagna testified concerning this analysis, he could not tell how much better any of the Listerine users who might otherwise have been in category 5 might be. "My interpretation is if someone asked what would happen if I gargled with Listerine with a cold, I would say you have some chance of feeling better, a little better, you might not feel better at all." (Tr. 4150). This is far from the significant relief promised in respondent's advertising.

116. A curious aspect of this breakdown is that in categories 1-3, the number of days of overall severity correlate roughly with the number of days of severity of the six symptoms that are listed (nasal discharge, nasal congestion, postnasal drip, sneezing, sore throat and cough). In category 5, however, many fewer days of overall severity are estimated than days of severity for the individual symptoms. The ratio in favor of the individual symptoms ranges from three to one to five to one. On the other hand, in the next less severe category 4, many more days of overall severity are reported than there are days of symptoms. The ratio in favor of days of overall severity over days of individual symptoms ranges from three to one to eight to one. This disparity between categories 4 and 5 cannot be explained away by the suggestion that the lower the severity of the cold overall the more numerous the days of lower rated symptoms. The correlation between days of overall severity and days of symptoms under categories 1, 2 and 3 disproves such a suggestion.

117(a). Also, while this analysis of the test results purports to show that Listerine users had only 73 percent as many category 5 days (severe cold days) as those in the control group, according to the same analysis, they had 92 percent as many category 5 nasal discharge days, 91 percent as many category 5 nasal congestion days, 91 percent as many category 5 postnasal drip days, 89 percent as many category 5 sneezing days, 88 percent as many category 5 sore throat days, and 83 percent as many category 5 cough days. On the other hand, in the less severe category 4, Listerine had 97 percent as many overall cold days as those in the cold group, but 91 percent as many nasal discharge days, 93 percent as many nasal congestion days, about the same number of postnasal drip days, 67 percent as many sneezing days, 77 percent as many sore throat days and 85 percent as many cough days.

117(b). Thus, in the more severe category 5, Listerine users are reported as having an appreciably smaller percentage of overall cold days in comparison to the control group than is shown when comparing individual symptoms of the two groups. On the other hand, in the less severe category 4, where Listerine users are reported as having about the same number of days as those in the control group, the comparison of individual symptom days is more favorable to Listerine. These inconsistencies cast still further doubts upon the validity of the study.

118. Another curious aspect of the breakdown of the number of days of severity under the severity table is exemplified by the fact that under category 3, there are 3,833 days of nasal discharge for Listerine users. Under category 4, the number of days drops to 266, but under category 5, it jumps to 2,307 days. Similar patterns are reported both for Listerine users and those in the control group for each of the six

symptoms tested. As Dr. Charache testified (Tr. 3884), such a pattern is medically unlikely. Such skip areas should not appear.

119. Respondent (RPF 177-85, 187-88) has relied upon other compilations of mean scores of severity and days of severity comparing Listerine users and others participating in the St. Barnabas study. These further compilations, however, are basically additional means of presenting the same results that have already been considered, and no further discussion is deemed necessary.

(2) The Reddish Cold Tests

120. The Reddish Cold studies took place during the winter seasons from 1932 to 1942. They were conducted, to a large extent, in respondent's own factories with respondent's own employees as the subjects. There were 2,500 subjects over the 12 years. Some participated in more than one year. About 600 of the tests were performed on employees of respondent and another 900 were performed on employees of a subsidiary of respondent. Another 500 were conducted on employees of a company that manufactures Listerine cough drops. Half of the subjects gargled with Listerine twice a day. The other half were specifically instructed not to gargle with anything. An exception was made for a small number in the control group for 1938-1939, who gargled with a saline solution. In 1935-1936, some gargled with tap water (RX 103D, F, Z-17-19, 48, 55, 109, 234-36, 239-40, 469, 481-82).

121. In assigning the subjects to the test and control groups, persons were placed in the test group because they preferred to gargle for their colds. Conversely, many were placed in a control group as they did not want to bother to gargle (RX 103, Z-105-06). This procedure of election defeated the purpose of random selection. The placement of persons in the test group who believed they would be helped by gargling obviously increased the placebo effect in favor of the test group results. The doctor in charge of the study also had a predetermined belief that Listerine was good for colds (RX 103Z-232-33).

122(a). No definition of a cold was provided to the investigators. The different nurses over the years at the different plants where the tests were being conducted used their own judgments which, of course, could vary from investigator to investigator. Thus, pharyngitis could be counted as a sore throat and pneumonia, influenza and sinusitis could be counted as a cold or as cold complications. Their judgments would similarly vary on whether to categorize the cold as severe (RX 103Z-116-17, 184-85, 255, 323, 353).

122(b). Dr. Reddish, who was in charge of the study, believed that the average cold lasted about ten days to two weeks and that a normal cold could last 25 days without there being any complications (RX 103Z-185, 247). Thus, the record contains numerous examples of ailments well in excess of ten days that were counted as colds, *e.g.*, 25 days, 38 days, 35 days, 31 days, 38 days, 17 days, 20 days, 28 days, 23 days, 21 days, 32 days, 21 days, 25 days, 26 days, 33 days, 25 days, 24 days, 21 days, 36 days, 25 days, 23 days, 43 days, 50 days and as high as 69 days (RX 103Z-246, 259, 343, 345, 373, 404, 459, 484, 485, 492, 503, 509, 510, 511, 512, 515, 516, 517, 520, 540; Charache 3818). These examples are by no means exhaustive. Complaint counsel ceased examining as to the length of individual colds at the request of the hearing examiner (RX 103Z-532).

123. Common colds do not last more than ten days (Hornick 479; Seal 549; Proctor 607; Charache 3818). Even respondent's own St. Barnabas study originally defined the common cold as lasting from three to seven days and subsequently revised the definition to include up to ten-day colds. It is not clear, therefore, just what illnesses in addition to the common cold were included in the Reddish study. What is clear is that, in large measure, the results reflect ailments other than the common cold.

124. It is recognized, of course, that the Commission relied, in part, on the Reddish tests in its dismissal without prejudice of the complaint in Dkt. 4232 in 1944. However, such tests would be unacceptable to the scientific community today. The standards for evaluating clinical tests are different today (Jawetz 369-80). As Dr. Knight, expert witness for respondent, reported to the respondent in June 1970:

> Whatever the opinions concerning the mode of action of Listerine in the 1935-1942 experiments, those experiments must be considered incomplete in light of present knowledge of the etiology of common cold (sic). I believe that present opinion would hold that satisfactory evidence for efficacy is no longer provided by these early studies. (CX 162G-H).[10]

125. The Reddish studies are meaningless. Colds weren't defined. No effort was made to define or evaluate symptoms or signs. No objective basis for judging was employed. Each observer was on his own. Pneumonia, sinusitis, bronchitis, high fever and various other conditions now excluded from the definition of a cold were covered including lingering ailments of up to 69 days. Except for a very short period of time, no placebo was used for the control subjects. This was an important bias in favor of Listerine since at that time, gargling was thought by many to be effective in the treatment of colds. Subjects

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[10] Dr. Haggie, who at the time of the commencement of the St. Barnabas study was respondent's vice president for Consumer Products Research (Tr. 1703), persuaded Warner-Lambert's management to conduct the more recent study for the following reason: Essentially my position was that some 20-odd years had elapsed since the Reddish Studies—And what would we find in a modern study. Would we find additional support or would another study raise some doubts?

could and did choose which group they would be in, thus exercising their biases at the very outset. Dr. Reddish and the various observers were biased in favor of Listerine while the tests were being conducted. Many of the subjects were employees of respondent (Knight 2052; Jawetz 3697-3700; Charache 3817-21, 3823-32; Wehrle 4006-14).

126. The lack of a placebo, the ability of the subjects to choose which group to be in, the use of subjects who were employees of respondent, and the predetermined beliefs of the investigators all combined to create a very strong bias in favor of the Listerine test group. These biases, together with the other defects of the test, make the test results meaningless (CX 162G-H; Jawetz 3697; Charache 3817, 3823). The Reddish study would not be acceptable for publication in a medical journal under today's method of evaluating studies of this nature (Charache 3835). As Dr. Wehrle testified, "This series of studies is perhaps the poorest example of clinical research I have been privileged to review. * * * It is a lousy study." (Tr. 4013-14).

Respondent's Expert Witnesses

As previously noted, discussion of the opinion testimony of experts produced by respondent has been delayed until after consideration of the two major clinical studies upon which respondent relies. This is because respondent's experts based their opinions in large part upon the results of the St. Barnabas study. The following discussion of the testimony of respondent's witnesses is not to be taken as an exhaustive rationale for accepting the opinions of witnesses who testified in support of the complaint over those who testified on behalf of respondent. That determination was made upon the basis of the entire record and the opportunity to observe those witnesses who appeared before the undersigned. The following discussion merely points up some of respondent's expert witnesses' testimony.

127. *Dr. Haggie* was a vice president of Warner-Lambert from 1962 until his retirement in January 1971 (Haggie 1701-04, 1788). In his various capacities, Dr. Haggie was involved in all scientific and medical affairs associated with all the consumer products of the company, including Listerine (Haggie 1703). Dr. Haggie was responsible for the approval of Listerine advertising from 1962 until his retirement (Haggie Tr. 1704). Dr. Haggie, therefore, can hardly be considered an impartial witness. Dr. Haggie's education and experience is in the field of chemistry. He holds a Ph.D in organic chemistry (Haggie 1698). Dr. Haggie is not a pharmacologist. He performed no clinical testing, but "farmed out" clinical testing to experts in the field (Haggie 1699).

128. Recognizing that Dr. Haggie was a chemist and not a pharmacologist, the undersigned allowed Dr. Haggie to express his

opinion with respect to Listerine on the basis of what he had read and limited to his own field of expertise (Tr. 1782). One reason for allowing him to express his beliefs was that an expert witness for the complaint had interpreted respondent's advertising, basing his interpretation in part upon what he conceived to be respondent's intent (Mendelsohn 1308-10, 1318).[11] In order to rebut that testimony as to intent and also as bearing upon the scope of any order that might issue, Dr. Haggie was allowed to testify as to his understanding of the efficacy of Listerine (Tr. 1787). Dr. Haggie's opinions were based, in large part, upon the results of the Reddish and St. Barnabas studies (Tr. 1727, 1732, 1784, 1815). As already found, however, those studies furnish no basis for concluding that Listerine is efficacious for colds and sore throats. Dr. Haggie's opinion was also founded in part upon his belief that the secondary invasion by bacteria is part of the etiology of the common cold (Tr. 1795), a belief that has been rejected (see Findings 51 and 58).

129. Even Dr. Haggie agreed that Listerine would not cure colds or eliminate symptoms (Tr. 1787, 1810) and that the St. Barnabas test was not as double blind as he would like to have seen it (Tr. 1794).

130. *Dr. Krantz* is a pharmacologist who has been a paid consultant for respondent on an annual retainer for over ten years (Tr. 1828, 1851-52, 1872, 1906). While he testified that all of the active ingredients of Listerine (menthol, eucalyptol, thymol and methyl salicylate) were virucidal (Tr. 1857, 1877), he admitted that none of these ingredients were listed in the United States Pharmacopeia or in his own textbook as virucidal (Tr. 1876-77, 1898).[12] Dr. Krantz readily testified that if one were to gargle with Listerine every 2 hours, practically every type of a cold would be prevented. His only basis for making this claim for cure of the common cold was that he and his wife could smell Listerine for up to two hours after use (Tr. 1867, 1879, 1901-02). While he was unaware of the quantity of Listerine's ingredients that would reach the nasopharynx (Tr. 1882), he testified that so long as one could smell Listerine at all, it would kill cold viruses and so prevent colds (Tr. 1902-03).

131. Dr. Krantz' willingness to ascribe to Listerine the cure for the common cold makes his testimony suspect. Further, Dr. Krantz' opinion that gargling with Listerine would be beneficial is flatly contradicted by statements in his own textbook, Krantz, Carr and LaDu, *The Pharmacologic Principles of Medical Practice* (7th Ed. 1969), at p. 819:

> The use of gargles accomplishes little. In the act of gargling the fauces are completely closed, and the medicaments in the gargle do not reach beyond the anterior pillars of the

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[11] Of course, if a representation is false and misleading, intent is immaterial.

[12] Neither were the ingredients listed in the United States Pharmacopeia as analgesics or anesthetics (Tr. 1876).

> throat, whereas the areas of infection are posterior to this region. It is far better to place such cleansing gargles in an atomizer and spray the throat with them. In this way some palliative effect can be attained. (CX 161B).

Despite his averred belief in the benefits of Listerine, Dr. Krantz never taught his students to use Listerine for the treatment of colds (Tr. 1874).

132. Of the four active ingredients in Listerine, Dr. Krantz rated thymol as the least volatile and least likely to get into the nasal area. He would not expect very much thymol, if any, to get there (Tr. 1881-82, 1904-05, 1908). This was confirmed by Dr. Rieger's test (RX 73; Tr. 2506, 2508; see Finding 205).

133. *Dr. Knight* has been a paid consultant of the Warner-Lambert Company for the past three years at $5,000 per annum. In addition, respondent has issued grants to Dr. Knight's medical school and to Methodist Hospital in Texas to support viral research of considerable interest to Dr. Knight for the past four years in the sums of $37,000, $50,000, $60,000 and $60,000. This grant money has been used to finance all of the studies Dr. Knight performed on Listerine (Knight 1922, 2001-02).

134. Dr. Knight performed *in vitro* tests on Listerine and its ingredients and a series of tests using white mice (RX 40-43). As Dr. Knight testified, "None of the tests have been in man. So, I have nothing—there is nothing I can say about man." Also, none of Dr. Knight's tests have been directed at the relief of cold symptoms (Knight 2045). *In vitro* tests on Listerine have only the most marginal relevance to the issues in this proceeding. The only *in vitro* tests that have any relevance are those performed with Listerine dosages comparable to that used by the consumer as recommended on the label. And the dose of Listerine gargled by the consumer is a far cry from what, if any, dosage actually reaches the nasal passage.

135. Respondent's exhibits 40 and 41 contain results of the effect of Listerine and some of its ingredients on certain viruses at various time intervals. Exhibit 41 contains data only on thymol and in 11 cases out of 14, the concentrations of thymol were approximately twice those found in Listerine (Knight 1960, 1963, 2008; RX 41F). The experiments with Listerine (RX 40) show that no significant results occurred after application of Listerine for 30 seconds (Knight 1946), the recommended amount of time for gargling. The first significant results in RX 40 occurred after a five-minute application of the full dosage. In RX 41, the tests only on thymol, no results were measured until 30 minutes after application of thymol to the virus solution.

136. Respondent's exhibit 42 is a chart showing the titer of mycoplasma pneumoniae after exposure of five minutes and 30 minutes

to thymol in different concentrations and alcohol in different concentrations. Again, this is much longer than the 30 second gargle whereby Listerine is used. Further, Dr. Knight testified that Listerine would be an inappropriate treatment for mycoplasma pneumoniae in humans (Knight 2038).

137. Dr. Knight conceded that Listerine would not inhibit the growth of non-lipid enveloped viruses even *in vitro* (Knight 2006). This, according to Dr. Knight, would leave the rhinovirus, which causes 40 percent of adult colds and 10 percent of children's colds, and the adenovirus, which causes 15 percent to 20 percent of colds in children and 5 percent of adult colds, unaffected even in *in vitro* tests (Knight 1957, 2005-07, 2055).

138. Dr. Knight testified that the experiments reflected in RX 41 could not be extrapolated to the use of Listerine in human beings as a gargle, do not prove that Listerine would inhibit the lipid-enveloped viruses in human beings, and would not prove that fact even if the concentration of thymol was comparable to the dose in Listerine (Knight 2008-10).

139. Dr. Knight agreed that the results of his test tube experiments depended upon and varied with the concentrations used, but that he did not know in what concentrations the active ingredients of Listerine would reach the nasopharynx (Knight 2014-15). Dr. Knight's tests showed that thymol has the major antiviral activity of all of the constituents of Listerine and that methyl salicylate has a minimal effect (Knight 1953, 1955, 1957, 2003-04, 2021). As indicated above, most of his tests used thymol. Yet, Dr. Krantz, also one of respondent's expert witnesses, testified that thymol was the least volatile of the four active ingredients in Listerine and he would not expect very much thymol, if any, to reach the nasal area (Finding 132). This was confirmed by Dr. Rieger's test (RX 73; Tr. 2506, 2508; see Finding 205). Thus, Dr. Knight's *in vitro* tests which show the virucidal properties of the active ingredients of Listerine have even less probative value. Even if we were to assume that Listerine had virucidal properties, this would be of no significance for, over the past 10 to 15 years, experiments with various substances known to be capable of killing viruses in solution have been found ineffective for colds (Finding 66).

140. Respondent's exhibit 43A-W records the results of Dr. Knight's experiments with Listerine, thymol and other ingredients of Listerine, utilizing white mice. Of ten experiments only two (experiments 1 and 3) came out in favor of Listerine. In the other experiments, the results with Listerine were negative. There was an "excess of deaths" in mice inhaling 100 percent Listerine for 4 days, (Experiment 8, RX 43U; Knight 1979-80), a "moderate excess of deaths

in animals given 100% Listerine small particle aerosol for 2 days in comparison to untreated controls," (Experiment 9, RX 43V; Knight 1981), and "Lack of effect of 50% Listerine or a mixture of thymol, menthol, methyl salicyclate as in 50% Listerine in mice infected with influenza A Hong Kong 68." (Experiment 10, RX 43W; Knight 1982). Further, the experiments using thymol, which Dr. Knight testified was "conceivably the only substance for real significance" in Listerine (Knight 2004), indicated that, "thymol, through a wide range of concentration, was ineffective." (Knight 1978, 1979, 1982; RX 43Q, R, S).

141. In several of the experiments, the mice were treated with Listerine prior to being infected with influenza and some were treated after being infected. Yet, in none of them did Listerine prevent infection (Knight 2010-12). Dr. Knight's experiments measured the difference in mortality rates caused by pneumonia between mice treated with Listerine and those untreated. However, he doubted that Listerine would reduce the mortality rate in man as far as influenza is concerned (Knight 2012). The mice experiments "wouldn't prove anything about what might have happened in man," and Dr. Knight was unable to state that Listerine would prevent infection in man (Knight 2026). Dr. Knight also testified that none of his mice experiments would be publishable because "it's an incomplete investigation." (Knight 2033).

142. The mice were forced to inhale specific amounts of the test materials into the lungs by use of a machine called a nebulizer (Knight 1974). In contrast, when one gargles, the larynx is closed so the substance does not get into the lungs (Knight 2027-38). The only thing Dr. Knight's test purported to show was a difference in mortality caused by pneumonia in mice infected with influenza (Knight 2010-11). This is in no manner related to any issue in this case.

143. Dr. Knight did testify that Listerine could be beneficial for cold symptoms. This opinion was based on the results of his test tube studies, his mice tests and his reading of the results of the Reddish and St. Barnabas studies (Tr. 1991-94, 1999). When pressed, however, he conceded that his tests did not establish this; and that none of his tests were directed at the relief of symptoms. He did not know if merely being able to smell Listerine meant it was present in an effective dosage. He retreated to the position that there were threads of evidence upon which one could put together a theoretical basis for the efficacy of Listerine, but that there were also threads of evidence to the effect that Listerine was ineffective (Tr. 2045-48).

144. Dr. Knight's qualified opinion, based as it is upon his test tube and mice studies, which lack probative value, and the Reddish and St. Barnabas studies, which prove nothing favorable with respect to the use of Listerine, is clearly entitled to little or no weight.

145. *Dr. Noller* gave no opinion as to the efficacy of Listerine. His testimony (Tr. 2070-2101) related to tests he had conducted which purported to show the efficacy of menthol as a nasal decongestant. He applied menthol in a vaseline base either just below the nostril or inserted into the nostril. (His testimony was inconsistent as to just which he did—Tr. 2105, 2145-46, 2157-58). Dr. Noller also applied menthol by rubbing ointment on the chest of the patient and directing a stream of menthol to the nose by use of a vaporizer (Tr. 2113-14, 2118). These procedures, however, are of little or no weight in evaluating the value of gargling Listerine for use as a nasal decongestant. Further, Dr. Noller's inconsistencies in testifying as well as his vague and evasive responses to inquiries (see, *e.g.*, Tr. 2087-89, 2119) detract from his reliability as a witness.

146. *Dr. McNamara* is a microbiologist who was employed by respondent in its Department of Dental Science from 1962 to 1973 (Tr. 2212). Dr. McNamara did not qualify as a virologist (Tr. 2219-20). Relying upon various tests, studies and articles (RX 51-64), this witness expressed his opinion that Listerine, gargled as directed, would kill in humans any pathogen with which it might come in contact, that it has substantivity wherever it reaches and that the killing of pathogens other than viruses would prevent complications caused by secondary invaders (Tr. 2222-36).

147. Dr. McNamara's opinion that Listerine would kill all pathogens is, of course, disproved by Dr. Knight's tests that Listerine would not kill or inhibit the growth of non-lipid enveloped viruses. Further, the ability to kill pathogens in the mouth has already been found to be irrelevant to the prevention or treatment of colds. Cold complications have been found to be caused by secondary invaders inaccessible to the ingredients of Listerine. And, notwithstanding any virucidal claim for Listerine, experiments over the past 10 to 15 years have shown the application of known virucidal agents to be ineffective.

148. To a large extent, Dr. McNamara's testimony and the tests and articles he relied upon were limited to showing what Dr. McNamara relied upon as a responsible official of respondent for purposes of considering the scope of an order to cease and desist should one be issued. The following exhibits fall in that category: RX 51, 52, 54, 55, 58, 59 (Tr. 2230-31, 2236, 2249-50, 2257, 2280, 2287-88). And RX 62, upon which Dr. McNamara also relied, was rejected as an exhibit (Tr. 2296).

149. RX 53 is an *in vitro* study conducted by Dr. McNamara which purports to show that Listerine killed certain bacteria in a test tube. Again, as discussed with regard to Dr. Knight's testimony, this does not show what would happen in the human mouth, and the ability to kill bacteria is irrelevant when considering possible effects on the common

cold. Dr. McNamara conceded on cross-examination that bacteria do not cause the common cold or affect cold symptoms such as runny nose (Tr. 2345).

150. A portion of RX 55 was subsequently admitted following the testimony of the doctor who performed the test. It is entitled to little weight because of admitted unresolved statistical errors. The other portion of the test report was rejected, in part, because the doctor in charge of the test concluded that "The significance of findings using this method is therefore questionable" (RX 55C, P; Tr. 2252, 2255, 2257; Frances 3362, 3371-72, 3375).

151. RX 56 is a test introduced to show that Listerine is retained in the mouth after gargling (substantivity). It was conducted on hamsters' cheeks, not on humans (Tr. 2263). Also, the test was not of Listerine, but of thymol and eucalyptol (McNamara 2320). Dr. Krantz rated thymol as the least likely of any ingredient in Listerine to get into the nasal area. This was confirmed by Dr. Rieger's test (RX 73; Tr. 2506, 2508; Findings 132, 205). Further, the test did not quantify the amount of the ingredients actually retained (McNamara 3226).

152. RX 57 is a report of a test conducted for the Federal Trade Commission by the Food and Drug Administration. Six volunteers swished and gargled 25 ml. of Listerine for ten seconds, then expectorated. They then immediately rinsed the mouth twice with 25 ml. of 25 percent strength alcohol in exactly the same manner. Measurements were made of the expectorations after both alcohol garglings to determine the amount of the active ingredients of Listerine collected in the two alcohol garglings. Two to three percent of the original concentrations were collected. Respondent (RPF 74(b)) contends that, as reported by the Food and Drug Administration official in charge of the test, the substantially lower percentage recovered after the second alcohol gargle indicates there was a binding of the ingredients to the cheek membranes which the alcohol could not recover. To the contrary, the test results equally, and indeed more probably, indicate that after fully expectorating the Listerine in the mouth, the first alcohol gargle got most of what remained so that the second gargle gathered a much smaller residual amount. Indeed, Dr. McNamara's interpretation of the test was that the two to three percent that the alcohol obtained was what had been absorbed in the tissue when gargling with Listerine (Tr. 2329, 2331).[13] And, of course, the residual amounts would wear off even more quickly than usual if the subject were to eat or drink (McNamara 2331-33). The witness did modify his position by stating that additional rinses might have gathered more of the ingredients (Tr. 2330).

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[13] No witness was presented who was involved in the test.

153. RX 60 is a test conducted by Dr. McNamara to see whether a group of microorganisms would develop resistance to Listerine. This adds nothing of probative value. RX 61 is a journal article which does not relate to the common cold and similarly lacks probative value. RX 63 and 64 are *in vitro* antibacterial studies and afford little basis for Dr. McNamara's opinion for the reasons previously stated with regard to *in vitro* studies.

154. Dr. McNamara conceded that there are sites in the oral cavity which contain large quantities of bacteria, including pathogenic bacteria, where Listerine cannot reach (McNamara 2339-42, 2349-50); and that bacteria killed by Listerine would rebound to the point that, for periods of up to an hour, more bacteria can be present than there were originally (McNamara 2345-46).

Dr. McNamara's testimony, therefore, contributes little in support of respondent's position.

155. *Dr. Ritchie* is a physician who had been employed by the Health Department in Scotland and later in England (Ritchie 2361-64). It was his opinion that, while most colds are caused by viruses, virus-caused symptoms usually last two days, rarely as long as three days. This he called the promodal stage. The remaining term of a cold, according to Dr. Ritchie, is caused by the patient's own nasopharyngeal bacteria. He called this phase of the cold the sequela (RX 65, 66, 67; Ritchie 2376, 2387, 2410-11, 2413-14, 2416-17, 2426). Based on tests which he conducted, Dr. Ritchie was of the opinion that antibiotics could prevent or lessen the severity of the sequela portion of a cold. From this he reasoned that the use of disinfectants such as Listerine would have the same effect (Tr. 2412, 2427-31). In addition to viruses, Dr. Ritchie was of the opinion that such things as wet feet, cold clothing, general chill and dust lowered the body's resistance to its own normal bacteria so that a cold would ensue (Tr. 2411-12).

156. Dr. Ritchie's opinion of the role bacteria play in the etiology of the common cold is completely contrary to findings already made based upon the testimony of both complaint counsel's and respondent's witnesses (Findings 51, 58). His theory that wet feet, cold clothing, general chill and dust trigger bacteria-caused colds is directly contrary to the otherwise unanimous view that colds are caused by viruses (Finding 48).

157. Further, if one were to accept Dr. Ritchie's testimony and experiments at face value, it would appear that, despite the inability of the medical profession to do so, he found the cure for the common cold in the 1930's. For it was then, according to Dr. Ritchie, that by a weekly injection of a vaccine made from each subject's own sputum, he prevented practically all colds for his clerk, several others and then

members of the Birkenhead, England, departmental staff and the police department (Ritchie 2371-72).

158. Inexplicably, when Dr. Ritchie repeated the tests in 1948, his reports (RX 65, 66) no longer reflected any prevention of colds. Rather, all subjects caught colds, but the colds lasted only two days (Ritchie 2373-76). After a time, instead of using the subject's sputum as the vaccine, Dr. Ritchie used antibiotics chosen specially for each subject's types of bacteria (Ritchie 2378-79).

159. Dr. Ritchie's test results are inconsistent in that first he purportedly found an absolute prevention and then went on to find merely a means of curing colds after two days. Not only are Dr. Ritchie's theories as to the role of bacteria in colds contrary to sound and uniformly accepted medical opinion, but studies conducted through the years by competent and eminent authorities have shown that antibodies such as those used by Dr. Ritchie are useless in the prevention or treatment of a cold in any respect. Further, the indiscriminate use of such antibodies should be avoided because of the resultant harm and immunities that may be caused (Findings 67 and 68).

160. Dr. Ritchie's belief that reactions to dust and other non-viral elements cause colds leads to the probability that conditions that were not colds were included in his studies. He also included chronic cold sufferers, which he defined as "people who took colds for a long time" (Ritchie 2372). Common colds, however, do not last for more than ten days (Finding 123).

161. In addition to his own studies (RX 65 and 66), Dr. Ritchie relied upon a similar study conducted by a Dr. McKerrow (RX 68). However, in a 1973 article written by a Dr. Banks and Dr. Ritchie, it is conceded that the "evidence submitted * * * [by Dr. Banks', Dr. Ritchie's and Dr. McKerrow's studies] does not reach statistical significance" (RX 67G), meaning that the results could be due to chance alone.

162. Dr. Ritchie's tests involved administering an autogenous vaccine made from the subject's sputum subcutaneously and later having the subject suck such antibiotics as penicillin, various forms of tetracycline including terramycin, aureomycin and chloramphemicol (Ritchie 2371-73, 2379-81, 2397, 2418). There is simply no basis for carrying over the results obtained from such methods of application of such products to the gargling of Listerine.

163. In view of all of the foregoing, neither Dr. Ritchie's testimony nor the tests upon which he relied have any probative value in this case. Respondent has admitted that Listerine will not prevent all colds and is not a cure for the common cold. Therefore, to the extent respondent

attempts to rely upon and apply Dr. Ritchie's tests to the use of Listerine, it is being inconsistent with its own admissions.

164. *Dr. Shirkey* has been a paid consultant for respondent for the past nine years (Tr. 2592-93). Dr. Shirkey had no opinion on whether the use of gargling Listerine would prevent colds. In his opinion, it would not cure colds, but it would provide relief for some cold symptoms (Tr. 2607, 2616, 2628, 2667-69, 2674). It is clear, however, that Dr. Shirkey relied, in large part, upon the reported results of the St. Barnabas study in reaching the opinion that Listerine would provide such symptomatic relief (Shirkey 2605-07, 2615-16, 2645, 2659, 2660-61, 2662, 2673-76).[14] He testified that if it were demonstrated to him that the St. Barnabas studies were unreliable, he would change his testimony (Tr. 2662). As has been found, the St. Barnabas studies are unreliable upon which to base an opinion that Listerine is efficacious for the treatment of colds.

165. Dr. Shirkey stressed the safety of Listerine and at the same time recognized the value of the placebo effect of over-the-counter preparations such as Listerine for colds, a self-limiting ailment (Tr. 2619, 2627, 2633, 2635-37, 2643, 2674). Dr. Shirkey summarized his position as follows:

> *We have got some studies which show that it has some value which I hope would be expanded to show more value or show that it doesn't do anything, one or the other,* but at this point in time as a Pediatrician and with this kind of background interested in kids, I think the preparation Listerine, what it claims for treating the symptoms of the common cold, I hope they are not wiped out because I would hate to see the results when something else fills its place which is less safe and I don't know anything that is as safe as this.
>
> That is my whole reason for coming here. (Tr. 2675; emphasis added)

166. Thus, Dr. Shirkey himself has expressed dissatisfaction with the tests to the point that he would want further tests to show Listerine has more value or that it has none. His support of cold claims for Listerine because of its relative safety and placebo effect is of no probative value in resolving whether respondent's representations are false and deceptive.

167. *Dr. Carson* is a pharmacologist who is affiliated with an independent research company (Tr. 3012-13). He has served as a consultant to respondent for the past eight to ten years (Tr. 3026). Dr. Carson described the pharmacological properties of the active ingredients of Listerine (Tr. 3028-29). Based upon studies that he had

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[14] Having stated, "We do the best we can with what we have got and right now, we are in a pretty sad situation and we have got something that is safe and has some efficacy," Dr. Shirkey was asked, "We have had it all these years. How come we haven't found out about it?" Dr. Shirkey answered, "Because the studies have only been done; * * *" (Tr. 2676).

conducted, he gave his opinion that Listerine's active ingredients were pharmacologically and therapeutically effective dosages to provide relief for cough and nasal congestion (Tr. 3032-34).

168. To support his opinions with respect to the efficacy of Listerine for the relief of coughs, Dr. Carson relied, in large part, on RX 97. This was an experiment he performed for respondent in 1965, using only nine subjects (RX 97E), the purpose of which was "to determine the effectiveness of the aerosol room vaporizer when tested by a modification of the directions on the printed label of the product." (RX 97C). In addition to menthol, thymol and eucalyptol (ingredients contained in Listerine), the aerosol room vaporizer then tested also contained camphor and dipropylene glycol (RX 97A; Carson 3568, 3597). There was no way of determining what part of the results of RX 97 were attributable to camphor and there was no way of separating the results (Carson 3568; Shellenberger 2201-03). Dr. Carson testified that he thought camphor "played a role" in the results (Tr. 3597). Listerine contains no camphor (CX 48, *in camera*).

169. The tests reported by RX 97 were performed in the following manner:

> * * * Tests were carried out in a room which was completely sealed from outside air currents. The subjects were exposed in this room following aerosolization of the test formulation into the atmosphere and subsequent inhalation through a handkerchief treated with the aerosol. The subjects were challenged by a citric acid aerosol approximately two hours before the test for control purposes, and at seven intervals through the next two hours in order to evaluate the effectiveness of the antitussive agent * * *.
>
> * * * * * * *
>
> The subjects were exposed for 3 minutes in a closed room 8' x 10' and approximately 8' high in which the contents of a can had been expressed for 10 seconds. At the end of the 3-minute period each subject was given a large-sized folded handkerchief into which the aerosol was expressed for a 10-second period at a distance of 12". The subjects were then instructed to hold the impregnated handkerchiefs against their nostrils for 30 seconds. (RX 97C-D)

The procedures utilized in this experiment differed from those normally employed in this kind of test:

> It will be noted that *in contradistinction to the procedure described in the appendix, it was necessary to challenge the subjects at shorter intervals than are ordinarily employed.* It was realized that the shorter than usual intervals between the citric acid challenges *might have an undesired effect on the responses* but they were unavoidable since the object of this study was to evaluate the early responses. (RX 97D; emphasis added)

170. On direct examination, Dr. Carson testified that the dosages of

the ingredients inhaled in RX 97 would be lower than those gargled with Listerine; and that his calculations were based on the amount of aerosol sprayed into the closed room and the inspiration rates of the subjects (Tr. 3036-38). On cross examination, Dr. Carson admitted he had forgotten a very important element in his calculations—the additional amount of aerosol inhaled by applying the impregnated handkerchief directly to the nostrils, a factor which Dr. Carson agreed should have been taken into consideration (Tr. 3554-55). The test report itself clearly revealed that the "effectiveness [of the material tested] was reinforced by inhalation of additional aerosol sprayed into a handkerchief." (RX 97E).

171. Dr. Carson agreed that his RX 97 study, which tested the results of a product upon coughs artificially induced in healthy people, was preliminary and exploratory; that "[i]f you wanted to evaluate the antitussive claim, one would go to a clinically ill group." (Tr. 3568-69).

172. RX 97, therefore, provides no reasonable basis for Dr. Carson's testimony as to the efficacy of Listerine. The number of subjects was limited; the active ingredients differed from those in Listerine; the method of application differed from that of Listerine; the test procedure itself differed from that normally utilized with recognized possible undesired results; the strength of ingredients which reached the critical portions of the respiratory tract was not reliably compared with that portion of Listerine's active ingredients which reaches the critical areas; and the test itself was admittedly preliminary and exploratory in that it purported to test the effect of a product upon coughs artificially induced in healthy people.

173. Dr. Carson also relied on a clinical report entitled, "Antitussive Effect of Aerosolized Medication on Experimentally Induced Cough in Man" (RX 50). The purpose of RX 50 was "to determine the effectiveness of an aerosolized preparation containing *camphor*, eucalyptol, thymol, menthol, *triethylene glycol*, *dipropylene glycol* and alcohol as an antitussive agent under experimental conditions" (RX 50A; emphasis added). Both Dr. Carson and Dr. Shellenberger, through whom the article was introduced, agreed that there was no way of telling what part of the results were attributable to camphor and that the results could only be attributed to the product as a whole (Shellenberger 2201-02; Carson 3568). Listerine does not contain camphor, triethylene glycol or dipropylene glycol (CX 48, *in camera*). RX 50 was conducted in a manner similar to RX 97, except that a handkerchief impregnated with the medication was not used (RX 50C). The amount of the test material that would be inspired by the subject was not calculated (CX 50; Carson 3567-68). This exhibit, therefore,

provides no more reasonable basis for Dr. Carson's opinion testimony as to the efficacy of Listerine than does RX 97.

174. Dr. Carson also relied on RX 47, an article entitled, "A Bronchomucotropic Action in Rabbits From Inhaled Menthol and Thymol," by E. M. Boyd and E. P. Sheppard. The study reported in RX 47 was performed on healthy rabbits who inhaled the test material "through a T-cannula ligated into the trachea" (RX 47B-C). The animals inhaled the test material for four to six hours during which time the respiratory tract fluid upon which the results were based was collected (RX 47C). RX 47 indicates that eucalyptus oil, which Dr. Carson testified would have a similar effect to that of eucalyptol (Tr. 3575), had no effect at doses recommended for use in man (RX 47B). Dr. Carson agreed with this conclusion, "Yes, remembering the conditions of this test which is steam inhalation" (Carson 3575). This comment implies that the result with respect to menthol and thymol in RX 47 are also dependent on "conditions of this test" which involved steam inhalation, *not* gargling.

175. Thymol produced no significant changes in volume output of respiratory fluid at any dose studied. Menthol had no effect in doses up to and including 27 mg/kg (RX 47C-D). Even under Dr. Carson's calculations, only 4.4 ml. of menthol would be available after gargling Listerine for 30 seconds (Carson 3557-58). In RX 47, the inhalation was from four to six hours.

176. Thymol produced significant changes in the specific gravity of respiratory tract fluid at doses of 81 and 243 mg/kg (RX 47D). These doses far exceed the amount of thymol available in gargling one ounce of Listerine for 30 seconds (CX 48, *in camera;* Carson 3038-39). The authors of RX 47 concluded that the therapeutic significance of the inhibition of respiratory tract fluid, if any, remains obscure (RX 47G-H). Again, as he did with regard to RX 97, Dr. Carson admitted that the test reported in RX 47 was preliminary and in order to draw conclusions for the effect of a drug in man, clinical tests in man are required (Tr. 3575-76).

177. RX 47, therefore, provides no more reasonable basis for Dr. Carson's opinion testimony as to the efficacy of Listerine than do RX 97 and RX 50.

178. Dr. Carson relied to some extent (Tr. 2188-89) on RX 48, an article entitled "On the Expectorant Action of Volatile Oils" by E. Boyd and G. Pearson, published in 1946. RX 48 reports the results of the expectorant action of various ingredients, only one of which (eucalyptol) is found in Listerine. The drug was administered by stomach tubes to guinea pigs (RX 48B). This procedure, of course, is entirely different than gargling. Although the results of the 1946

experiment showed some expectorant action of eucalyptol, these results were completely contradicted by Dr. Boyd's more recent article, RX 47B-H, which was written in 1969, and upon which respondent and Dr. Carson also rely. RX 48, therefore, provides no reasonable basis for Dr. Carson's opinion testimony as to the efficacy of Listerine.

179. Dr. Carson also relied on decongestant studies he had done on Pertussin. The ingredients of Pertussin are similar to those of the products tested in RX 97 and RX 50. Pertussin contains camphor. The studies on Pertussin involved room dispersion and a hankerchief method of administration of the test material (Carson 3576-77). It is clear, therefore, that the Pertussin studies are irrelevant to this case and provide no sound basis for Dr. Carson's opinions concerning the efficacy of Listerine.

180. While Dr. Carson testified at length concerning, and relied upon, the ingestion of medicinal properties into the stomachs and lungs of animal subjects, he limited his opinion on the efficacy of Listerine for coughs to irritant induced coughs (Carson 3601).

181. Dr. Carson relied upon the volatile nature of the active ingredients of Listerine (Tr. 3592-93). However, he conceded that there was a fall-off for every volatile product and that he did not know the fall-off point for the ingredients of Listerine (Tr. 3603). The witness was unable to quantify the amount of Listerine's ingredients he asserted would reach the sites of cold infection (Tr. 3572-73). His testimony in no way weakens that of the experts who testified that, apart from the ineffectiveness of Listerine's ingredients, they would not reach the critical areas in therapeutic concentration.

182. Dr. Carson relied, in large part, upon the results of the St. Barnabas test (Tr. 3047-48, 3051-52, 3057). As previously found, this test affords no basis for an opinion that gargling with Listerine is efficacious for colds. Further, Dr. Carson would equate statistical significance with clinical significance (Tr. 3605). See Finding 105 to the contrary. Even Dr. Carson evaluated the St. Barnabas test as establishing that the use of Listerine will not result in fewer colds (Tr. 3057-58).

183. *Dr. Sadusk,* from mid-1967 until November 1971, was vice president of Parke, Davis & Company and later its group vice president for Medical and Scientific Affairs. Parke, Davis was acquired by respondent in 1970 (Sadusk 3172-73, 3178-79, 3180). After the merger, he became senior vice president of Warner-Lambert and its director of Medical and Scientific Affairs until February 1974, at which time he became an employee-consultant to the company (Sadusk 3180-81).

184. Dr. Sadusk testified that he would recommend Listerine for the relief of cold symptoms. This opinion was based upon the safety of

the product and the results of the St. Barnabas study (Sadusk 3211, 3268). As former Medical Director of the Food and Drug Administration, he would have approved a label claiming relief of overall severity of colds, nasal discharge, nasal congestion, post-nasal drip, sneezing and sore throat—the elements for which the four-year St. Barnabas study showed statistical significance in favor of Listerine. He would not have approved a label that said "for the relief of cold symptoms" since that would indicate all symptoms, nor would he have approved a label which read "for colds." All of this testimony was based on the results of the St. Barnabas study (Sadusk 3268-72). Inasmuch as the St. Barnabas study does not demonstrate that Listerine is efficacious for colds in any respect, Dr. Sadusk's testimony that Listerine is efficacious in certain respects is entitled to no weight.

185. Further, it is clear that Dr. Sadusk, who testified that he was familiar with the St. Barnabas test and had carefully studied its results and the manner in which it was conducted (Tr. 3204, 3210-11), had, at the very least, overstated his familiarity with the tests. For example, he thought the children determined the overall severity of their own colds and that they gargled at home before going to school. He was also vague and uninformed in other respects, including the fact that Dr. Nitzberg examined the children while the odor of Listerine was still on their breaths (Sadusk 3215, 3225, 3229-33). Dr. Sadusk simply assumed that the timing was set up properly so the examining doctor could not smell the breaths of the subjects (Sadusk 3230-31). The record, however, establishes the contrary (Finding 99).

186. Dr. Sadusk conceded that, if by smelling the breath of the children, the investigating doctor could tell which group they were in, "the theoretical objection might be rendered that he might be biased" (Tr. 3230); that, "[i]f the doctor knew—and this would indicate that the doctor was dishonest because he would actually ask each person—the experiment, of course, would not be valid" (Tr. 3228).

187. Dr. Sadusk testified on direct examination that the fact a placebo was not used in the St. Barnabas test would make no essential difference because (1) there was a control group and (2) "many of the symptoms of the common cold are obviously objective in nature and not just subjective" (Tr. 3205). However, on cross examination, Dr. Sadusk testified that every symptom examined in the St. Barnabas test was either completely subjective in nature or a combination of subjective and objective elements (Tr. 3217-25). This was also the evaluation of the examining doctor (Nitzberg 2816-18). Under Dr. Sadusk's own testimony, it is clear that a placebo was necessary in the St. Barnabas test, but that there was none.

188. Dr. Sadusk appears to have equated statistical significance

with clinical significance (Sadusk 3211, 3268-69). To the contrary, statistical and medical significance are different matters (Finding 106). Bearing on this very point, Dr. Sadusk testified that a doctor could not tell the difference between a student with a 2.5 severity cold and one with a 2.6 severity cold, although the differences were statistically significant (Tr. 3259).[15] Dr. Sadusk also testified that the statistics show that only three to five people out of 100 would be benefited by using Listerine, but he could not testify how much less severe their colds would be from the data (Tr. 3260, 3264).

189. Dr. Sadusk would not recommend Listerine for the prevention of colds or for fewer colds. On the basis of the St. Barnabas test results, he would have to state that Listerine does not prevent colds; that the test disproves any theory upon which it could be reasoned that Listerine would prevent colds (Tr. 3211-12, 3265-66).

190. *Dr. Lasagna's* opinion as to the efficacy of Listerine for colds was based upon the results of the St. Barnabas test. His opinion, however, was quite guarded and his brief for the benefits of Listerine was rather weak:

> My interpretation is if someone asked what would happen if I gargled with Listerine with a cold, I would say you have some chance of feeling better, a little better, you might not feel better at all.* * *
>
> * * * * * * *
>
> No, I don't know how anyone could promise them relief. You could say it looks as though you have a chance to feel better, you might feel better if you use this. (Tr. 4150-51)
>
> I think they [the consuming public] cannot expect a guarantee of improvement. I would like to see the advertising phrased in such a way that they get the same impression I have from the study which is if you gargle with Listerine regularly there is a chance that you will feel somewhat better when you have a cold. (Tr. 4154)

He agreed that, on the basis of the St. Barnabas test, "all we can say is Listerine might help some elementary school children sometimes." (Tr. 4164).

191. This is a far cry from the significant relief from symptoms that respondent promises. However, as we have seen, the St. Barnabas test affords no basis for concluding that Listerine affords any relief from colds, so that there is no foundation even for Dr. Lasagna's guarded opinion.

192. Dr. Lasagna was critical of the first two years of the St. Barnabas test because no control substance was used. He conceded that this was a potential for bias that would distort the results of the test in

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[15] Neither could a doctor tell the difference between two subjects, one with a 2.170 severity cold and one with a 2.262 severity. These figures represent the results of the four years of the St. Barnabas study and the differences are statistically significant (Sadusk 3262-63; RX 85D).

favor of the group taking Listerine (Tr. 4108, 4130-31, 4160, 4162). He was very much concerned, therefore, with the reliability of any of the test results which pooled data relating to the first two years with those of the second two years (Lasagna 4109). However, the control substance used in the third and fourth years was not an acceptable placebo and the subjects knew, in those years, who were using the test material (Findings 87, 88, 89 and 90), so that bias in favor of Listerine was present in the third and fourth years as well as in the first two years. RX 114, a tabulation for the last two years upon which Dr. Lasagna relied for his opinion, therefore, is no more reliable than the test results which include the first two years and to which Dr. Lasagna objected. Indeed, Dr. Lasagna agreed that the control substance used in the last two years may have been inadequate as a placebo (Lasagna 4132-33). And, of course, the bias of the investigating doctor was present all four years, since he knew who was using Listerine (Findings 99 and 100).

193. As already found (Findings 105, 106), instances of statistical significance do not necessarily indicate medical significance. Dr. Lasagna agreed with this distinction (Tr. 4095, 4127, 4151). Dr. Lasagna also testified that he could not examine a table of mean severity scores for Listerine and the control group and tell whether the Listerine users would feel discernibly better; that one could not tell what such mean figures represent (Tr. 4116-17, 4139, 4148, 4149). RX 114, which showed results for only years three and four, was prepared at Dr. Lasagna's request (Tr. 4119) in order to avoid his criticism of including data for the first two years. This exhibit, however, compares mean severity scores for the Listerine and control groups and is meaningless under Dr. Lasagna's own evaluation of such comparisons.

194. The only document relating to the St. Barnabas study, other than RX 114, for which Dr. Lasagna could have any feeling, was RX 86, which reported the number of days the participants in the test had various degrees of severity of symptoms and of the cold overall (Lasagna 4149). This exhibit, however, incorporated information covering the first two years of the study, which Dr. Lasagna felt should not be used (See Finding 192). There is, therefore, no basis for Dr. Lasagna to have expressed an opinion as to the efficacy of Listerine, since neither RX 86 nor RX 114 meet Dr. Lasagna's own stated requirements.

195. From the foregoing, it is clear that, to the extent the opinion testimony of experts called by respondent controverts the opinions of experts called by complaint counsel, there is no reasonable basis for such opinions; and that the opinions of experts called by complaint

counsel are, to a large extent, supported by the testimony of experts called by respondent.

Additional Tests Relied upon by Respondent

In addition to the testimony of its expert witnesses and the St. Barnabas and Reddish studies, respondent has introduced, and relies upon, a number of other studies and writings which, it asserts, support its position. Many of these studies and reports have already been discussed and discounted in the course of discussing and evaluating the testimony of experts called by respondent. There is no need to restate the findings already made with respect to such exhibits. The additional exhibits, therefore, will be discussed to the extent deemed pertinent and not already covered above.

196. A number of the studies relate to the alleged antibacterial properties of Listerine. Since a cold is an infection caused by virus particles inhaled into the nose which enter into and damage the cells there, the antibacterial properties of Listerine are, for all practical purposes, irrelevant. Bacteria play no part in the common cold, and the ability of Listerine to kill millions of bacteria in the oral cavity is of no medical significance in the prevention, cure or treatment of colds or sore throats. Listerine does not reach the site of infection or manifestation of symptoms in medically significant concentration and the tests and writings relied upon by respondent do not tend to show otherwise. Listerine will not reach the sites of secondary offending bacteria and will not attack bacteria in deep-seated tissue folds and crypts. There are many other areas in the oral cavity which Listerine will not affect. Numerous tests conducted in the ongoing research on the common cold have demonstrated the lack of efficacy of using virucidal and antibiotic agents in the prevention or treatment of colds.

197. Apart from the irrelevance of Listerine's antibacterial effect, the tests relied upon by respondent provide no evidence as to the concentration of Listerine's ingredients that reach the critical sites nor the period of time they remain in particular concentrations. Respondent's tests fail to contribute any information tending to show that the ingredients of Listerine reach the critical sites in sufficient concentrations to kill such viruses as may be exposed or to perform the other therapeutic accomplishments claimed for them by respondent.

198. Respondent (RPF 74D) relies upon a test (RX 44) done under the supervision of Dr. Knight for the proposition that when thymol contacts a cell of the upper respiratory tract, it will attach to and penetrate that cell and that the concentration in the cell of thymol would be much greater than in the surrounding medium. The red blood cells in the test, however, were suspended in a buffered liquid solution

(Knight 1988). The test, therefore, provides no evidence as to thymol's effect on cells surrounded by the normal constituents of the upper respiratory tract. As Dr. Knight conceded, "The concentration, with gargling, may have very little relationship to the concentration that would be present in—within the cells that we're supposed to examine" (Tr. 2016). The direct application of thymol by suspending the cells in a liquid solution, therefore, has no bearing upon what happens to the thymol in Listerine when it is gargled. Listerine does not reach the nasal pharynx in liquid form (McNamara 2343-44). And thymol is the least volatile of all of the active ingredients in Listerine and very little, if any, reaches the nasal pharynx (Findings 132, 205).

199. Respondent (RPF 74A) relies on a test (RX 69, 70, 71) conducted by one Norman Oksman, a Warner-Lambert employee, to establish that, after gargling with Listerine, the product's ingredients are retained in the subject at the following percentages of the quantities gargled:

Eucalyptol	36%
Menthol	33%
Methyl Salicylate	27.5%
Thymol	23.4%

In this test, ten subjects rinsed and gargled with 15 ml. of Listerine, which is one-half the ordinary dose. They immediately expectorated into a beaker, including two extra spits. The amounts of the active ingredients were quantified and compared with the amounts in a 15 ml. quantity of Listerine. The average differences between what is contained in a 15 ml. amount of Listerine and what was found in the beaker provides the percentage figures reproduced above.

200. At the very outset, the following question occurs. Why, if respondent wanted to ascertain the percentages of Listerine ingredients retained by users, did it have the test subjects gargle with only one-half of the ordinary dose? One answer that immediately suggests itself is the possibility that the larger the quantity gargled, the larger the percentage of that quantity that can be readily expectorated. The fact that the test was conducted with only one-half of the normal quantity does not indicate what percentage would have been retained under usual gargling conditions.

201. The data does not establish what was retained in the mouth after gargling. Some could have escaped through the mouth while gargling and some could have been swallowed (Oksman 2461-63). Further, the test was conducted immediately after gargling and expectorating three times in rapid succession. There is no evidence, therefore, as to the length of retention and how quickly whatever was

retained after that short period of time was expelled in the course of eating, drinking, talking or otherwise (Oksman 2463-64). This does not purport to be a substantivity test (Oksman 2464). It neither establishes that the amounts retained are in therapeutic quantities nor that they reach critical sites. To the contrary, the active ingredients in Listerine are in insufficient concentration to be of therapeutic value even if they were applied directly to the critical areas (Findings 74-80). Respondent's exhibits 69, 70 and 71 show that at least 64 percent to 76 percent of those already insufficient quantities are disposed of immediately after gargling.

202. In the test reported by RX 73, ten subjects gargled with 20 ml. of Listerine. Immediately after gargling, one nostril was plugged and a tube connected with a device known as a gas chromatograph was inserted into the other nostril. This device drew air from the nostril by use of a suction pump and recorded peaks of when various elements were detected. The results were: ethanol—.8 minutes; eucalyptol—3.2 minutes; menthol—7.1 minutes; methyl salicylate—9 minutes; and thymol—13.8 minutes. The conclusion in the test report was that "alcohol, eucalyptol, menthol, methyl salicylate and thymol were detected in the nasal passage during a 0-10 minute interval after gargling with Listerine Antiseptic" (RX 73; Rieger 2475-79).[16]

203. An immediately noted inconsistency is that the test report states that "sampling of the nasal passage was continued for 10 minutes" (RX 73B), whereas the very same test report recites that the thymol peak was at 13.8 minutes (RX 73A). The results are not totally objectively obtained by machine. In order to ascertain what ingredients were registering, it was necessary for respondent's employees to smell the vapors in the machine and make subjective determinations. These determinations were often based upon what was expected (Rieger 2482, 2500-04). Thus, we have employees of respondent in a position to make subjective judgments in line with what respondent would like to develop. The machine itself was created for a different purpose and was adapted by respondent's employee, Mr. Rieger, for the tests he conducted. He had no previous experience in conducting this type of test (Rieger 2489-90).

204. The vapors were drawn from the subjects by a vacuum pump, with vacuum pressure level set at 300 mls. per minute. It could have been set at 30 utilizing a longer period of time. Thus, the vapors could have been pulled from the oral cavity through the nasal cavity into the machine. It cannot be concluded that the vapors were in the nasal

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[16] Mr. Rieger testified that he had also performed tests on a small number of subjects where air was collected between 10 and 20 minutes after gargling. He stated that the ingredients were noted and that after 20 minutes, the method failed (Tr. 2485-86, 2505-06). No such tests were offered into evidence.

cavity. The machine collects only air. It provides no information as to the materials in the mucous membrane of the nose (Rieger 2484, 2494, 2500).

205. The machine was very sensitive and reacted to small quantities in terms of parts per million. A very small amount of an ingredient would register on the machine. The test did not measure the quantities of any ingredient (Rieger 2478-79, 2494-97, 2505). According to Mr. Rieger, the test showed that thymol was the least volatile of any of the active ingredients of Listerine (Tr. 2509).

206. RX 73, therefore, both because of the matters noted with respect to the manner of conducting the test and because it supplies no information as to the quantities of any ingredients that are alleged by respondent to reach the nasopharynx, provides nothing material to the issue of this case.

207. RX 75 is the report of a test conducted by Mr. Konigsbacher, vice president of a company that has run various tests for Warner-Lambert (Konigsbacher 2514, 2520). In the test in question, six employees of the testing company were trained to smell thymol, eucalyptol, menthol and methyl salicylate. They gargled with Listerine and also with a control. While gargling with Listerine, they were able to detect the odors of its four active ingredients (RX 75; Konigsbacher 2540).

208. The panelists were also trained to recognize the odor of Listerine as a whole (RX 75E; Konigsbacher 2537), and some of them may have known that Listerine was being tested because of its characteristic odor (Konigsbacher 2538-39). The general level of test competence and performance is discussed with each panel member when he is not doing well. They are quite competitive in their ability to do well (Konigsbacher 2541). The test report is dated September 19, 1973, well after the present litigation commenced, so that it is probable that the panelists were aware of the litigation and the issues involved. As employees of a company engaged by respondent, they may well have exercised bias in favor of Listerine, particularly since they are trying to do "well."

209. The currently accepted theory is that all odor receptors are in the nose. There are only four taste senses—salt, sour, bitter and sweet (Konigsbacher 2530, 2536, 2544, 2547, 2565). It is apparent, therefore, that for the body to experience all of the other sensory perceptions from what is eaten or imbibed, the odor receptors in the nose must be extremely sensitive to the slightest stimulus. Therefore, the ability to

smell thymol, eucalyptol, menthol and methyl salicylate while gargling Listerine is no indication that the ingredients move into the nose[17] or that they are there in therapeutic quantity. The test reveals nothing as to how long the odor endures or in what strength it is present (Konigsbacher 2547-48, 2556). The test, therefore, lacks probative value.

210(a). Respondent (RPF 74G) relies upon the results of tests performed by Dr. Hunter (RX 108P-R, Z-26) for the proposition that Listerine penetrates into crypts, folds and crevices of the oral membranes and into the upper layers of the epithelial tissues; that it reaches the tonsils and tonsillar crypts, the hypopharynx, the oropharynx, and a portion of the nasopharynx in liquid form. These results, which were introduced during the trial involving Listerine thirty years ago, are totally and conclusively contravened by the testimony of today's experts, including that of respondent's own expert microbiologist, Dr. McNamara (Findings 57, 69, 71, 72, 154).

210(b). Dr. McNamara testified that there are several sites in the oral cavity where large amounts of bacteria reside, but where Listerine cannot penetrate to make contact; that Listerine cannot penetrate to the full depth of dental plaque, which he described as "the organic film that covers the teeth, and all the soft tissues in the mouth;" that there are tremendous amounts of bacteria in this dental plaque, and that Listerine certainly does not reach all of them; that there are millions of bacteria per gram in the crypts of the tongue that Listerine could not penetrate to contact; that Listerine cannot penetrate deeply into the crypts of the tonsils to contact the bacteria that reside there; that Listerine would not reach the nasal pharynx in liquid form; and that Listerine does not penetrate into tissue cells (McNamara 2339-44).

211. It is, therefore, found that the use of Listerine will not prevent or result in fewer colds or sore throats, will not cure colds or sore throats, and will not cause colds or their symptoms, including sore throats, to be less severe than they otherwise would be; and that the ability of Listerine to kill germs is of no medical significance in the prevention, cure or treatment of colds and sore throats. These findings are based upon consideration of the entire record. Upon such consideration, it is clear that the overwhelming weight of probative evidence compels such findings.

Discussion of Other Contentions of Respondent Bearing upon Finding 211

Respondent (RPF 222, 223) appears to challenge the probative value and substantiality as evidence of the opinions of medical experts called by complaint counsel because they had not conducted actual tests on Listerine or had no personal experience with it. This challenge of the opinions of experts in the field who were otherwise highly qualified to give such opinions is baseless. *Reilly* v. *Pinkus*, 338 U.S. 269, 274 (1949). Such testimony has been held to constitute substantial evidence even where witnesses who had personally observed the effect of the product have testified to the contrary. *Bristol-Myers Co.* v. *FTC*, 185 F.2d 58, 62 (4th Cir. 1950). Here, all of the evidence has been weighed and has been found not merely substantial, but overwhelming in establishing the above findings.

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[17] Mr. Konigsbacher's reported conclusion that the thymol, eucalyptol, menthol and methyl salicylate in Listerine migrate into the nasal passage during gargling was stated to be tentative (RX 751).

Respondent (Memorandum 12-21) argues that what it asserts are the standards utilized by the Food and Drug Administration in approving a new drug must be applied in this case. These standards are termed the "substantial evidence" test, *i.e.*, there need only be substantial evidence consisting of adequate and well-controlled investigations upon which qualified experts can fairly and responsibly conclude that the drug has the effects claimed for it. This, according to respondent, must be accepted as justifying a claim even though the preponderant evidence would establish that the claim is false. The responsible minority opinion based upon such tests would control.

Respondent's argument is untenable because the basic question in this proceeding under the *Federal Trade Commission Act* is whether the claims made for Listerine have the tendency and capacity to mislead the consuming public. This is a question of fact to be determined under the normal standards of the Federal Trade Commission Act, not under standards established by the Federal Food, Drug and Cosmetic Act. Respondent's argument has, in effect, already been rejected by the Commission in its order denying respondent's interlocutory appeal from the ruling of the administrative law judge striking portions of respondent's answer, when the Commission stated, "The complaint in this case, unlike that in *Pfizer*, [*In the Matter of Pfizer, Inc.*, (81 F.T.C. 23 (1972))] does not charge as a separate violation that respondent 0 did not have a reasonable basis for its claims. It alleges that respondent's claims are false, misleading and deceptive. Whether or not respondent had a reasonable basis for making such claims is therefore totally irrelevant." (82 F.T.C. 749, 752 (1973)).

Even if the standards contended for by respondent were applicable here, it still could not prevail, for it has failed to meet the "substantial evidence" test. As found above, the Reddish and St. Barnabas tests, upon which respondent relies, do not constitute the "adequate and well controlled investigations upon which qualified experts can fairly and responsibly conclude [that Listerine] has the effects claimed for it."

Respondent (RPF 246-51) contends that the efficacy of Listerine as a cold remedy is demonstrated by consumer satisfaction. It relies primarily upon survey data for its conclusion that there is consumer satisfaction. In evaluating any such data, it must be noted that Listerine is the only mouthwash sold with respect to which cold claims are made. Having been sold as a cold remedy, there is the resultant placebo effect, particularly since colds are self-limiting and improve without medication (Findings 81, 82). The contention of consumer satisfaction, as derived by respondent from its surveys, cannot begin to approach in probative value the overwhelming weight of the expert testimony adduced by complaint counsel. Upon an overall evaluation, it is entitled to very little, if any, weight. Indeed, as held in *Erickson* v. *FTC*, 272 F.2d 318, 322 (7th Cir. 1959), "* * * [T]he fact that petitioner had satisfied customers is not a defense to Commission action for deceptive practices." Accord, *Feil* v. *FTC*, 285 F.2d 879, 883 n.5 (9th Cir. 1960).

Respondent's reliance (Reply 45) upon *Evis Mfg. Co.* v. *FTC*, 287 F.2d 831 (9th Cir. 1961), *cert. denied*, 368 U.S. 824 (1961), is misplaced. In *Evis*, a case which involved the efficacy of a water softener, the Commission relied upon experts whose testimony was based upon experiments and laboratory tests performed upon the device in question. They did not know the theory upon which the device purportedly worked; they did not know the composition of the metal; and they were not acquainted with the claimed special processing thereof. In performing their experiments, they did not follow instructions of operation which, according to evidence adduced by the company, was important to achieve desired results. Further, the Commission relied upon a purported admission to the effect that 3,000 dissatisfied users could be called. This was construed by the court to mean that of 100,000 purchasers, 3,000 dissatisfied ones could be called.

It was only under such circumstances that the court in *Evis* ruled that the Commission had failed to adduce substantial evidence in the face of the sworn testimony of satisfied consumers, subject to cross examination, many of whom were themselves qualified experts in the field. The situation in *Evis* is a far cry from that in the case at hand.

The Bearing of "Future Facts" upon the Foregoing Findings

Respondent (RPF 318-20; Memorandum 22-25) contends that under the Commission's order in *Lambert Pharmacal Co.*, 38 F.T.C. 726, 730

(1944), a finding of violation may not be made without a showing of "future facts"[18] and that no such future facts have been developed that would warrant a resolution of the issues against respondent. Respondent appears to argue that it is incumbent upon complaint counsel to introduce different types of evidence than what was introduced in the prior proceeding; that since the expert opinion evidence offered by complaint counsel in the prior proceeding was not deemed sufficient, they cannot now prevail on the basis of opinion evidence.

Respondent's position has, in effect, been ruled upon by the Commission when it denied respondent's motion for interlocutory appeal (82 F.T.C. 749 (1973)). There, the Commission held that it was unnecessary for the complaint to allege "future facts." Its opinion quoted at length from *Manco Watch Strap Co.*, 60 F.T.C. 495 (1962), where, following the principles enunciated in *FTC* v. *Raladam Co.*, 316 U.S. 149 (1942), it was held that dismissal of a complaint for failure of proof did not preclude a finding of violation in a subsequent proceeding based on like allegations, but covering a subsequent period of time; that the later record constituted new and different facts upon which a finding of violation may be made.

In the instant case, the undersigned has considered all portions of the prior record that have been incorporated into the present record, either by introduction as exhibits or by means of official notice. Consideration has also been given to the vast amount of new evidence introduced. The overall record, therefore, is a new one and presents new facts, not limited by the prior record. It is partly because of this situation that the undersigned has gone into some detail in discussing the testimony of witnesses produced by both sides and the tests introduced by respondent. By "future facts" the Commission meant future knowledge and facts that could be established in the future. In the undersigned's opinion, the facts found above have clearly and overwhelmingly been established.

In the Commission's dismissal of the prior complaint, it took note of the views of many medical practitioners that the use of a product such as Listerine would assist in resisting invasion of pathogenic cold-causing organisms (38 F.T.C. at 739). This is clearly not the view of knowledgeable medical men today, and respondent's own St. Barnabas test establishes that the use of Listerine will not cause fewer colds. In its prior opinion, the Commission relied, in large part, upon the Reddish tests as constituting clinical support of the representation that the use of Listerine resulted in fewer and less severe colds and the complications thereof (38 F.T.C. 740, 741, 746, 749). The Reddish tests, however, would be unacceptable to the scientific community today and must be disregarded on the basis of the entire record (Findings 120-126). Another "former fact" upon which the Commission relied was that bacteria play a very important role with respect to the common cold including complications caused by secondary invaders (38 F.T.C. at 744). It is clear, under the present record, that bacteria play no part in the common cold (Findings 51, 58, 67), and that Listerine would be ineffective to prevent, cure or alleviate infections caused by secondary invaders (Finding 71).

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[18] In *Lambert Pharmacal Co.*, it was ordered "That the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to institute further proceedings should future facts so warrant." 38 F.T.C. at 730.

Finding 212, which follows, further disposes of respondent's position relative to the necessity to show "future facts."

ADDITIONAL FINDINGS OF FACT

212. Much has been learned about colds in the last 30 years (Gwaltney 397-98, 403-04; Hornick 490-91, 515; Parrott 908). There were clues, generally accepted as valid, prior to the 1940's that common colds were caused by viruses, but 30 years ago bacteria were not ruled out as a cause of colds. Most people thought that bacteria were somehow involved and it was popular to inject toxins from killed bacteria to try to prevent colds. When antibiotics were developed after 1942, there was a time when most colds were treated with antibiotics (Seal 590; Proctor 622; Rammelkamp 785, 787). Today, the theory that bacteria play a part in the common cold has been ruled out (Findings 51, 58, 67). The record, therefore, clearly demonstrates that there are "future facts" even under respondent's position.

Representation that Tests Support Listerine Cold Claims

213. In advertisements published in periodicals and newspapers during the period extending from Dec. 27, 1968 to Feb. 22, 1969, and then again on Sept. 13, 1969 (CX 10, 26A-B), the following statement appears:

> Tests over a 12-year period proved that people who gargled with Listerine twice a day had fewer colds than those who did not (CX 9, 25).

It has been stipulated that the phrase "Tests over a 12-year period" refers to the Reddish tests conducted between 1930 and 1942; and that final approval by Warner-Lambert for dissemination of CX 9 was given on Aug. 15, 1968 (CX 139C).

214. CX 51, the interim report covering the results of the first year of the St. Barnabas study, was issued on Sept. 18, 1968, after final approval for dissemination of CX 9 for the 1968-1969 "colds" season.

The second interim report, which covered the second year of the study, was not issued until Mar. 16, 1970, subsequent to the last publication of the representation in question (CX 139D). In the late summer or early fall of 1969, Dr. Haggie, who was then respondent's vice president for Consumer Products Research (Tr. 1703), received the top-line results of the second year of the St. Barnabas study which showed what overall results were going to be reported (Tr. 1770).

215. The results of the first year of the study and the top-line results of the second year both showed no statistically significant difference between the Listerine group and the control group insofar as fewer colds were concerned (Haggie 1771). Dr. Haggie recommended to management officials that advertising claims for fewer colds be suspended pending a resolution of the differing results between the Reddish and St. Barnabas studies (Tr. 1770-71, 1774). The recommendation was accepted to the extent of stopping the representation that appears in Finding 213 (Haggie 1777-78).[19]

216. A representation that tests prove a claim is a representation as to the most recent tests available. Respondent had the first year of the St. Barnabas study, which did not substantiate the claim, prior to its 1968-1969 colds season advertising. It received, in addition, the top-line report of the second year of the St. Barnabas study, which also failed to substantiate the claim, around the time of the last publication of the representation.

217. The circumstances under which respondent acted were most unusual. The representation referred to a test which had been run for a period of 12 years. The test in question had been found by one Commissioner to constitute a measure of clinical support for the claim of fewer colds (38 F.T.C. at 740) and by another not shown to be incorrect and untenable (38 F.T.C. at 749). It was, in large measure, because of the Reddish test that the complaint in Dkt. 4232 was dismissed. Under these circumstances, respondent cannot be said to have acted unreasonably when it waited until it received an indication of what the second year of the St. Barnabas study would show before it abandoned reference to the Reddish tests in its advertising. Upon receipt of top-line results of the second year of the St. Barnabas study, respondent acted promptly to cease reference to the older study. The last such reference was made in an advertisement placed on Sept. 13, 1969, long before the instant complaint was issued on June 27, 1972.

218. Under the particular and unusual circumstances surrounding the dissemination of the challenged representation and its withdrawal, it is found that respondent was not engaged in a separate and distinct

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[19] Dr. Haggie's testimony was actually broader—to the effect that all "fewer colds" claims were stopped. An evaluation of respondent's advertisements has shown that this was not done (See Findings 31-38, 40).

violation of Section 5 of the Federal Trade Commission Act, as alleged in Paragraphs Nine and Ten of the complaint, by referring to the results of the Reddish studies when it did.[20] This finding in no manner detracts from the other findings of misrepresentation.

CONSIDERATION OF APPROPRIATE ORDER

Complaint counsel request issuance of an order that would require respondent "in connection with the labeling, advertising, offering for sale, sale or distribution of Listerine *or any other non-prescription drug product* in commerce" to cease and desist representing that the product will cure colds or sore throats, will prevent colds or sore throats or will cause users to have fewer colds than nonusers. The record is clear that there is no product that will prevent or cure colds or sore throats. The misrepresentation to be proscribed, therefore, is not peculiar to Listerine or any mouthwash product, but would be equally false if made for any nonprescription drug product. Section 5 of the Federal Trade Commission Act empowers the Commission to proscribe the use of unfair methods of competition and unfair or deceptive acts or practices. The unfair method of competition and unfair or deceptive practice is that of falsely representing a prevention or cure for colds and sore throats. While the representation was made in connection with a particular mouthwash product, it would be equally false with respect to any nonprescription drug product. Since respondent is engaged in the manufacture, sale and distribution in commerce of a number of nonprescription drug products, an order proscribing such representation in connection with any nonprescription drug product is deemed warranted and in the public interest.

Complaint counsel also seek an order requiring respondent to cease and desist from "misrepresenting the efficacy of * * * [Listerine or any other non-prescription drug product] or the benefit to be derived from the use of any such product." Such a proscription is deemed to be unwarranted and unauthorized in the instant matter. This case involves misrepresentations as to one product only—Listerine mouthwash—and, as to that one product, only one type of misrepresentation—the product's efficacy for colds. The following excerpt from *American Home Products Corp.* v. *FTC*, 402 F.2d 232, 237 (6th Cir. 1968), is equally applicable here:

> We are also of the opinion that the order must be modified by striking the provision which prohibits petitioner from disseminating any advertisement "In connection with the

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[20] While the Reddish tests were performed on adults and not children, the Commission's opinion in *Lambert Pharmacal Co.*, 38 F.T.C. 726, was not limited to a discussion of the effect of Listerine on adults. Hence, complaint counsel's position (CPF 19, 69, 70; Memorandum 14-15, 32-33) that it was false and deceptive to have included a reference to the Reddish tests in advertisements claiming benefits for children is rejected.

> offering for sale, sale, or distribution of any 'drug' * * * which misrepresents directly or by implication the efficacy of such drug." An order of the Commission must bear a reasonable relationship to the unlawful practice found to exist. * * * [cases omitted]
>
> The proceedings in this case dealt exclusively with representations as to the efficacy of Preparation H; no other drug was involved. It was not established that petitioner is a habitual violator of the Federal Trade Commission Act, even though it is not a first offender. The effect of this provision of the Commission's order is to admonish petitioner not to violate the law again. Such an order would, in practical effect, transfer the task of enforcing the Federal Trade Commission Act, as regards this petitioner, to the district courts under 15 U.S.C. §56. This is not within the contemplation of the Act.

Accord, *Grove Laboratories* v. *FTC*, 418 F.2d 489, 496-97 (5th Cir. 1969).[21]

ITT Continental Baking Co., Dkt. 8860, Oct. 19, 1973 [83 F.T.C. 865], upon which complaint counsel rely (Memorandum 26-29) is inapposite. There, the Commission approved an order proscribing the misrepresentation of nutritional values of "all food products" rather than limiting the proscription to Wonder Bread, bread or baked goods. There, the deceptive practice found was that of making unwarranted nutritional value representations concerning food products. The deception was not uniquely suited to bread or bread products. Here, respondent's very business is that of developing and promoting the sale of over-the-counter drugs that are efficacious for various purposes. There is no basis in this record for requiring respondent to engage in that business at peril of civil penalties.

Having found that, because of the circumstances under which respondent referred to its Reddish studies and then stopped making such references, respondent had not misrepresented that tests supported its claim of fewer colds, there is no basis for issuing an order relating to such a practice.

Corrective Advertising

The requirement of corrective advertising, in an appropriate case, is within the remedial powers of the Commission. *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 466-67, 473 (1972); *ITT Continental Baking Co.*, Dkt. 8660, Slip. Op. 31, Oct. 19, 1973 [*supra*]; *Campbell Soup Co.*, 77 F.T.C. 664, 668 (1970). In recognition of the Commission's position that it has such authority, respondent (Reply 59), while denying its existence, reserved argument on this issue for presentation to the Commission if necessary. The following findings bear upon the question of whether it would be appropriate and reasonable to require corrective advertising in this case.

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[21] The present case is even more compelling in favor of respondent in that it has never previously been adjudged to have made misrepresentations in violation of Section 5 of the Federal Trade Commission Act.

FINDINGS PERTAINING TO CORRECTIVE ADVERTISING

219. Listerine has been on the market since 1879. Throughout its history, the product has been represented as being, *inter alia*, beneficial in certain respects for colds, colds symptoms and sore throats. Listerine has been advertised directly to the consuming public as a cold remedy since 1921. Since prior to 1938, Listerine labeling has included the claims regarding colds and sore throats as set forth in CX 49 and CX 50 (See Finding 25). These claims have been made continuously since prior to the effective date of the Federal Food, Drug and Cosmetic Act of 1938, up to and including the date of issuance of the complaint on June 27, 1972 (CX 139A-B).[22]

220. The record shows that over the past ten years, respondent has spent large sums of money in all major media for advertising Listerine as a remedy for the prevention and cure of colds and sore throats and as an ameliorative for cold symptoms (Findings 8-46; CX 40A-B, 41A-B, 42A-B, 44, 45, 46, all *in camera*). The vast majority of these expenditures were spent on network and spot television, covering all parts of the day and evening but particularly on prime time network television (CX 40A-B, 45, 46, *in camera*). Spot television commercials covered practically all the major media centers in the United States (CX 41A-B, *in camera*). Listerine "colds" print advertising was disseminated in major magazines and newspapers throughout the country (CX 2, 4, 6, 8, 10, 12, 14, 16, 18, 21A-E, 24A-D, 26A-B, 29A-E, 31, 33A-H).

221(a). Advertising acts both in creating a belief in consumers and in reinforcing a belief once it has been created. It has a large role in creating and shaping beliefs with respect to a new product. Its role with an older, established product such as Listerine is more to reinforce established beliefs and act as a reminder. It serves to keep people from changing their attitudes. It still influences some new beliefs. There are always new people coming into the market, *e.g.*, people who were not users who grow up and form households (Rossi 1451, 1453; Bass 1533, 1560, 1607-12, 1619-21; Achenbaum 3389, 3393, 3438-41; Amerman 3455-56).

221(b). Advertising plays a relatively more important role for packaged goods, such as a mouthwash, than for items such as automobiles (Achenbaum 3392-93). Listerine having been advertised as a cold preventative, cure and symptom ameliorative for so many years, it is clear that it has acted both to create and reinforce beliefs in consumers corresponding with respondent's representations concerning that product. It is not plausible that respondent would have spent the millions of dollars that it has over such a long period of time to create and reinforce beliefs about Listerine's use for colds unless it were convinced that the advertisements were effective. Respondent, of course, has taken issue with what claims were made. This, however, has already been found (Findings 27-46). If effective, the advertisements would have created, influenced and reestablished beliefs corresponding with what was represented.

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[22] See Finding 26 for description of label claims since December 1972.

222. CX 52-65 are market research reports known as "Product Q" reports on the "Mouthwash Market," produced from the files of respondent. The reports contain marketing, advertising and purchase behavior data on Listerine and competing mouthwashes from 1963 through 1971.

223. The purpose of a Product Q test is to relate a number of different types of information, such as (a) product awareness, (b) product use, (c) brand experience, attitudes and beliefs toward the brand (including the degree to which certain attributes and benefits are liked and the degree to which they are important to consumers) and (d) awareness and familiarity with advertising, to the same people at the same time. That is the same group of people is surveyed at different times as to the same types of information (Levitt 1210-11). As respondent's own advertising agency, J. Walter Thompson Company, reported to respondent: "By collecting continuous data on consumer reaction, Product Q is ideally suited to provide guidance in such vital areas as * * * the basic strengths and weaknesses of Listerine and the competitive brands as perceived by the consumer * * * [w]hat qualities do people look for in a mouthwash * * * [and] [*h*]*ow successful are the current advertising campaigns of different brands on awareness, recall, attitudes, and sales.*" (CX 80D-E; emphasis added).

224. Each Product Q study utilized a sample of housewives which was drawn from a nationwide consumer panel maintained by the Home Testing Institute (Levitt 1224-25). The demographic characteristics of the sample used in each of the tests in evidence parallel "what the population at large looks like as reported by the census data." (Levitt 1225). The sample of each test is representative of the total United States in areas of residence, market size, family income, age of housewife, education of housewife and size of family (Levitt 1225-26). The results of the Product Q tests, therefore, represent the opinions of millions of American housewives. The percentages expressed in the Product Q reports would vary only 5 or 10 points in either direction with a band of confidence at the .05 level of significance if a scientifically drawn sample, literally projectable to the entire country, had been employed in lieu of the selected consumer panel samples (Rossi 1420, 1423-27). The Product Q studies, therefore, also provide

information on the opinions held concerning Listerine for the United States as a whole.

225. The Product Q studies (CX 52-65) were commissioned by respondent and used by it from 1963 to 1971. Product Q studies have been used during the past 10 years by over 20 different companies including General Foods, General Mills, Sears, Hunt-Wesson Foods, Kimberly-Clark, Scott Paper Company and Uncle Ben's Rice. No other company has used the Product Q service as continuously and as long as respondent (Levitt 1212).

226. Respondent was actively involved in the planning and evaluation of the Product Q reports. It selected the competitive brands and product qualities to be tested (Levitt 1222-23). Tabulations of the raw data were sent to Warner-Lambert for its independent review. Meetings and telephone conversations were held between personnel of the testing company and Warner-Lambert to discuss the data. Final reports were sent to respondent and oral presentations were made (Levitt 1227, 1230; CX 71A). Respondent's officials reevaluated and summarized Product Q data in internal company documents (CX 66-79). Copies of these memoranda were circulated at management levels of respondent and to J. Walter Thompson, respondent's advertising agency (CX 66A, 67E, 68A, 69C, 70B, 72A, 73A, 74B, 75A, 77D, 78D). Respondent had its advertising agency, J. Walter Thompson Company, prepare a report, "Analysis of Product Q With Some Suggestions For Improvement" (CX 80).

227. Each Product Q report originally cost between $4,000 and $5,000. The price currently approximates $12,000 to $13,000 per test (Levitt 1211). Since there were 23 Product Q reports on the mouthwash market between 1963 and 1971, respondent spent well over $100,000 on these marketing studies.

228. Findings 225, 226 and 227 compel the further finding that respondent placed a high degree of confidence and reliance on the Product Q tests and what they showed.

229. The Burke Recall tests (CX 82-89) indicate that a significant number of consumers remember specific copy points in particular "colds" commercials after only one exposure to an advertisement and after a 24-hour time lapse (Findings 44-46). It is not unexpected that, as is evidenced by the Product Q studies, the long-standing and extensive campaign of advertising Listerine for colds has produced a strong image for Listerine as a "colds" product.

230. A number of the categories used in questions posed in Product Q tests are precoded. The quality or description "effective for colds and sore throats" is such a category established prior to conducting a Product Q survey. It encompasses prevention, cure and relief, but the

Product Q test cannot be broken down so as to separate or quantify the actual beliefs covered by that category (Levitt 1229-30, 1255; Bass 1583-84, 1604; CX 52Z-48-51).

231. The following table summarizes the results of the Product Q reports, covering 1963 to 1971, to the extent of showing the percentage of consumers exposed to a lot of Listerine advertising who recall "effective for colds and sore throats," "effective for killing germs" and "effective for bad breath" as main ideas of Listerine advertising.[23]

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[23] The table is based on answers given by consumers who have seen or heard a lot of advertising for Listerine in response to the following question: "Thinking of the recent advertising you've seen or heard for each brand, which one of the following main ideas do you feel the brand has been advertising: effective for colds and sore throats, not too strong tasting, gives long lasting protection, recommended by dentists, leaves mouth feeling refreshed, effective for bad breath, leaves no unpleasant after-taste, effective for killing germs, pleasant flavor."

Selected Advertising Themes Recalled by Consumers as Displayed in Listerine Advertising

Quarterly Period	Effective for Killing Germs	Effective for Colds and Sore Throats	Effective for Bad Breath
4th Qtr 1963	71%	68%	66%
1st Qtr 1964	76	74	69
2nd Qtr 1964	69	62	65
3rd Qtr 1964	68	62	66
4th Qtr 1964	67	65	68
1st Qtr 1965	65	67	68
2nd Qtr 1965	69	65	68
3rd Qtr 1965	68	63	71
4th Qtr 1965	71	66	72
1st Qtr 1966	73	74	71
2nd Qtr 1966	69	69	70
3rd Qtr 1966	67	66	65
4th Qtr 1966	70	68	60
1st Qtr 1967	70	72	57
2nd Qtr 1967	72	73	56
3rd Qtr 1967	....	Data Missing	....
4th Qtr 1967	72	71	63
1st Qtr 1968	71	77	60
2nd Qtr 1968	....	Data Missing	....
3rd Qtr 1968	72	69	60
4th Qtr 1968	75	78	68
1st Qtr 1969	71	80	62
2nd Qtr 1969	....	Data Missing	....
3rd Qtr 1969*	64	62	50
4th Qtr 1969	....	Data Missing	....
1st Qtr 1970*	65	69	52
1st Qtr 1971*	67	69	52
Average	69.6	69.1	63.4
Range: High	76	80	72
Low	64	62	50

* Percentages for these quarters based on total respondents rather than just on those who have seen or heard a lot of advertising.

Source: CX 159H

232. The above table shows that Listerine's advertising theme "effective for colds and sore throats" has extremely high recall among American consumers, higher even than recall of Listerine's breath advertising upon which many times as much money is spent (RX 100, *in camera*). As the J. Walter Thompson Company, respondent's advertising agency, reported to respondent, the major distinctive copy points

remembered for Listerine are "effective for colds and sore throats" and "effective for killing germs" (CX 80Z-6).

233(a). Although recall of Listerine's "colds" advertising is at all times very high, such advertising is recalled to an even greater degree during the winter months' "cold season" when Listerine "colds" advertising is disseminated. This indicates that the advertising is especially effective during the months in which it is disseminated. At the same time, it is important to recognize that the "colds" theme is highly recalled as recent advertising even during the 6-month period when there is no such advertising. This is most significant in considering the propriety of requiring corrective advertising, particularly in view of the fact that the subjects are being asked to recall the major themes of recent advertising, not of advertising 3, 4, 5 or 6 months ago. It shows the lasting impression of the non-current advertising.

233(b). The following table presents the seasonal variations in recall of selected Listerine advertising themes for 1963 through 1969, derived by averaging the quarterly recall scores for each attribute (Rossi 1439):[24]

Average Seasonal Variations in Proportions Recalling Selected Listerine Advertising Themes (1963-1969)

Season	Effective for Killing Germs	Effective for Colds and Sore Throats	Effective for Bad Breath
4th Qtr (October through December)	71%	69%	66%
1st Qtr (January through March)	71%	74%	64%
2nd Qtr (April through June)	70%	67%	65%
3rd Qtr (July through September)	68%	64%	62%

Source: CX 159J[25]

234. Listerine's advertising is particularly distinctive when compared to that of its three leading competitors, Scope, Lavoris and Micrin, especially on the attributes "effective for colds and sore throats" and "effective for killing germs" (Rossi 1434, 1440-42, 1448-49;

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[24] Calculations are based on proportions shown in Finding 231 excluding data from 3rd Qtr 1969 and later periods since those proportions were calculated on different bases.

[25] See also CX 59Z-16, Z26.

Achenbaum 3407-08; CX 80Z7, 159K). This very distinction in advertising would serve to keep Listerine's advertising messages in the minds of the public after they may have stopped (see Finding 233).

235. Product Q reports measure the percentage of survey respondents who held the belief that Listerine possesses the attribute of being "effective against colds and sore throats." The reports establish that Listerine is perceived by the majority of those surveyed as being effective against colds and sore throats. Below is a table derived from Product Q data (Rossi 1435-36; Levitt 1234-35; CX 159E) which shows the percentage of the total sample who rate Listerine "One of the Best" mouthwashes for the qualities "effective against colds and sore throats," "effective against germs," and "effective against bad breath" for a 7 1/2 year period from 1963 to 1971:

Proportions Rating LISTERINE as "One of the Best" with Respect to Certain Qualities

Quarterly Period	Effective Against Germs	Effective Against Colds/Sore Throats	Effective Against Bad Breath
4th Qtr 1963	51%	43%	49%
1st Qtr 1964	53	47	52
2nd Qtr 1964	53	46	51
3rd Qtr 1964	53	47	51
4th Qtr 1964	53	49	52
1st Qtr 1965	53	50	51
2nd Qtr 1965	52	51	51
3rd Qtr 1965	55	51	54
4th Qtr 1965	56	52	55
1st Qtr 1966	60	59	59
2nd Qtr 1966	58	55	57
3rd Qtr 1966	59	58	57
4th Qtr 1966	57	55	53
1st Qtr 1967	53	53	47
2nd Qtr 1967	56	55	51
3rd Qtr 1967	....	Data Missing	....
4th Qtr 1967	58	56	51
1st Qtr 1968	59	59	53
2nd Qtr 1968	....	Data Missing	....
3rd Qtr 1968	57	58	53
4th Qtr 1968	59	59	55
1st Qtr 1969	60	59	54
2nd Qtr 1969	....	Data Missing	....
3rd Qtr 1969	57	57	50
4th Qtr 1969	....	Data Missing	....
1st Qtr 1970	59	60	55
1st Qtr 1971	59	59	56
Average Proportion	56.1	53.8	52.9
Range: High	60	60	59
Low	51	43	47

Source: CX 159D

236. The above table does not fully reflect the extent of the belief that Listerine is effective against colds and sore throats—only the percent that rated it "one of the best." Other possible affirmative ratings not included in the above tabulation are "very good," "good" and "fair" (CX 52Z-50, 53Z-43; 54Z-81). This evaluation reflects the belief of the entire population surveyed regardless of whether the responders have ever used Listerine (see, *e.g.*, CX 52Z-50, 53Z-43, 54Z-81, 65Z-23).

237. While the latest Product Q report in the record is for the first quarter of 1971, it may be anticipated that the 59 percent level of those who thought Listerine was one of the best mouthwashes effective against colds and sore throats would prevail today. This is because of the stability of the percentage since 1968 (the percentage not varying more than two points from the 59 percent level) and because this particular belief with respect to Listerine ranks high in comparison with the level of consumer beliefs on other mouthwash properties of Listerine. Also, consumer beliefs are very stable once they come to exist (Rossi 1433; Bass 1549-50, 1554-55; CX 59P).

238(a). The percentage of people who believe that Listerine is effective for colds and sore throats is very high in comparison with other brands. While *the percentage of those surveyed* believing Listerine to be effective for colds and sore throats was 58 percent in 1968, 59 percent in 1969 and 60 percent in 1970, the corresponding figures for Scope were only 7 percent in 1968, 8 percent in 1969 and 7 percent in 1970. During that period, Scope was Listerine's nearest competitor in mouthwash sales (Bass 1547-48, 1550-52; CX 60Z-4, 64Z-4, 139-0). Among those surveyed *who had an opinion concerning the attribute*, effective for colds and sore throats, 62 percent in 1967 believed Listerine had that attribute and 66 percent in 1968 believed Listerine had it. The levels of belief among the same individuals on Lavoris and Micrin possessing that attribute were 16 percent and 19 percent, respectively, in each year. The figures for Scope were 11 percent in 1967 and 13 percent in 1968 (Bass 1552-53; CX 80Z-11).

238(b). Listerine has the most distinctive brand image among the four competing brands (Listerine, Scope, Lavoris and Micrin). Its distinctiveness is based particularly on the product attributes of "effective for colds/sore throats," "effective for killing germs," and "effective for gum trouble" and, to a lesser extent, "gives long lasting protection" and "effective for bad breath." (CX 159F; Rossi 1433-34; Achenbaum 3408). As respondent's advertising agency summarized the Product Q survey results, "Listerine is perceived as a powerful germ-killer, effective both for bad breath and for colds/sore throats," while "[t]he main negative images[26] for Lavoris, Micrin, and Scope are in the therapeutic field, viz., effective for colds/sore throats, and effective for relief of gum trouble." (CX 80H).

239. The phrase "effective for colds and sore throats" clearly encompasses prevention, cure and relief. The responses under this category, however, cannot be broken down to ascertain what each person had in mind when responding to questions containing that

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[26] Negative images are the percentage rating the brand "fair" or "poor" among those with an opinion about the brand (CX 80Z-10; Levitt 1237).

phrase (Finding 230). However, inasmuch as Listerine does not prevent, cure or provide symptomatic relief for colds, the public's belief must, in large part, have come from respondent's extensive advertising over the years. And that advertising has represented that Listerine will prevent and cure colds and sore throats and will ameliorate symptoms and afford symptomatic relief (Findings 27-46). It follows, therefore, that these representations and beliefs are what is reflected by the responses to survey inquiries as to "effective for colds and sore throats."

240. Findings 221 and 239, in and of themselves, establish that the widely held beliefs as to Listerine's efficacy for colds have, in large part, been created and reinforced by respondent's advertising. The Product Q tests themselves recognize that the data collected reflects, in part, the success of current advertising (Finding 223). Those surveyed were requested to give their impression on how good Listerine was for colds and sore throats even though they may never have used the product (see, e.g., CX 52Z-50, 53Z-43, 54Z-81, 65Z-23). Respondent's distinctive Listerine "colds" advertising themes are recalled to a high degree even during the 6-month period of the year when there are no "colds" advertisements (Findings 232, 233 and 234).[27] The very high percentage of belief that Listerine is effective for colds and sore throats compared with the low percentage of such belief for competitive products (Findings 235-38) reflects the impact of Listerine's distinctive "colds" advertising. Listerine "colds" advertising helps generate increased sales of the product (CX 109A).

241. There is a very close relationship between advertising registration and product image and this is true with respect to Listerine (Bass 1571-73; Rossi 1450; CX 59Z-12, 65E-F, 159F, K, L). As concluded in the latest Product Q report (CX 65E-F):

> Listerine continues to be first on most measures and it continues to grow while Scope remains a distant second; its performance relatively static. However, despite this one sided picture, comparable numbers of respondents claim to recall 'a lot' of advertising for each brand. With this dimension constant and Listerine well ahead of Scope on everything else, it would appear that *the quality of Listerine's advertising and/or its media plan are making a vital contribution to the brand's success.*
>
> Also, *there is a very close relationship between Listerine advertising registration and the brand's image.*
>
> * * * * * * *
>
> *Therefore, one conclusion appears that a significant change in Listerine ad*

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[27] While 76 percent of the respondents, in a 1968 survey "who recall a lot of advertising," stated that "effective against colds and sore throats" was an advertising claim made for Listerine, only 23 percent associated "effective against colds and sore throats" with Lavoris advertising, 26 percent with Micrin advertising and 12 percent with Scope advertising (Bass 1563-64; CX 80Z-7).

> *registration will, in most cases, affect the brand's image in the same direction.* (emphasis added)

This analysis demonstrates that there is not only a strong relationship or correlation between Listerine's advertising registration and its product image, but that its product image is largely a result of its advertising.[28]

242. Another factor to be considered, which bears upon the propriety of requiring corrective advertising, is the importance of the belief that has been engendered by the advertising. For, if it is deemed important, people will tend to retain the belief notwithstanding the cessation of the advertising (Bass 1558).

243(a). The quality "effective for colds/sore throats" is important in the consumer's purchase of a mouthwash[29] (Rossi 1455). Over 35 percent of those covered by the Product Q surveys over the 7 1/2 year period from 1963-1971, stated that "effective for colds and sore throats" was "extremely important" in the selection of a mouthwash (CX 159A-B). These statements were in response to the directive: "We have listed some qualities which might be found in various brands of mouthwash. Some of these are probably more important to you than others in helping you to decide which brand to buy. Please rate each quality on its importance to you. Not too important, fairly important, very important, extremely important." (CX 159A).

243(b). Since only those who rated the quality "extremely important" were tabulated in the Product Q studies, there was an undetermined number of additional consumers who rated "effective for colds and sore throats," "very important," "somewhat important" or "fairly important" in their purchase decisions.

244(a). The belief that Listerine is effective for colds and sore throats is a determining factor in a significant number of consumers' decisions to purchase Listerine (Rossi 1460; CX 64D, 66C, 80N, 106A, B, 159G). As respondent has advertised: "It is a fact that more families use Listerine during these cold-catching months than any other oral antiseptic." (CX 34, 140B); "For fewer colds, milder colds, more people use Listerine than any other mouthwash." (CX 34, 140F).

244(b). The 1968 Product Q survey reveals that of those who rated as "extremely important" the property "effective for colds and sore throats," 46 percent bought Listerine last, whereas only 34 percent of the entire sample bought Listerine last (CX 80N). Listerine "colds" advertising generates increased sales of the product (CX 109A).

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[28] This is also demonstrated by the results of a 1-year advertising campaign on the West Coast where Listerine's image was markedly changed with regard to its taste and flavor, while its image on these characteristics remained unchanged throughout the remainder of the country (Rossi 1450-51, 1453; CX 65Z-12, 159M).

[29] Families with both teenagers and young children are more likely to deem this quality important than other demographic groups (CX 80L, M).

245. Finding 244 is, of course, further substantiation of Finding 243 that "effective for colds and sore throats" is important in consumers' purchases of a mouthwash. It also constitutes a direct showing of the unfair competitive impact of respondent's advertising practices. In that respect, Listerine users use mouthwash in connection with colds and sore throats to a significantly higher degree than the users of the next leading brand, Scope (CX 131J). As developed by the Product Q reports, "effective for colds and sore throats" and "effective for killing germs" are the two product qualities where Listerine has its greatest competitive advantage to the point of being unchallenged (CX 54D, 55C, 57D, Z-2, 58E, Z-9, 10). Even if competitive mouthwashes are not sold as cold remedies, to the extent Listerine is purchased as a mouthwash and a cold remedy, it displaces and competitively injures competitors whose mouthwashes might have been purchased rather than Listerine if the products had been in competition solely as mouthwashes. Listerine advertising injures competition by claiming an attribute it does not possess.

246. Consumer beliefs tend to continue once they are created. Consumers would continue to believe that Listerine is effective for colds and sore throats even after the cessation of colds advertising (Bass 1555). Once a belief has been created, the belief lasts much longer than the memory of the copy points of the advertisements that created the belief (Bass 1556-57). In the present case, a very high percentage of consumers recalled "effective for colds and sore throats" as a recent Listerine advertising theme even during the 6-month periods when such advertisements were not being seen (Findings 231, 232, 233); and practically the same high percentage of consumers rated Listerine as "one of the best" for "effective against colds and sore throats" during the 6-month periods when no "colds" advertisements were run (Finding 235).

247. Among the factors that would help maintain the consumer belief that Listerine is effective for colds and sore throats, despite the cessation of "colds" advertising, are (1) the continuous advertising of Listerine as a cold remedy for over 50 years and the exhaustive media presentation of such claims for at least the past ten years to the point that it would be difficult to disassociate the name Listerine from the thought that it is presented as a cold remedy (Findings 219, 220, 221); (2) the high recall of copy points of Listerine advertising after exposure to even a single commercial (Finding 229); (3) the high recall of Listerine's advertising theme "effective for colds and sore throats" even during periods when there were no such advertisements (Findings 231, 232, 233); (4) the distinctive nature of Listerine claims "on effective for colds and sore throats" in comparison to the

advertising representations of its leading competitors (Finding 234); (5) the high and stable belief that Listerine is "one of the best" mouthwashes "effective against colds and sore throats" as opposed to a lack of such belief with respect to other mouthwashes (Findings 235, 236, 237, 238); and (6) the importance to consumers in selecting a mouthwash that is "effective for colds and sore throats" (Findings 242, 243, 244; Bass 1555; 1558; Rossi 1472).

248. The complaint does not challenge respondent's representation that Listerine kills millions of germs on contact. Respondent remains free to continue this representation in connection with its "bad breath" or other advertisements. This representation, however, has been used by respondent in conjunction with its "colds" advertisements to represent that Listerine is of medical significance in the prevention, cure and treatment of colds and sore throats (Finding 40). In so advertising, respondent has capitalized upon public belief that germs, followed by virus/bacteria cause colds and that members of the public consider a mouthwash to be a means of obtaining symptomatic relief from colds (Finding 41). Because of such public belief and the prior use by respondent of the representation that Listerine kills millions of germs on contact in conjunction with its cold claims, future representation of Listerine as a germ killer, without corrective advertising, would automatically constitute, or remind the public of cold claims even in the absence of any reference to colds.

249. Dr. Bass is a highly qualified authority in the field of marketing research which includes the cause, content and durability of consumer beliefs, attitudes and behavior and their relationship to advertising (CX 160; Bass 1531-41). Upon an analysis which took into account the various factors recited above, and based upon his general experience with respect to the stability of beliefs, Dr. Bass expressed his opinion that the belief that Listerine is effective for colds and sore throats would continue at the Product Q reported levels for about two years after "colds" advertising ceased; that even after five years from the cessation of advertising, the belief would still be at a very high level (Bass 1560-61). In giving his opinion, Dr. Bass contemplated that the beliefs as to Listerine's effectiveness against colds and sore throats would vary to include, separately or jointly, beliefs as to prevention, as to it being unlikely to catch a cold and as to relief from cold symptoms (Bass 1553, 1583-84, 1605-06).

250. Dr. Rossi is a highly qualified authority in the design, implementation and analysis of surveys having to do with the ascertainment of public opinion. He has worked with surveys (including consumer panel data) which have measured consumer attitudes and beliefs toward consumer products, trends in purchase behavior and

casual relationships underlying shifts in brand preference and usage (CX 158; Rossi 1397-1404). Dr. Rossi testified that, in his opinion, the belief that Listerine was effective against colds and sore throats, as reflected in the Product Q reports, would, in the absence of "colds" advertising, decline at no greater a rate than 5 percent a year (Rossi 1469-72).

251. Respondent has introduced no evidence to controvert the opinions of Drs. Bass and Rossi. Based upon those uncontroverted opinions and other facts recited above, it is clear that an order merely directing respondent to cease and desist from making the unfair, false and deceptive representations would be insufficient to protect the public interest; that the order should also include a provision requiring corrective advertising.

The purpose of requiring corrective advertising is to terminate continuing injury to the public. "This continuing injury may be in the form of lingering effects which a misrepresentation may have on consumers' minds or in the form of a lessening of competitive vigor in the marketplace due to the deceptive practices." *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 470 (1972). Both aspects of continuing injury are present in this case.

The Commission, in *Firestone*, held that the order there should not contain a corrective advertising provision. While no clear majority view was stated as to why such an order should not issue, the opinion does recite the conclusions of the hearing examiner as follows (81 F.T.C. at 466):

> Although this is a matter of judgment, it appears that such an order is not necessary or desirable in this case for the following reasons:
>
> (1) There has been a considerable lapse of time since the advertising occurred.
>
> (2) There is no reason to believe that many of the tires advertised as safe have enough tread left on them for the owners to believe they are safe.
>
> (3) The evidence shows that the residual effect of the advertising will be slight indeed by the end of this year even if the evidence offered by SOUP is viewed in the most favorable light.
>
> (4) Many of respondent's competitors have made safety claims through the use of brand names similar to "Safety Champion" and are under no cease and desist order of any kind.

The instant case differs from *Firestone* in each of the noted aspects:

1. In the present case, there has been no showing of lapse of time since the advertising occurred. There is no indication that it is not presently occurring.
2. This reason is obviously inapplicable here.

3. The evidence shows that the residual effect of the advertising will be high even after five years from the termination thereof.

4. The representations in question are uniquely those of respondent. Respondent's competitors make no such representations. Indeed, respondent's competitors have been, and will continue to be, at a competitive disadvantage because of respondent's representations until their residual effects are removed by corrective advertising.

In *Firestone*, the only reasons given for not including a corrective advertising order were those expressed in Chairman Kirkpatrick's separate statement (81 F.T.C. 398, 440). He stressed what he described as the lack of showing "that the particular advertisements challenged by the complaint in this matter were in fact commercials which succeeded in achieving the effect desired by advertisers—*i.e.*, to continue to influence consumers' purchasing decisions long after the advertisements had been perceived by consumers." Among the elements he emphasized were the time elapsed since the advertisements in question appeared (in that case four years), the media of advertising (there, print only), the frequency and length of time run (there, two advertisements printed 68 times in 10 publications between January 1967 and September 1968) (81 F.T.C. at 440). In the instant case, the success of the advertising in question was evidenced by tests perceived by respondent's advertising agency to be "ideally suited" for such purpose (Finding 223). The copy points in question are shown to have registered and to have been retained during periods when such advertisements were not placed. The image created and reinforced by the advertising was also shown to be strong and continuing in nature. The advertisements had not been discontinued. They were not limited to print exposure for less than two years, but included print and prime time television coverage for many years.

Form of Corrective Advertising Order

Having determined that an order requiring corrective advertising is necessary and appropriate in the public interest in this matter, it remains to consider the form of such an order.

Relying upon the opinion testimony of (1) Dr. Bass that there would be little decline in the percentage of consumers who would hold the false "colds" belief as to Listerine two years after the cessation of colds advertising and that a substantial number would still retain that belief five years after the cessation of such advertising and (2) Dr. Rossi that the decline in the false belief would be no more than 5 percent per year, complaint counsel (Memorandum 37-38) seek a five-year maximum period of corrective advertising. Respondent, however, upon demonstration by means of a consumer survey that the false beliefs have been fully dissipated or upon the presentation of other evidence satisfactory to the Commission that corrective advertising is no longer required, could have that period shortened (Memorandum 39-40).

The testimony of Drs. Bass and Rossi, while bearing directly upon the necessity to require corrective advertising and providing an indication of the strength and durability of advertising effects to be overcome, does not provide direct opinion evidence as to the period of time for which corrective advertising would be required to dissipate substantially the advertised-induced false beliefs. Their testimony is as to what may be anticipated in the event "colds" advertising were to stop, not how long it would take corrective advertising to perform its function.

In deciding upon a time period for corrective advertising, it is not necessary to impose a time calculated to remove everyone's belief as to the use of Listerine for colds. Some people will continue to have that belief irrespective of any corrective advertising. One variable that will have an effect upon what is accomplished is the amount of Listerine advertising respondent may see fit to engage in. This, of course, is an unknown. With full knowledge that an exactly appropriate time period cannot be calculated, a period should be selected that would be sufficient to accomplish its purpose. Since the order to engage in corrective advertising is not punitive, it would be preferable to overestimate the time required than to underestimate it. Nevertheless, in reaching a time period, the undersigned has not attempted to overestimate the time required. The time deemed reasonable and necessary, in view of all of the factors previously discussed, is two years.

In view of the two-year period decided upon, which does not appear burdensome at this point of time under any foreseeable circumstances, complaint counsel's suggested escape clause is not deemed appropriate. It would not be deemed appropriate even if a longer period of corrective advertising were required in light of Section 3.72(b) of the Commission's Rules of Practice, which provides a procedure for altering, modifying or setting aside an order upon a showing of changed conditions of fact.

The order specifies the precise language of the disclosure that must be made. This has been done in the instant case since the information to be disclosed is susceptible to this exactitude which is complete and, at the same time, brief so as not to unduly burden respondent. It is not deemed necessary, as urged by complaint counsel (Memorandum 41), that the disclosure recite that the Federal Trade Commission is the source of the correction. Such a recitation would be unduly punitive in nature by requiring respondent to indicate that it has been found to be a law violator.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

2. Respondent has been, at all times relevant herein, engaged in interstate commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. The methods of competition herein found to be unfair and the acts and practices herein found to be unfair and deceptive have all been engaged in interstate commerce within the meaning of Section 5 of the Federal Trade Commission Act.

3. Respondent's use of false, misleading and deceptive statements and representations as herein found has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of Listerine by reason of said erroneous and mistaken belief; and, in the absence of an appropriate order, such members of the purchasing public are likely to continue to purchase substantial quantities of Listerine in the mistaken belief that respondent's past statements and representations regarding the efficacy of Listerine with respect to colds and sore throats are true.

4. The acts and practices of respondent noted above as herein found, were and are to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

5. Complaint counsel have failed to sustain their burden of proof relative to the allegations of Paragraphs Nine and Ten of the complaint.

6. The following order is warranted both under applicable legal precedent and the facts of the case.

ORDER

PART I

It is ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale or distribution of Listerine or any other nonprescription drug product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such product will cure colds or sore throats.

2. Representing, directly or by implication, that any such product will prevent colds or sore throats.

3. Representing, directly or by implication, that users of any such product will have fewer colds than nonusers.

PART II

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale, or distribution of Listerine or any other mouthwash product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such product is a treatment for, or will lessen the severity of, colds or sore throats.

2. Representing that any such product will have any beneficial effect on the symptoms of colds or sore throats.

3. Representing that the ability of any such product to kill germs is of medical significance in the treatment of colds or sore throats or the symptoms of colds or sore throats.

PART III

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist, for a period of two years, from disseminating, or causing the dissemination of, any advertisements for the product Listerine Antiseptic unless it is clearly and conspicuously disclosed in each such advertisement in the exact language below that:

> Contrary to prior advertising of Listerine, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold symptoms or sore throats.

In print advertisements, this disclosure shall be displayed in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears and shall be separated from the text so that it can be readily noticed. In television advertisements, the disclosure shall be presented simultaneously in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur. Each such disclosure shall be presented in the language, *e.g.*, English, Spanish, principally employed in the advertisement.

PART IV

It is further ordered, That the allegations of Paragraphs Nine and Ten of the complaint be, and they hereby are, dismissed.

PART V

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

OPINION OF THE COMMISSION

BY ENGMAN, *Commissioner:*

I. *Background*

Respondent, the Warner-Lambert Company, manufactures Listerine Antiseptic, a mouthwash preparation. It is the purpose of this proceeding to determine whether respondent, through various labels and advertisements, has misrepresented Listerine's utility. Specifically, the complaint, dated June 27, 1972, charged Warner-Lambert with misrepresenting, through various labels, print advertisements and television commercials, that the use of Listerine Antiseptic will cure colds and sore throats, will prevent colds and sore throats and will cause colds and sore throats to be less severe than they otherwise would be. It also alleged that through the use of the statement "Kills Germs By Millions On Contact" respondent falsely represented that

Listerine's ability to kill germs is of medical significance in the prevention, cure or treatment of colds and sore throats.[1]

In its answer, respondent denied representing either that the use of Listerine will cure colds and sore throats or that it will totally prevent colds and sore throats, but it admitted representing that the use of Listerine, as directed and in conjunction with a regimen of proper rest and diet, will result in fewer colds and will relieve or lessen the severity of cold symptoms to a significant degree. It further admitted that use of Listerine will not cure colds or sore throats and will not totally prevent colds or sore throats.

After extensive hearings covering thousands of pages of testimony, the administrative law judge (hereafter "ALJ") concluded that complaint counsel had sustained their burden of proof on these allegations. He issued an order which prohibits respondent from making the challenged claims in regard to Listerine, other mouthwashes and other nonprescription drugs (Part I and II). His order further requires respondent to include in all Listerine print and television advertisements during the next two years the following statement:

> Contrary to prior advertising of Listerine, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold symptoms or sore throats.

Respondent appealed from the initial decision and order claiming, *inter alia*, that the ALJ did not fairly and adequately consider the evidence on the record as a whole. It charged that Judge Berman "engaged in a wholly one-sided and unfair consideration of the factual and legal issues in this case, and that, in so doing, he has deprived respondent of a fair hearing." (RB at 9.)[2] We have reviewed the record thoroughly and have found no indication that the ALJ's findings were the products of bias or that he conducted this proceeding in an unprofessional manner. While we do not agree with every finding in the initial decision, there is not a scintilla of evidence that the ALJ treated respondent unfairly.

II. *Did Respondent Make the Challenged Representations about Listerine?*

We agree with the ALJ's conclusion that respondent did in fact make the challenged representations that Listerine will ameliorate, prevent and cure colds and sore throats. In so concluding, we have taken into account respondent's admissions and the views of experts called by both sides to interpret the ads, but most importantly, we have studied each of the challenged labels, print ads and television commercials ourselves.

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[1] The complaint further charged that respondent falsely represented that tests prove that children who gargle with Listerine twice a day have fewer and milder colds and miss fewer days of school because of colds than do children who do not use Listerine. Since complaint counsel have not challenged the ALJ's dismissal of this count, that issue is not before us on this appeal.

[2] The following abbreviations are used in this opinion: IDF - Initial decision of administrative law judge. (cited by paragraph except as otherwise noted); Tr. - Transcript of testimony; CX - Commission exhibit; RX - Respondent's exhibit; RB - Respondent's appeal brief; RRB - Respondent's reply brief; CCB - Complaint counsel's answering brief.

A. The Amelioration Claim

Respondent admitted making amelioration claims, *i.e.*,

> * * * that the use of Listerine as directed will cause colds and sore throats to be less severe than they otherwise would be and that such a representation encompasses the representation that such use of Listerine will relieve or lessen the severity of cold symptoms to a significant degree. IDF 39.

These amelioration claims were being made at least as late as January of 1974, as is evidenced by respondent's most recent Listerine labels.[3]

B. The Prevention Claim

Respondent also admitted representing that the use of Listerine as directed and in conjunction with a regimen of proper rest and diet will cause fewer colds. The ALJ concluded that this admission satisfies the complaint's allegation that respondent represented that Listerine will prevent colds. We agree.

However, respondent has qualified its admission by contending that *all* prevention claims ceased prior to the fall of 1969. (RB 82.) Respondent's assertion is incorrect. Our review of Listerine television commercials aired in 1970, 1971 and 1972 convinces us that prevention claims were being made during that period.[4] In particular, numerous television commercials of the 1970-72 era urged the viewer to use Listerine twice a day all winter long. The message is inescapable: Use Listerine twice a day, every day, in conjunction with proper rest and diet, and you will improve your chance of warding off colds. (CX 142A-D, CX 143C-F, CX 144A-E.) The prevention claim was also conveyed in the post-1969 period by the claim that Listerine users have a "fighting chance" against catching a cold. This "fighting chance" theme appeared in print ads as well as television commercials. (CX 17, CX 32, CX 142A, CX 143C, CX 143E, CX 144A.) Even respondent's own expert psychologist, Donald E. Payne, agreed that CX 144A, a commercial aired in the 1971-72 season, had a prevention message. (Tr. 3661-3662.)

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[3] CX 139b and 139o.

[4] We also note that the ALJ found that respondent made prevention claims subsequent to 1969. In support of this conclusion the ALJ noted that consumer surveys which respondent commissioned, called "Burke Tests," demonstrate that substantial percentages of persons who had an opportunity to view the commercials perceived the message that Listerine prevented colds and sore throats. (IDF 45.) Respondent contends that the Burke Test is not "a reliable test for construing advertisements." (RB 83.) In view of respondent's admission that it made prevention claims prior to the fall of 1969 and our finding, based upon our review of the advertisements, that it made prevention claims subsequent to that date, we need no additional evidence in support of the prevention allegation, and therefore, we do not reach the question of whether the Burke Test adds additional support.

The ALJ also concluded that although it need not be shown that respondent made claims of *total* prevention, respondent's advertisements may well be understood to represent total prevention. Since the relevant allegations in the complaint are satisfied by a finding that respondent made qualified prevention claims, *i.e.*, that use of Listerine in conjunction with proper rest and diet will result in fewer colds, we need not reach the question of whether respondent made claims of total prevention.

C. The Cure Claims

We agree with the ALJ's conclusion that respondent represented that the use of Listerine will cure colds through the following statements:

(1) that Listerine "is for colds and resultant sore throats" (IDF 27, 25, 10.)

(2) that "those colds we do catch don't seem to last as long" (IDF 27.)

In reaching the conclusion that "for * * * colds and resultant sore throats" is a cure claim, we rely primarily on the Listerine labels and wrappers used from prior to 1938 to December 1972 which proclaimed:

LISTERINE
ANTISEPTIC
KILLS GERMS
BY MILLIONS
ON CONTACT
For General Oral Hygiene
Bad Breath, Colds and
resultant Sore Throats
Minor Cuts, Scratches
Insect Bites, Infectious Dandruff[5]

On this label, the statement "Kills Germs By Millions On Contact" immediately precedes the assertion "For General Oral Hygiene Bad Breath, Colds and resultant Sore Throats."[6] By placing these two statements in close proximity, respondent has conveyed the message that since Listerine can kill millions of germs, it can *cure*, prevent and ameliorate colds and sore throats.[7] It has also made this representation in numerous print advertisements which emphasized colds and prominently displayed the Listerine label.[8] However, we do not agree with the ALJ's additional finding that advertisements which simply state that "you can help with Listerine" or that "Listerine provides a fighting chance" or a "means of fighting off colds" or "fighting back" but which do not display the label prominently are reasonably subject to the construction that a cure is represented.

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[5] Respondent incorrectly contends that the FTC lacks jurisdiction over the labeling of foods, drugs and cosmetics. *Stanley Laboratories* v. *FTC*, 138 F.2d 388 (9th Cir. 1943); *Justin Haynes* [*Co.* v. *FTC*, 105 F.2d 988 (2d Cir. 1939), *cert. denied*, 308 U.S. 616 (1939); *Fresh Grown Preserve Corp.* v. *FTC*, 125 F.2d 917 (2d Cir. 1942); *Houbigant* v. *FTC*, 139 F.2d 1019 (2d Cir. 1944), *cert. denied*, 323 U.S. 763 (1944).

[6] CX 49 and 50 demonstrate minor variations on this theme. In December 1972 respondent altered the label to read:

LISTERINE
ANTISEPTIC
Kills Germs By Millions
On Contact

(Continued)

Respondent's television commercial entitled "School Bus" (CX 34F, 140F) also made the claim that Listerine cures colds. In that commercial a mother extolls the virtues of gargling with Listerine twice a day or at the first sign of a cold stating, *inter alia*, "I think we've cut down on colds, and those we do catch, don't seem to last as long." We find that the statement, "those we do catch, don't seem to last as long," conveys the message that Listerine cures colds.

III. *Are Respondent's Representations about Listerine True?*

Respondent admits that "the use of Listerine Antiseptic will not cure colds or sore throats and will not totally prevent colds or sore throats," but it asserts that use of the product "* * * as directed and accompanied by a regimen of proper diet and proper rest has been demonstrated to result in fewer colds, milder colds and milder symptoms thereof, and less severe colds and sore throats." [Answer, Paragraph 6.]

Complaint counsel called numerous medical and scientific experts to the stand. Each of these witnesses had impressive credentials and was well-qualified to testify in this proceeding. It is the consensus of these experts that viruses cause the common cold and that bacteria play very little part. Virus particles enter the body through the nose (or sometimes the eyes), attach to cells in the nasopharynx, ("the back of the nose where the nose turns downward into the pharynx"—Tr. 616)[9] and begin to multiply. The viral activity destroys cells, causing the

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For General Oral Hygiene, Bad Breath
Minor Cuts, Scratches,
Insect Bites, Infectious Dandruff
For Relief of Colds Symptoms
and Minor Sore Throats due to Colds

[7] Respondent claims that the ALJ reached the conclusion that "for * * * colds and resultant sore throats" is a cure claim by relying on a *per se* rule of construction that "for" means "cure." Respondent has misread the ALJ's opinion. Rather than posit a *per se* rule, the ALJ emphasized that he rested his opinion on his examination of the evidence in the record. We too rest our conclusion on an evaluation of the evidence.

[8] CX 19, CX 20, CX 23, CX 27. These ads appeared in national publications from 1968 to 1969. We note, in addition, that several advertisements which focus on Listerine's purported breath freshening ability depict a bottle of Listerine and the label thereon. CX 1, CX 7, CX 11, CX 13, CX 15, CX 28, CX 30. To the extent the label is readable in these advertisements, they make the same representation as does the label by itself.

[9] RX 14 illustrates the location of the nasopharynx.

various symptoms of the cold to occur. These symptoms can include stuffy nose, runny nose, postnasal drip, burning sensation in the nose, sore throat, sneezing, coughing, burning eyes, fever, general malaise, muscle ache and mild headache. (ID pp. 16-18 [pp.1417-1418 herein].)

It is also the consensus of the experts called by complaint counsel that Listerine has no efficacy in the prevention of colds and sore throats or in the amelioration of colds symptoms, including sore throats.[10] Several of these medical experts stated that gargling with Listerine could provide temporary relief from a sore throat. We agree with the ALJ that this temporary relief is not the "significant relief" promised by respondent's advertisements. More importantly, the record demonstrates Listerine would be no better than salt water or perhaps simply warm water.[11] Thus, as the ALJ found, any relief to a sore throat by gargling with Listerine is not peculiarly attributable to Listerine. (IDF 57.) It is clearly deceptive to attribute significant medical benefit to a purported medication when, in fact, the same benefit can be obtained from ordinary salt water or perhaps even warm water. *Cf. Stauffer Laboratories* v. *FTC*, 343 F.2d 75 (9th Cir. 1965.)

A. The Experts' Reasons for Concluding that Listerine Has No Efficacy in the Prevention of Colds and Sore Throats and in Amelioration of Cold Symptoms

In order to prevent a cold from developing or to lessen the severity of a cold, an efficacious substance must reach the affected cells of the body in therapeutic concentrations. Experts for complaint counsel concluded that gargling with Listerine would not meet these criteria for the following three reasons, each of which is a sufficient ground for concluding that Listerine lacks the claimed efficacy:

(1)

Listerine's ingredients, considered together, are present *in the bottle* in insufficient concentrations to have any utility in the prevention or treatment of a cold or sore throat when gargled (Tr. 712 and 1010-1111).[12]

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[10] *E.g.*, Tr. 837-838, 860, 550, 393, 480-81, 617-18, 903-907, 1057-58.

[11] Tr. 395, 446-47, 483, 566-69, 860, 862, 1011-12. It should be noted that Dr. Modell, a pharmacologist called by complaint counsel, testified that the lower the surface tension of a gargle the better it can remove accumulated debris in the throat (a source of irritation) Tr. 1042-43. The record shows that Listerine does have a lower surface tension than salt water. However, the record does *not* show that this lower surface tension translates into meaningfully greater relief than could be obtained by gargling with salt water.

[12] *See also* Tr. 1016, 1007 (methyl salicylate) Dr. Sorrell Schwartz, a pharmacologist, claimed that the ingredient methyl salicylate, if present in great enough amounts, would increase blood flow to the throat and that this would have a counter-soothing effect because a sore throat, in large part, is the result of too much blood flow. (Tr. 683.) Since the concentration of methyl salicylate in Listerine is insufficient to have *any* effect on sore throats, we need not determine

(*Continued*)

(2)

Listerine does not reach the critical areas of the body. As the ALJ aptly summarized:

> The mechanism of gargling makes it virtually impossible for the gargle to reach the nasal passages or the lower respiratory tract. When gargling, the palate closes off the nasal passage and nasopharynx and the glottis closes off the entrance to the lower respiratory tract. The gargle is confined to the mouth chamber. Hence, Listerine would not reach the site of infection or manifestation of symptoms in any medically significant concentration. Any vapors that might reach the site where the action is would not be in therapeutic concentration and, in any event, would soon be swept away. Thus, the gargling with Listerine would be ineffective in preventing or producing fewer cold infections or in relieving or reducing the severity of cold symptoms (Gwaltney 393, 448; Hornick 483; Seal 554-56, 571, 573; Proctor 616-19; Rammelkamp 787 (sic 782); Sanders 854; Parrott 904). IDF 69.[13]

(3)

Listerine would not penetrate the infected cells.[14] Again, as the ALJ correctly noted:

> Even if gargling with Listerine caused its ingredients to reach the nose and nasopharynx, they would not penetrate the cells where the action of the viruses would be taking place. Hence, Listerine would still be ineffective in this regard (Hornick 481-82; Parrott 904). If Listerine's ingredients were in a concentration strong enough to be effective and reached the infected cells in therapeutic strength and did and could penetrate the cells, the cells would be killed. This would be undesirable as it would destroy the protective covering of the lining of the nose and throat and so provide portals of entry for various bacteria (Hornick 482-83). IDF 70.

Even when asked to assume that Listerine can kill millions of germs on contact (*i.e.*, that Listerine has bactericidal properties), complaint counsel's experts did not alter their conclusions as to Listerine's lack of

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whether Dr. Schwartz was correct in asserting that a greater amount would be counter-soothing); Tr. 1008 (boric acid); Tr. 1009-1010, 687-688 (benzoic acid, used for the purpose of obtaining a certain level of acidity); Tr. 1010 (alcohol); Tr. 686, 712, 1009, 1025-26 (menthol); Tr. 678-79, 1008 (thymol); Tr. 688-691, 1010 (eucalyptol); IDF 74, 76, 77, 78, 79 and 80.

[13] *See also* CX 161B. Dr. John C. Krantz, a witness for respondent, wrote a textbook which lends support for this view. It states that the mechanical action of gargling will not deliver the gargled substance to the infected regions of the throat.

[14] Respondent claims that a test conducted by the FDA, RX 57, demonstrates that after gargling, some of the ingredients in Listerine are substantive with the membrane lining; that is, some binding between the oral cavity membrane and ingredients of Listerine occurred. In that test, each subject swished Listerine in his mouth for ten seconds, expectorated and rinsed his mouth twice with an alcohol solution. A substantially smaller percentage of Listerine was recovered in the second rinse than in the first. This finding led the ALJ to conclude that rather than demonstrate a binding effect the test results more probably "indicate that after fully expectorating the Listerine in the mouth, the first alcohol gargle got most of what remained so that the second gargle gathered a much smaller residual amount." IDF 152. The FDA did not offer the ALJ's interpretation as an alternate conclusion, and we see no reason to reject the FDA's conclusion. However, this test does not demonstrate that Listerine's *vapors* would have the same binding effect to the membrane in the nasopharynx as would Listerine in liquid form to the buccal membrane. More important, it does not demonstrate that Listerine would penetrate the tissue cells. In fact, respondent's own witness, Dr. Thomas McNamara, has testified that although Listerine may bind to the mucous membrane, it will not enter the tissue cells (Tr. 2343).

effectiveness. The following findings by the ALJ adequately summarize the views expressed by complaint counsel's witnesses:

> Bacteria play very little part in the common cold. Apart from viruses, cold type symptoms may be caused by the bacteria called Beta Hemolytic Streptococci or Group A Hemolytic Streptococci, more commonly referred to as a strep throat, and another organism somewhere in between a virus and a bacteria called microplasma [sic: mycoplasma] pneumonia. These agents may cause at most 5 to 10 percent of the occurrences of cold-like symptoms.
>
> These ailments, however, must be treated with specific medicinal agents. In the case of strep throat, failure to treat properly may result in rheumatic fever, valvular heart disease and kidney infections, which are very serious to the point of being life-threatening. Microplasma pneumonia is a lingering ailment if antibiotics are not used. It would be inappropriate to treat patients with strep throat or microplasma pneumonia with Listerine or with anything other than the specific medications that should be prescribed (Gwaltney 380-81, 384-85, 438, 453-54; [Hornick] 486, 493-94; Proctor 610; Rammelkamp 767-71, 799-800; Sanders 836-40, 870; Parrott 896-97, 900-01, 918-19; [*See also*] Knight 1925-26, 2037-40, 2048). IDF 51.
>
> Colds are not caused by bacteria. Bacteria in the oral cavity play no role in cold symptoms. The ability of Listerine to kill millions of germs on contact, therefore, is of no medical significance in the prevention, cure or treatment of colds or sore throats (Gwaltney 397, 453; Hornick 486, 488-89; Seal 551-53; Proctor 609, 616-18 [19 and 20]; Rammelkamp [775] 776-77; Sanders 836; Parrott 918-19; Kilbourne 1058; *see also* Knight 2048). IDF 58.
>
> Colds are sometimes followed by secondary infections caused by bacteria known as secondary invaders. Instances are sinusitis and otitis media (middle ear infection) where drainage from the sinuses or middle ear is impaired by the cold, and bacteria which are already in those sites get the opportunity, because of the lack of drainage, to cause trouble. Another secondary infection is peritonsillar cellulitis. The ingredients of Listerine, however, would not reach the resting places of the secondary invaders. Listerine could not reach the sinuses, the middle ear or the deep crypts of the tonsils or adenoids or other deep-seated places where such bacteria might be. Listerine, therefore, would be ineffective to prevent, cure or alleviate such secondary infections (Seal 552-54, 572; Proctor 614-15, 618, Rammelkamp 772-74, 811-12; Sanders 842, 844). IDF 71.
>
> While Listerine kills millions of bacteria in the mouth, it also leaves millions. It is impossible to sterilize any area of the mouth, let alone the entire mouth. There are significant numbers of bacteria in various tissues, tissue folds and crypts which Listerine can't reach. For example, there is more flora in the crevices of the teeth than on the roof of the mouth. The bacteria grow back quickly or the voids are quickly replaced by other bacteria. The use of Listerine has only a transient effect on the flora (Hornick 488-89, 523-24; Seal 554; Proctor 620; Sanders 847, 881-83). IDF 72.
>
> To the extent that Listerine may kill millions of bacteria in the mouth, it would do so only ahead of the soft palate. This would have nothing to do with the throat, nose or the posterior pharynx. Consequently, the killing of germs in the mouth would have nothing to do with preventing, curing or relieving colds or coughs or cold symptoms (Hornick 483; Seal 554; Rammelkamp 777). The bacteria in the normal flora of the mouth play no role in the causation of colds or in the symptoms of colds. Thus, killing some of those bacteria would have no effect on the prevention, cure or symptoms of colds or coughs (Sanders 846-47, 879-80; And See Findings 48, 51, 52, 58 and 62, *supra*). IDF 73.

B. Respondent's Experts

Respondent sought to refute the prima facie case made by complaint counsel's experts with a battery of ten expert witnesses and numerous studies, clinical as well as nonclinical. Although several of these witnesses offered no support for one or more efficacy claims or substantially qualified their views,[15] the general import of their testimony, taken as a whole, was that Listerine can reduce the number of colds one catches and ameliorate cold symptoms.

Nine of respondent's experts based their opinions to a substantial degree upon laboratory tests and/or clinical studies.[16] We have painstakingly reviewed each of the exhibits introduced for the purpose of establishing Listerine's effectiveness and conclude that they have little or no probative value for this proceeding. We have set forth at length in the Appendix our views as to each of these studies. Since these tests do not provide a sound basis for concluding that Listerine may have the claimed preventive or ameliorative powers, the persuasiveness of those witnesses who relied upon them is greatly diminished.

The tenth witness, Dr. John C. Krantz, Jr., apparently did not rely upon the exhibits in question. However, we accord his testimony little weight, because he was unaware of the quantities of Listerine which would reach the nasopharynx, (Tr. 1882) and his view that gargling with Listerine would be beneficial for a sore throat is contradicted by statements in his own textbook. (CX 161A and 161B, Tr. 1889-95.)[17]

In weighing the evidence we have taken into consideration the fact that the experts called by complaint counsel based their opinions on their general medical and pharmacological knowledge and, in some instances, on their experiences as clinicians. With the exception of Dr. Hornick, none of complaint counsel's witnesses examined the exhibits which respondent presented in support of its assertion that Listerine is efficacious. Failure to provide these witnesses with respondent's tests is inconsequential because, as we have set out in the Appendix, these tests lack probative value. Moreover, the experts called by complaint counsel are well versed in their fields, several having devoted their careers to the task of studying and treating respiratory diseases. If valid tests demonstrating Listerine's efficacy as a cold treatment had been conducted, we seriously doubt that such tests would have remained a secret to *all* of complaint counsel's medical and pharmacological experts.

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[15] Dr. Noller offered no opinion as to Listerine's efficacy. He merely asserted that an ingredient of Listerine, menthol, acts as a nasal decongestant. Dr. Shirkey asserted only that Listerine could ameliorate some cold symptoms, Tr. 2607, 2616, 2628, 2667-69, 2674. Dr. Carson limited his evaluation of Listerine's efficacy to relief for coughing and nasal congestion, Tr. 3032-34, *See also* Tr. 3057. Dr. Knight on cross examination, "* * * retreated to the position that there were threads of evidence upon which one could put together a theoretical basis for the efficacy of Listerine, but that there were also threads of evidence to the effect that Listerine was ineffective (Tr. 2045-48)." IDF 143. Dr. Lasagna concluded that "if you gargle with Listerine regularly there is a chance you will feel somewhat better when you have a cold," Tr. 4154. Dr. Sadusk would recommend Listerine for relief of cold symptoms, but was not in a position to recommend it for prevention of colds and would not recommend it as a cold cure, Tr. 3211-12.

[16] Haggie, IDF 128; Knight, IDF 143-44; Noller, IDF 145; McNamara, IDF 146; *See also* Tr. 2306; (Dr. McNamara may have relied additionally upon tests admitted into evidence solely for the purpose of "showing what Dr. McNamara relied upon as a responsible official of respondent for purposes of considering the scope of an order to cease and desist should one be issued." IDF 148); Ritchie, IDF 155; Shirkey, IDF 164; Carson, IDF 167 and 182; Sadusk, IDF 184; Lasagna, IDF 190.

[17] The ALJ noted that many of respondent's experts had financial ties to respondent. In view of the reasons we have expressed for placing little reliance on the testimony of respondent's witnesses, we need not consider the possible effect of their financial ties. Finally, in regard to Dr. Noller, although we agree with the ALJ that his testimony was not a model of clarity, we will attribute the ambiguities in his testimony solely to language difficulties.

This is not the first proceeding in which the Commission has had to choose between experts who based their views on their general medical and pharmacological knowledge and others who based their views at least in part on deficient studies. It is well established that the Commission has authority to rely on the testimony of the former. *E.g., J. E. Todd* v. *FTC*, 145 F.2d 858 (D.C. Cir. 1944); *Fulton* v. *FTC*, 130 F.2d 85 (9th Cir. 1942), *cert. denied*, 317 U.S. 679 (1942); *Aronberg* v. *FTC*, 132 F.2d 165 (7th Cir. 1942); *Justin Haynes & Co.* v. *FTC*, 105 F.2d 988 (2d Cir. 1939).

C. Consumer Satisfaction

Respondent claims that Listerine's cold-fighting ability is demonstrated by the fact that vast percentages of the population consider Listerine Antiseptic to be effective for colds and sore throats "because a consumer's image of a product and his propensity to purchase it repeatedly is substantially dependent upon his experience with it." (RB 74-75, RRB 20.) The record does show that a consumer's "experience" with a product affects his image of the product and his propensity to purchase it. (Tr. 1199-1200, 1673, 3389-90, 3402-03, 3436-38, 3455-56.) The record also demonstrates that many consumers think Listerine is effective for colds and sore throats. (*Infra*, Sec. V A2.) But this evidence does not, as respondent contends, prove that Listerine works. The flaw in respondent's reasoning is that a consumer may *perceive* a product to be effective when, in reality, it has no efficacy. In short, he may repeatedly purchase the product out of ignorance. A cold is a self-limiting disease, and therefore a cold sufferer who takes Listerine may wrongly attribute the termination of the cold episode to his gargling with Listerine. (Tr. 2039.) Clearly, unless the patient can perform well-controlled clinical tests, he is not in a position to know whether his improvement was attributable to the medication.

In addition, the cold-sufferer who takes Listerine is likely to experience the placebo effect, the phenomenon in which the patient who takes a medication feels better because he thinks he should feel better even though the product has no genuine therapeutic value.

(Appendix at 6A.) The Commission cannot accept as proof of a product's efficacy a psychological reaction stemming from a belief which, to a substantial degree, was caused by respondent's deceptions. (*Infra*, Sec. V A2.)

Since there may be a divergence between what the user *thinks* the product will do for him and what the product actually does (or does not do), evidence of consumer beliefs has little probative value for determining whether Listerine is effective for colds or sore throats.

In support of its contention that consumer satisfaction constitutes persuasive evidence of product efficacy, respondent cites *Evis Mfg. Co.* v. *FTC*, 287 F.2d 831 (9th Cir. 1961), *cert. denied*, 368 U.S. 824 (1961). That case does not stand for so broad a rule. In *Evis* the court merely held that tests conducted by experts who failed to follow the manufacturer's instructions did not constitute substantial evidence of the challenged product's lack of efficacy, and that the Commission erred in failing to consider testimony of user witnesses (many of whom were experts). The court did not hold that evidence of consumer satisfaction is persuasive of a product's efficacy, but merely that the Commission must consider such testimony. In the case at hand we have taken into account the fact that survey evidence shows that many consumers consider Listerine to be effective for colds and sore throats, and for the reasons discussed above, we conclude that this evidence does not demonstrate that Listerine has any efficacy in the prevention or treatment of colds or sore throats.

To summarize, after carefully reviewing the testimony of the experts called by both sides and of the studies admitted into evidence in support of respondent's efficacy claims, we must conclude that the preponderance of the evidence[18] demonstrates that, contrary to respondent's advertising claims, the use of Listerine, as directed, will

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[18] This Commission has consistently used a preponderance of the evidence test in evaluating the truthfulness of product claims. Respondent asserts that in evaluating a drug's effectiveness we must follow, instead, the "substantial evidence" standard set forth in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §355(d), which the Secretary of Health, Education and Welfare must apply when he considers a new drug application. We cannot agree. Of course, we would take into account an evaluation by the Secretary that substantial evidence supported the claimed efficacy, but we find no indication in either the Federal Food, Drug and Cosmetic Act or our own Act that Congress intended that we automatically defer to the Secretary's determinations.

However, the question of which standard to apply is not crucial to the outcome of this proceeding because respondent has not met even the more lenient standard prescribed by §355(d). That section requires that an application for a new drug be denied if "there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof." Sec. 355(d) defines "substantial evidence" as: "evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling or proposed labeling thereof."

The FDA's relevant regulations specify that "essentials of adequate and well-controlled clinical investigations" include the necessity "to minimize bias on the part of the subject and the observer." Sec. 314.111(a)(5)(ii)(a)(3). The Supreme Court has noted that "[L]ower courts have upheld the validity of these regulations, and it is not disputed that

(*Continued*)

not prevent or cure colds or sore throats or ameliorate cold symptoms. Accordingly, respondent has violated the Federal Trade Commission Act.

IV. *The Prior Proceeding*

In 1940 the Commission issued a complaint challenging cold and sore throat claims for Listerine which it later dismissed "* * * without prejudice to the right of the Commission to institute further proceedings should future facts so warrant." 38 F.T.C. 730 (1944). Respondent argues that the complaint in the present proceeding must be dismissed because complaint counsel have not come forward with "future facts." Respondent has misconstrued the 1944 order. In previously expressing our position on this question, *Warner-Lambert Company*, 82 F.T.C. 749, 752 (1973), we stated:

> The future facts which would warrant a new proceeding are those upon which the Commission's decision to issue a complaint are based and, as we have previously held, respondent is precluded from inquiring into our mental processes leading up to that decision. *In the Matter of the Seeburg Corporation*, 70 FTC 1818.

Respondent also contends that the Commission relied upon the Reddish Study in dismissing the 1944 complaint, and therefore the ALJ's findings relating to the deficiencies in the Reddish Study "constitute an impermissable [sic] relitigation of matters long ago settled." (RB 67.) Although in his separate statement Chairman Freer said that the Reddish tests

> * * * afford some basis for the respondent's conclusion that the use of Listerine in practice actually mitigates or shortens colds and their complications,

the Commission's order belies respondent's assertion that the validity of the Reddish tests was settled in the prior action. Had it been of the

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they express well-established principles of scientific investigation." *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 619 (1973). As is discussed in the Appendix, respondent did not take adequate precautions to minimize bias on the part of either the subjects or the investigators in its clinical tests of Listerine. Thus, respondent has not satisfied even the substantial evidence standard.

Respondent also contends that (RB at 39): "* * * in the case of old (pre-1938), well-established drugs such as Listerine Antiseptic, Congress further concluded that their history of consumer acceptance was in itself substantial evidence of efficacy and established for those drugs a presumption of efficacy and an exemption from the preclearance procedures established in the 1962 Drug Amendments." 21 U.S.C. §321(p); *see*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, *supra* at 614.

Neither §321(p) nor the cited case suggest that a "history of consumer acceptance was in itself substantial evidence of efficacy" or that old drugs are presumed to be efficacious. On the contrary, Congress viewed this grandfather clause merely as a "transitional" provision for implementing the 1962 Drug Industry Act (S. Rep. No. 1744, 87th Cong., 2nd Sess., Part II at 7-8 1962). FDA was given the statutory mandate "to review all marketed drugs for their therapeutic efficacy, whether or not previously approved * * *" *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 614 and, as the Supreme Court has noted, "[i]n May 1972 FDA adopted a procedure for determining whether particular OTC products, not covered by NDA's are safe products, not ineffective, and not misbranded." *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 650 (1973). Thus, no presumption of efficacy arises from the fact that Listerine has been on the market since 1879.

view that the Reddish tests proved that Listerine was effective for the treatment of colds, the Commission presumably would have dismissed the complaint with prejudice. Instead, it dismissed the complaint "without prejudice to the right of the Commission to institute further proceedings should future facts so warrant."[19] The dismissal of a Federal Trade Commission action "without prejudice" does not work an estoppel to a future determination of the merits of that action. *Hastings Mfg. Co.* v. *FTC*, 153 F.2d 253 (6th Cir. 1946), *cert. denied*, 328 U.S. 853 (1946).

V. *The Remedy*

A. Corrective Advertising

The ALJ imposed on respondent the duty to engage in corrective advertising. Specifically, for two years respondent shall not disseminate any advertisement for Listerine unless the advertisement clearly and conspicuously states: Contrary to prior advertising of Listerine, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold symptoms or sore throats.

1. Authority to Issue a Corrective Advertising Order

The Commission has previously noted its authority to issue corrective advertising orders.[20] It also has ordered affirmative relief to dispel the lingering effects of misrepresentations[21] and has accepted numerous consent orders which require corrective advertising.[22] In concluding that the Commission's statutory mandate encompasses the

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[19] In explaining his reason for so doing Chairman Freer said:

> In my opinion the issues raised by paragraphs 3, 4 and 5 of the complaint involve in their determination the adoption of one of two opposing medical or scientific opinions in respect to which our decision would settle only the legal right of the respondent to continue to make the challenged representations and not the underlying controversy. Should we so resolve those issues (both as to interpretations of the advertisements and as to the medical or scientific opinions) as to require an order to cease and desist, the respondent can, and no doubt will, appeal. In that appeal, however, the door will be closed to any weighing of the evidence by the court, since "the findings of the Commission as to the facts, if supported by evidence, shall be conclusive." Should we, on the other hand, so resolve the several issues of interpretation of language and of medical or scientific opinion in such a manner as to dictate an outright dismissal of the complaint, the respondent might, and probably would, raise the defense of *res adjudicata* to any proceeding which the Government might decide to institute at some future time when and if the medical profession learns more about and reaches a greater degree of unanimity concerning the cause of and cure for dandruff, bad breath and colds or sore throats.
>
> Hence, while not unmindful of the forcefulness of the arguments on the one hand for an order to cease and desist and on the other for outright dismissal, I feel that a *dismissal without prejudice* is warranted by the probability (almost certainty) that neither an order to cease and desist nor an outright dismissal would settle with finality or help greatly in the final settlement of the *underlying medical and scientific controversies*, although either disposition would be interpreted as having settled these matters once and for all. 38 F.T.C. at 741-42.

[20] *Firestone Tire & Rubber Company*, 81 F.T.C. 398, 464-74 (1972) *aff'd.* 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *ITT Continental Baking Company, Inc.*, Dkt. 8860 (Oct. 19, 1973 [83 F.T.C. 865]) at 31-32, appeal docketed No. 75-4141, 2d Cir., July 11, 1975; *Campbell Soup Company, et al.*, 77 F.T.C. 664, 668 (1970).

[21] *Travel King, Inc.*, Dkt. No. 8949 (Sept. 30, 1975 [86 F.T.C. 715]).

[22] Matsushita Electric of Hawaii, Inc., 78 F.T.C. 353 (1971); *Sugar Information, Inc.*, 81 F.T.C. 711 (1972); *ITT Continental Baking Co., Inc.*, 79 F.T.C. 248 (1971); *Ocean Spray Cranberries, Inc.*, 80 F.T.C. 975 (1972); *Shangri-La*

(*Continued*)

authority to order corrective advertising, we have been mindful of the wide latitude courts have afforded the Commission in fashioning appropriate relief.[23] Illustrative of this wide latitude are orders requiring divestiture, *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1 (7th Cir. 1971); ordering compulsory licensing of a patent on a reasonable royalty basis, *Charles Pfizer & Co., Inc.* v. *FTC*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969); limiting the purchases of certain products between respondents, *Luria Bros. & Co., Inc.* v. *FTC*, 389 F.2d 847 (3d Cir. 1968), *cert. denied*, 393 U.S. 829 (1968); and requiring affirmative disclosures in advertisements and on products, *J. B. Williams Company* v. *FTC*, 381 F.2d 884 (6th Cir. 1967), *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18 (5th Cir., 1960), *Ward Laboratories, Inc.* v. *FTC*, 276 F.2d 952 (2nd Cir. 1960), *cert. denied*, 364 U.S. 827 (1960), *Waltham Precision Instrument Co.* v. *FTC*, 327 F.2d 427 (7th Cir. 1964), *cert. denied*, 377 U.S. 992 (1964).

Simply stated, the common thread linking these cases is the principle that the Commission has authority to order the relief necessary to adequately protect the public from the effects of a law violation. Thus, if a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease

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Industries 81 F.T.C. 596 (1972); *Pay Less Drug Stores Northwest, Inc.* 82 F.T.C. 1473 (1973); *Boise Tire Co.*, C-2425 (July 16, 1973); *Lens Craft Research and Development Co. et al.*, D. 8950 (Sept. 4, 1974[84 F.T.C. 355]); *Wasem's Inc.*, C-2524 (July 23, 1974[84 F.T.C. 209]).

[23] We said in *Firestone*, 81 F.T.C. at 467-68:

> The courts have repeatedly recognized that to deal with the ever expanding scope of unfair and deceptive practices, the Commission must be permitted wide latitude in fashioning effective relief, In *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612-13 (1946) the Court stated:
>
> > The Commission is the expert body to determine what remedy is necessary to eliminate the unfair and deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.
>
> Again in *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952) the Supreme Court reiterated this view:
>
> > Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. (Footnote omitted.)
>
> The court pointed out that if the Commission is to carry out the objectives envisioned by Congress "it cannot be required to confine its road block to the narrow lane the transgressor has traveled," but must be able "to close all roads to the prohibited goal." *Ruberoid, supra* at 473.
>
> Such wide latitude in determining remedy has been deemed necessary so that the Commission can effectively carry out the statutory policy of the Federal Trade Commission Act to protect consumers and maintain competitive vigor in the marketplace. As the Ninth Circuit stated in *Carter Products, Inc.* v. *FTC*, 268 F.2d 461, 498 (9th Cir. 1959):
>
> > Shaping a remedy is essentially an administrative function. Congress has entrusted the Commission with the responsibility of selecting *the means* of achieving a statutory policy—the relation of remedy to policy is peculiarly a matter for administrative competence.
>
> The Seventh Circuit recently reflected this same view in *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1,24 (7th Cir. 1971):
>
> > The Commission must be accorded latitude in forming its orders for "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413, 78 S. Ct. 377, 379, 2 L. Ed. 2d 370 (1958)."

disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.

Respondent claims that *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974), rejected the proposition set forth in *Firestone* that the Commission has authority to terminate continuing injury to the public.[24] Respondent has misread *Heater*. In that case the court simply held that the Commission lacked authority to order a respondent to refund to customers monies obtained from them through deceptive practices. Neither the holding in *Heater* nor the court's rationale support respondent's assertion that the Commission lacks authority to order corrective advertising. In fact, the *Heater* court explicitly distinguished the Commission's order in that case from a corrective advertising order:

> Our holding denies retroactive impact to a Commission decision, at least insofar as private rights and liabilities are involved * * *
>
> We recognize that divestiture and corrective advertising orders support the Commission's position that it has power, in order to remedy the continuing effects of violations of the Act, to order acts imposing economic costs properly attributed to conduct occurring before the conduct is declared illegal. Moreover, we recognize that there is no economic difference in the impact of those orders and a restitution order—in each case the offender loses the benefits of money expended in reliance on the legality of conduct later found illegal. Nevertheless, the two cases must be treated differently because Congress, out of reasonable fair notice consideration, chose to leave the cure of private injuries caused by violations of the Act to whatever common-law remedies existed. 503 F.2d 321, 324-25 n. 13.

We thus conclude that *Heater* is no authority for the contention that the Commission lacks authority to issue a corrective advertising order to dispel the continuing effects which a deceptive advertisement has on the consuming public.

Moreover, the continued sale of a product under false pretenses is itself a violation of the FTC Act,[25] which, in the case of lingering false beliefs created by discontinued advertisements, can be remedied only by dispelling the false belief.

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[24] In considering the Commission's authority to issue an order designed to terminate the continuing effects of a deceptive advertisement, the Commission said in *Firestone:*

> ANA and respondent contend that a corrective advertising order is retrospective and therefore unlawful because it seeks to dissipate the effects of illegal conduct. In our view, however, such an order is quite obviously not retrospective if its purpose and effect is to terminate *continuing* injury to the public. This continuing injury may be in the form of lingering effects which a misrepresentation may have on consumers' minds or in the form of a lessening of competitive vigor in the marketplace due to the deceptive practices. Under such circumstances, the appropriate relief is that which will terminate the continuing injury to the public. 81 F.T.C. at 470.

[25] *J. B. Williams Company* v. *FTC*, 381 F.2d 884 (6th Cir. 1967); *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18 (5th Cir. 1960); *Ward Laboratories, Inc.* v. *FTC*, 276 F.2d 952 (2nd Cir. 1960); *Waltham Precision Instrument Co.* v. *FTC*, 327 F.2d 427 (7th Cir. 1964), *cert. denied*, 377 U.S. 992 (1964).

2. Applying the Corrective Advertising Standard to the Case at Hand

The record demonstrates that respondent's deceptive advertisements have created false beliefs which are likely to continue to exist and influence consumer decisions to purchase Listerine.

Consumer Beliefs. Market research reports, known as "Product Q" reports,[26] which were commissioned by respondent over a seven-year period at a cost of over $100,000, demonstrate that the majority of those surveyed believe that Listerine is effective for colds and sore throats. Specifically, the percentage of those persons surveyed who rated Listerine as "one of the best" in the category "effective for colds and sore throats" rose from 43 percent in 1963 to 59 percent in 1971, averaging 53.8 percent for the entire period. This figure includes the entire population surveyed, Listerine users as well as nonusers. 53.8 percent is itself a substantial portion of the survey population, but that figure probably understates the percentage who believes Listerine has some effect on colds and sore throats because it includes only those who believe that Listerine is "one of the best" mouthwashes for that characteristic. It does not include responders who rated Listerine as "very good," "good" or "fair" for the category "effective for colds and sore throats." (IDF 236.)

Although the data for the precoded category "effective for colds and sore throats" was not refined into more specific beliefs, the ALJ concluded that this category encompasses prevention, amelioration and cure claims. (IDF 230.) On the one hand respondent takes issue with the ALJ's interpretation, but on the other hand, it appears to argue, in support of its amelioration and partial prevention claims, that consumers perceive Listerine to be an effective remedy. (RB 74-75.) More important, the record adequately supports the conclusion that "effective for colds and sore throats" includes prevention and amelioration beliefs. (Tr. 1553.) However, on the basis of the record before it, the Commission is unconvinced as to cure beliefs. We thus find that a substantial portion of the consumer public holds prevention and amelioration beliefs but we can draw no conclusion about cure beliefs.

Effect of Listerine Advertisements on Consumer Beliefs. Respondent has advertised Listerine to consumers as a cold remedy since 1921. Not only have Listerine packages and labels contained cold efficacy messages, but also respondent has spent large sums to advertise Listerine on television and in print media as effective for colds and sore throats. (IDF 219-220.) Common sense indicates that this extensive cold efficacy advertising campaign (including labels and packages) has contributed substantially to Listerine cold and sore throat efficacy beliefs and that current advertising performs the dual functions of maintaining beliefs created by prior advertisements and creating beliefs in consumers entering the market.

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[26] For discussion of the nature of Product Q reports see IDF 222-227.

Record evidence supports what common sense suggests:

(1) Dr. Peter Rossi, a witness for complaint counsel, testified that (Tr. 1451):

> Indeed, the evidence here is consistent with the idea that it is the advertising of Listerine as registered in the memories of consumers which produces the distinctive patterning of the brand image for that brand; and, indeed, the advertising for Micrin does the same thing for Micrin, but certainly it is clear that the advertising for Listerine does its job for that brand.

(2) Dr. Alvin A. Achenbaum, a witness for respondent, stated (Tr. 3439-40):

> * * * insofar as the users of a brand are concerned that advertising for a well-established product like Listerine — that probably the advertising has the effect of reminding people of information or their belief or about the brand so that at the time at which they make a purchase — that hopefully that brand will come to their mind as opposed to perhaps some other brand which is out there trying to advertise and have some effect upon their point of view as well. So I would say that, in that sense in the life cycle, it has a reminding effect.
>
> Now, there are always new people coming into the market. I mean, people grow up and form households who are not users, and, to some degree, the advertising could affect their belief structure.

See also testimony of Dr. Frank Bass. (Tr. 1607-12, 1617-21.)

(3) The benefit of spending vast sums on cold efficacy advertising has not escaped respondent's notice. A Product Q report commissioned by respondent stated:

> Listerine continues to be first on most measures and it continues to grow while Scope remains a distant second; its performance relatively static. However, despite this one sided picture, comparable numbers of respondents claim to recall "a lot" of advertising for each brand. With this dimension constant and Listerine well ahead of Scope on everything else, it would appear that *the quality of Listerine's advertising and/or its media plan are making a vital contribution to the brand's success.*
>
> *Also, there is a very close relationship between Listerine advertising registration and the brand's image.* (Emphasis added) CX 65E-F.

Moreover, a letter from respondent to the J. Walter Thompson Co. stated that a cold efficacy commercial, "* * * helped generate all-time high brand shares." (CX 109A.)

(4) Apparently, Listerine's three leading competitors were not advertised as colds remedies. (Tr. 1595, RB 85.) The Product Q data reveals that over 60 percent of responders in 1967 and 1968 believed

Listerine was effective for colds and sore throats, whereas fewer than 20 percent attributed that quality to Listerine's three leading competitors.[27] (CX 80Z-11.) Although this empirical data showing a three-fold differential in belief levels does not prove that Listerine cold efficacy advertising substantially affected consumer beliefs, it is consistent with the aforesaid views expressed by experts and respondent.

Respondent argues that consumer beliefs result from actual experience with the product rather than from the advertising. We have previously concluded that Listerine has no efficacy for colds and sore throats. We further noted that a cold is a self-limiting malady, and therefore a cold sufferer may wrongly attribute the termination of the cold episode to Listerine. In fact, the only source of consumer "satisfaction" is the placebo effect. Although the placebo effect probably causes some Listerine users to think the mouthwash works, the record does not establish it as the exclusive or even major source of the belief.

Respondent further incorrectly contends that a corrective advertising order cannot properly be issued unless the Commission finds that advertising was the sole source of the belief. We have previously ordered affirmative relief to correct a false impression created merely "in part through respondent's own efforts." *Waltham Instrument Co.*, 61 F.T.C. 1027, 1049 (1962) *aff'd.* 327 F.2d 427 (7th Cir. 1964), *cert. denied*, 377 U.S. 992 (1964). To the extent that dicta in *Sun Oil*, Dkt. 8889 (Aug. 19, 1974 [84 F.T.C. 247]), an unappealed initial decision adopted by the Commission, could be construed as supporting a sole-source standard, that opinion does not reflect the views of this Commission. The Commission's mandate is to eliminate the effects of false advertising, and a sole-source standard would effectively bury a remedy which is vital to the achievement of that goal.

Persistence of the False Beliefs. The record demonstrates that long after Listerine cold efficacy advertising ceased, a substantial proportion of the public would continue to believe in Listerine's efficacy for the treatment and prevention of colds and sore throats. Dr. Bass testified that cold efficacy belief levels would continue at the 1971 rate (59 percent) for about two years after colds advertising ceased and would remain high even *after* five years. (Tr. 1560-61, 1611.) It is Dr. Bass' view that consumer beliefs tend to continue once they are created and that after a belief is created it lasts much longer than the memory of the copy points of the ads that created the belief. (Tr. 1556-57.) Dr.

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[27] In commenting on the low scores of Listerine's competitors, Dr. Bass said "and I would expect that there would be levels of belief for these other brands of about the level that we observe in the absence of advertising." Tr. 1595. He suggested that the low percentages which the other mouthwashes registered in the absence of colds advertising could have resulted from color, image of antiseptic properties and perhaps word of mouth. Tr. 1596.

Rossi concluded that the stability of Listerine's image is quite impressive, and that in the absence of colds advertising consumer beliefs would decline at *no greater* a rate than 5 percent a year. (Tr. 1433, 1469-72.) At that maximum rate of decline, belief levels would still register over 30 percent ten years after the advertising ceased. Moreover, the Product Q data reveals that consumer beliefs about Listerine's effectiveness against colds and sore throats were practically the same during the portions of the year when respondent engaged in colds advertising as during the rest of the year. (CX 159D.)

As was previously discussed (*supra*, Part II), the record shows that respondent's advertisements and labels made the challenged claims at least as late as 1972. Thus, we conclude that a substantial proportion of the consuming public will retain the beliefs in issue well into the 1980's.

Materiality of the False Beliefs. The ALJ found that "[t]he belief that Listerine is effective for colds and sore throats is a determining factor in a significant number of consumers' decisions to purchase Listerine." (IDF 244(a).) The testimony of Dr. Rossi supports this conclusion (Tr. 1455, 1460) as does empirical evidence. According to Product Q data, 37.5 percent of those interviewed over a seven-year period said that "effective for colds and sore throats" was "extremely important" in their selection of a mouthwash. (CX 159A.) This tabulation did *not* include those for whom "effective for colds and sore throats," was "very important," "somewhat important," or "fairly important." Thus, although 37.5 percent is in itself substantial, it probably does not fully reflect the extent to which cold efficacy beliefs affect purchasing decisions.

3. The Nature of the Corrective Advertising Order

In view of the foregoing findings that respondent's advertisements substantially contributed to the development and maintenance of the belief that Listerine is effective for the prevention and treatment of colds and sore throats, that a substantial portion of the population will continue to hold this belief well into the 1980's and that this belief plays a material role in purchasing decisions (thereby injuring both consumers and competition), we conclude that an order merely requiring cessation of the deceptive advertising would not afford the public adequate protection. The lingering false belief must be dispelled, a task which requires corrective advertising.[28]

The ALJ's order, which requires respondent to include a corrective message in all advertising for two years, may not accomplish this task.

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[28] The ALJ justified the corrective advertising order on the additional ground that future representations of Listerine as a germ killer would automatically remind the public of false colds claims (IDF 248). We need not consider at this time this additional rationale.

If respondent chose not to advertise during the two-year period (or to do a miniscule amount of advertising) the corrective message would not adequately reach the public and the false beliefs would live on. To avert this possibility we shall order respondent to include the corrective message[29] in all Listerine advertising until it has expended an amount on such advertising equal to its average annual Listerine advertising budget for the ten-year period of April 1962 to March 1972 (as set forth in CX 44). A corrective advertising campaign of this scope should adequately dispel the lingering beliefs.

In this proceeding we cannot determine in advance with computer-like precision the minimum amount of corrective advertising which will dispel the otherwise continuing beliefs at issue. However, in ordering the relief which the public interest requires, it is the duty of a tribunal to exercise its best judgment to predict the relief which is essential. As the Supreme Court has recognized, the fashioning of appropriate affirmative relief necessarily "* * * involves predictions and assumptions concerning future economic and business events." *Ford Motor Company* v. *United States*, 405 U.S. 562, 578, (1972).[30] We see no reason why different considerations should apply when drafting a corrective advertising order.

4. Other Objections to a Corrective Advertising Order

Respondent contends that a corrective advertising order would raise First Amendment questions. However, it has not disputed the commercial nature of its advertisements. As we noted in *Firestone*,[31] courts have repeatedly held that regulation of false commercial advertising is constitutional. In *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 389 (1973), the Supreme Court articulated a balancing test which must be applied to the regulation of truthful commercial speech:

> Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

Assuming that the same considerations apply when mandating commercial speech as when proscribing it, we conclude that the corrective advertising order in this case is a valid limitation on economic activity because it is designed to dispel the continuing effects of illegal commercial activity.[32]

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[29] Since the record does not demonstrate that consumers hold cure beliefs, we have modified the message to read: Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity.

[30] The Court upheld a lower court's determination that to restore and encourage competition, Ford must, *inter alia*, be enjoined from manufacturing spark plugs for ten years, be ordered for five years to buy one half its spark plug requirements from the divested plant under the "Autolite" name and refrain from using its own name on spark plugs during that five-year period, and be ordered for ten years to sell to its dealers at prices not less than the minimum suggested jobbers' selling price.

[31] 81 F.T.C. at 471-72.

Respondent also claims that a corrective advertising order is a punitive measure because it may adversely affect the product's consumer franchise as a breath freshener. The corrective advertising order that we are issuing is intended solely to dissipate the effects of respondent's deceptive representations. In dispelling these beliefs, respondent may impair a portion of its breath-freshener franchise, but the fact that the remedy may have some harsh consequences does not render it punitive. As the Commission said in *Firestone*, 81 F.T.C. at 469:

> The fact that the remedy may be deemed by the court to have severe consequences to the respondent does not in itself render the order punitive if the order is also deemed a "needed public precaution." *All-State Industries of North Carolina, Inc.* v. *FTC*, 423 F.2d 423, 425 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970).

B. Objections to Part II of the ALJ's Order

Part II of the ALJ's order requires respondent to cease representing that Listerine *or any other mouthwash product* is effective for colds. Respondent objects to the inclusion of other mouthwashes on the ground that the complaint challenges solely the efficacy of Listerine.

Respondent has spent a considerable sum advertising Listerine as a cold remedy for decades. Presumably, it found this representation to be profitable. Respondent thus has an incentive to formulate a new mouthwash which it could advertise as a cold remedy. In view of our conclusion that the act of gargling does not deliver a mouthwash to the critical areas of the body, we question whether any mouthwash would be effective for colds or sore throats. Thus, by limiting the order to Listerine we would set the stage for a replay of the instant proceeding, the only difference being the name of the mouthwash. To avert this prospect we must, in the exercise of our fencing-in authority, include all mouthwashes within the coverage of Part II of the order. *See FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965).

Of course, if respondent were to develop a mouthwash which was effective for colds or sore throats, it could petition to modify the order, as provided by Section 3.72 of the Commission's rules.

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[32] *See also Bigelow* v. *Virginia*, 95 S. Ct. 2222, 2235 (1975) where the Court again noted the distinction between advertising related to activities the state may legitimately regulate (including fraudulent or deceptive advertising (2235-36)) and advertising not so related.

APPENDIX

The ALJ determined that the following exhibits do not support respondent's efficacy claims. After a thorough review of each exhibit, we concur in the ALJ's conclusion that they lack probative value, but as explained below, in some instances we have a different reason for finding that a particular exhibit has no value.

1. *RX 40-43:* We agree with IDF 134-142 (the last citation to Dr. Knight's testimony in IDF 142 should be "Knight 1982").

2. *RX 44:* We agree with IDF 198.

3. *RX 46:* As described in IDF 145, the procedures used in the tests discussed in RX 46 render those tests useless in this proceeding.

4. *RX 47:* This is a report of a test in which the drug was administered to test rabbits. In addition to the reasons advanced by the ALJ for according little value to this test (IDF 174-176) we emphasize the following:

Dr. Carson stated that studies in animals are simply preliminary studies and that clinical tests are necessary to draw conclusions about the effect of a drug in man (Tr. 3576). Moreover, the probative value of the test is further reduced by the dissimilarity between the method by which the drug was administered to the rabbits and the method by which Listerine is administered to humans. Furthermore, even assuming *arguendo* that this test demonstrated that ingredients of Listerine can have a decongestant effect, Dr. Carson did not satisfactorily establish that an effective dose of these ingredients would reach the critical areas of the respiratory tract (Tr. 3572-73).

5. *RX 48:* The systemic administration of the drug renders the test valueless. We note, however, that since we place no value in RX 47, we need not reach the ALJ's conclusion that RX 47 contradicts RX 48. (IDF 178.)

6. *RX 50:* We agree with IDF 173.

7. *RX 53:* We agree with IDF 149.

8. *RX 55:* We agree with IDF 150.

9. *RX 56:* This was an in vitro test conducted in hamster cheek tissue. Assuming *arguendo* that hamster cheek tissue closely resembles tissues in the human nasopharynx, this test has little value because, as the ALJ noted, the amount of ingredients retained was not quantified. (IDF 151.)

10. *RX 57:* See opinion at 15 [pp. 1494-1495 herein].

11. *RX 60, 61, 63 and 64:* We agree with IDF 153.

12. *RX 65-68:* We agree with the ALJ that the tests discussed in these exhibits deserve little weight in this proceeding. RX 67, a document to which Dr. Ritchie, the coauthor fully subscribes (Tr. 2404)

stated, in essence, that the results of the tests described in RX 65, 66, 67 and 68 are not statistically significant:

> Severe colds are usually those in which the viral stage of about three days duration is succeeded by a more prolonged bacterial stage, believed to be due to the multiplication of the native nasopharyngeal bacteria. Such colds can be prevented by a six-months course of autogenous bacterial vaccines given beforehand, or they can be aborted and rendered innocuous by early antibiotic treatment. The evidence submitted, although strong, does not reach statistical significance.

These tests, therefore, have little probative value. Respondent argues that the above reference to the statistical insignificance of the tests does not encompass so-called "subsequent tests" described in RX 66. However, RX 66 was printed in 1958. RX 67, which was published in 1969 (Tr. 2389), was offered into evidence as a summary of Ritchie's views over the period 1958-1969. Thus, we cannot see how the test discussed in RX 66 could be regarded as a "subsequent" test which Dr. Ritchie somehow failed to consider in making the assessment in RX 67 that "the evidence * * * does not reach statistical significance."

We also accord these tests little weight because the record does not show that the results obtained with a bacteriostatic substance (which purportedly maintains the bacteria population at a reduced level) carry over to a bactericidal substance, particularly since bactericides do not prevent the bacteria from growing back to their previous strength or greater. *See* IDF 154.

13. *RX 69-71:* We agree with ALJ at IDF 199-201.

14. *RX 73:* The ALJ's finding (IDF 205) that the machine did not measure the quantities of any ingredient is sufficient reason to accord this test little weight, and therefore, we need not reach other reasons he offered for finding the exhibit valueless.

15. *RX 75:* We agree with IDF 207-209. In IDF 208 the ALJ noted the prospect that the panelists may have exercised bias in favor of Listerine. Although the panelists may have been biased, we need not reach this issue because the test has little probative value for the other reasons discussed at IDF 207-209.

16. *RX 97:* We agree with IDF 168-172.

17. *RX 108:* In 1935, Dr. Oscar B. Hunter performed tests which he claimed showed that gargling is an adequate mechanism for bathing the crypts of the tonsils with Listerine. *See* RX 108 p-r, z-z26. However, he also testified that Listerine would not get into *all* of the crevices of the mouth, RX 108 z-96. We have resolved this apparent inconsistency in his testimony in favor of his assertion that Listerine would not reach all the crevices because this is the view which is consistent with the testimony of experts for both sides in this proceeding, *e.g.*, Seal Tr. 554; McNamara, Tr. 2342.

Clinical Studies of Listerine

Respondent contends that two clinical studies, the St. Barnabas and Reddish studies, demonstrate the efficacy of Listerine for colds and sore throats. After a careful review, we must conclude that the design and execution of these tests heavily biases the results in favor of Listerine, and therefore, the results cannot support respondent's efficacy claim.

1. *The St. Barnabas Test*

Students in an elementary school and a high school were randomly selected to participate in this study which spanned four years (the high school was dropped at the end of the third year). During the first two years, the participating students were assigned either to the treatment group, which gargled with Listerine twice a day, or to a control group which used no mouthwash at all. (RX 81, Tr. 2789-90.) During the last two years the control group gargled with water colored to resemble Listerine's amber hue, (Baron Tr. 2746-47). Since it did not have Listerine's taste or odor, the ALJ concluded that this amber-colored water was not a true placebo, IDF 87, and that the absence of a true placebo biased the test results in favor of the tested agent, Listerine. We agree with this conclusion. As the ALJ noted:

> People who are given medication for an ailment frequently feel better because they think they should, even though the product has no therapeutic value. There are very few people who are not susceptible to this phenomenon (Seal 562, 566; Proctor 659; Rammelkamp 785). As Dr. Proctor testified, "Even with severe pain you can substitute sugar for morphine and about 30 percent of the people will be relieved of their pain." (Tr. 659.) And as Dr. Rammelkamp explained, "[Y]ou see paralysis even stopped where you just give an injection of salt water." (Tr. 783.) This is known as the placebo effect. The placebo effect is always present when medication is taken (Shirkey 2635). (IDF 81.)

In order to determine whether the product has efficacy, the bias of the placebo effect should be removed. This bias can be neutralized by "blinding" the participants, *i.e.*, dispensing to the control group a placebo which simulates in taste, smell and appearance the product being tested. This practice of blinding the control group through the use of a placebo is a generally-accepted procedure today. (*See* Knight 2051; Bogarty 3072-73, 3117; Shirkey 2655-56; Jawetz 3698-99, 3838-39; Wehrle 4011; Lasagna 4126, 4131). Use of an adequate placebo becomes even more important where the evaluation of symptoms involves subjective judgments (Wehrle 4038). The record demonstrates that a cold is a self-limiting infection, and evaluation of cold symptoms tends to be quite subjective (Gwaltney 407; Hornick 476, 497, 499; Seal 549).

We are not requiring in this case that the placebo duplicate the taste, smell, texture, color, etc. of the tested product. There may well be degrees of simulation short of duplication which would neutralize the placebo effect.[1] However, the use of caramel-colored water was patently inadequate.

Respondent urges that the absence of a true placebo can be counterbalanced by factors which tend to reduce the impact of the placebo effect, such as conducting the study over a long period of time, permitting the use of concomitant medication, and maintaining the "blindness" of the examining physician—precautions which respondent claims were taken in the St. Barnabas study. Perhaps in some drug studies other factors could compensate for the absence of a placebo but so many uncertainties permeate the St. Barnabas test that we cannot place any reliance in it. For example, it is unclear whether the examiner was properly blinded. We note that blinding the examiner is not merely a device for counterbalancing the absence of a proper placebo; it is essential that a properly administered test avoid bias on the part of the investigator. Whatever bias he may consciously or subconsciously possess can be neutralized by preventing him from knowing which subjects used the purported medication and which received no medication. In this sense, the examiner is "blinded." The ALJ aptly summarized the necessity for properly "blinding" the examiner (at IDF 83):

> Another bias that must be avoided is that of the investigator who is recording the results as narrated to him by the subjects or as observed by him when he conducts his examination. Every investigator has his own biases. It is important that the investigator not know whether the subjects are taking the test agent or are in the control group. Otherwise, he will subconsciously try to give his employer the answers the employer wants (Gwaltney 407; Haggie 1794; Knight 2051; Lamm 2934, 2937; Sadusk 3206; Carson 3589, 3601; Jawetz 3698-3701; Wehrle 3995, 4013-15, 4037-39; Lasagna 4126, 4133-34; CX 162G-I). As Dr. Knight reported to respondent (CX 162G-H):
>
> > * * * In the absence of double blind controls, however, there is no way to exclude the possibility of some bias. There is a tendency of both patients and experimentalists to see a favorable effect of medication in any experiment.

As respondent's statistical expert testified (Lamm 2934):

> * * * [T]he important thing in this type of study is that your investigator be blind.

And, as one of respondent's expert medical witnesses testified (Sadusk 3228):

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[1] Dr. Vernon Knight, a witness for respondent, identified an alternative which may have proved adequate: A new study would have to be of the "double blind" type. This might be arranged by completely avoiding the use of the word "Listerine." Listerine colored another color or conceivably flavored slightly differently as well could be compared with a colored, flavored, 25% alcohol solution. A third group could be given a non-alcoholic, non-germicidal solution of a different color and flavor. CX 162 at 8.

> If the doctor knew [which subject that came to him was a control and which was a test]—and this would indicate that the doctor was dishonest because he would actually ask each person—the experiment, of course, would not be valid.

The ALJ concluded that the examiner, Dr. Benjamin W. Nitzberg, was not properly "blinded" because the test protocol required that the children gargle at 9:00 a.m., and he began examining them at 10 a.m. Although Dr. Nitzberg denied that he knew which children were in the test group (Tr. 2790, 2800) or that he smelled Listerine on the student's breath except on rare occasions (*i.e.*, three or four children in six months, Tr. 2803), the ALJ concluded that Dr. Nitzberg must have detected the odor of Listerine on the students' breath because other witnesses for respondent testified, on the basis of their own experiences with Listerine, that Listerine can be smelled on the breath for 1 1/2 to 2 hours after gargling. IDF 99.

The record offers support for the ALJ's concern. It establishes that Dr. Nitzberg knew that the test was being conducted for Warner-Lambert, that it involved Listerine and that the data would be used to determine the effect on colds of gargling with Listerine daily, Tr. 2829. Thus, if he knew which children used Listerine, he might have biased the results in favor of Listerine. The students gargled at 9:00 a.m. (CX 51D, RX 81D); Dr. Nitzberg arrived at 10:00 a.m. (Tr. 2811, 2826) and left within an hour during the first two years of the study and within one and one-half hours during the last two years (Tr. 2811). Therefore, many students were examined one to two hours after gargling. Two physicians who testified for respondent stated that, on the basis of their own experience with Listerine, it can be detected on the breath for 1 1/2 to 2 hours after gargling. (Sadusk Tr. 3216, 3229-30; Krantz 1879, 1901). *See also* Carache at 3840. On the other hand, another witness for respondent testified that a laboratory instrument could not detect some ingredients of Listerine in a human subject's nasal cavity twenty minutes after the subject gargled (Tr. 2486, 2505). However, he also testified that the instrument leaked large amounts of the volatile materials (Tr. 2498), and that after the instrument failed to detect the ingredients, they were identified by smell (Tr. 2505). Considering this evidence as a whole, we are led to conclude that by virtue of respondent's own witnesses, it is uncertain whether Dr. Nitzberg was properly "blinded."

Three additional infirmities heighten our concern about the study's probative value. Students were instructed to report to the medical examiner, usually Dr. Nitzberg, at the first sign of a cold. The medical examiner would evaluate and record the overall severity of the cold plus the severity of fourteen cold-related symptoms (only eight during the first two years of the study). The student returned to the examiner each day for the duration of the cold episode, and the physician examined and questioned the student about each symptom, recording the severity of the symptoms on the same sheet that he used the previous day (a rating scale of 0-4 was used during the first two years and 0-7 for the last two). Dr. Nitzberg allotted himself only 1 1/2 to 2 minutes to examine and question each child (Tr. 2820). This procedure detracts from the probative value of the test in three respects. First, by using the same score sheet day after day Dr. Nitzberg would know how he evaluated a child's symptoms the previous day (Tr. 2822-23). As the ALJ found, Dr. Nitzberg's knowledge of what he had done previously would tend to bias his scores, and therefore he would not make an independent judgment each day. IDF 101. Second, given the number of symptoms which Dr. Nitzberg had to evaluate and the fine gradations he had to make in his evaluation, we question whether he spent an adequate amount of time on each subject. In addition to asking each child for historical data on every item on the report form, he would "examine the upper respiratory tract, the eyes, the ears, the nose and the throat, the sinuses by palpitation and the neck for cervical adenopathy" Tr. 2791. During the last two years of the study the examiner checked for six additional symptoms (Tr. 2798-99). On Mondays he often had to fill in the form for Saturday and Sunday. (*See also* Tr. 2816-2819). Third, even if Dr. Nitzberg had been properly blinded the scores he recorded could have been biased to the extent the scores were based upon the non-blinded child's subjective evaluation. (*See Lamm* Tr. 2937).

All of the foregoing defects have the cumulative effect of rendering the St. Barnabas study unreliable for evaluating the efficacy of Listerine. In view of this conclusion, we find it unnecessary to consider the parties' disagreement over the meaning of the results.

2. *The Reddish Cold Tests*

During the winters of 1932 to 1942 respondent conducted tests, mainly using its own employees, to determine whether Listerine has the ability to fight colds. These tests, which respondent claimed established Listerine's efficacy against colds and sore throats, have such grave deficiencies in design and execution that their results are meaningless. Of foremost concern, no placebo was used. (During some winters control groups gargled with a saline solution or tap water. These liquids cannot qualify as adequate placebos.) Moreover, employees were allowed to choose which group they preferred, thereby further biasing the results because those who thought that gargling was an effective method for fighting a cold would most likely join the test group. In addition, the ALJ found that the investigators themselves had predetermined beliefs that Listerine was good for colds. Finally, the investigators were not provided with a uniform definition of a "cold." Common colds last no longer than 10 days, yet illnesses lasting up to 69 days were counted as "colds" in the Reddish study. Even respondent's own expert, Dr. Knight, said that "present opinion would hold that satisfactory evidence for efficacy is no longer provided by these early studies." IDF 124, CX 162G-H.

Respondent does not address these infirmities in the Reddish tests. Instead, it contends that the Commission relied upon these tests in dismissing the 1944 complaint, and therefore the ALJ's finding of deficiencies in the Reddish tests is "an impermissable [sic] relitigation of matters long ago settled." RB 67. This issue is discussed in Section IV herein.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the initial decision; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission, for reasons stated in the accompanying opinion, having denied the appeal; accordingly

It is ordered, That, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the administrative law judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter;

It is further ordered, That the following order be, and it hereby is, entered:

PART I

It is ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale or distribution of Listerine or any other nonprescription drug product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such product will cure colds or sore throats;
2. Representing, directly or by implication, that any such product will prevent colds or sore throats;

3. Representing, directly or by implication, that users of any such product will have fewer colds than nonusers.

PART II

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale, or distribution of Listerine or any other mouthwash product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such product is a treatment for, or will lessen the severity of, colds or sore throats;
2. Representing that any such product will have any significant beneficial effect on the symptoms of sore throats or any beneficial effect on symptoms of colds;
3. Representing that the ability of any such product to kill germs is of medical significance in the treatment of colds or sore throats or the symptoms of colds or sore throats.

PART III

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisements for the product Listerine Antiseptic unless it is clearly and conspicuously disclosed in each such advertisement in the exact language below that:

> Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity.

In print advertisements, the disclosure shall be displayed in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears and shall be separated from the text so that it can be readily noticed. In television advertisements, the disclosure shall be presented simultaneously in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur. Each such disclosure shall be presented in the language, *e.g.*, English, Spanish, principally employed in the advertisement.

The aforesaid duty to disclose the corrective statement shall continue until respondent has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972.

PART IV

It is further ordered, That the allegations of Paragraphs Nine and Ten of the complaint be, and they hereby are, *dismissed*.

PART V

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in its structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of this order, file with the Commission a written report, setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

MAGNETIC VIDEO CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2767. Complaint, Dec. 12, 1975 — Decision, Dec. 12, 1975

Consent order requiring a Farmington Hills, Mich., manufacturer and distributor of various tape products, including compilations of hits and sound alike recordings, among other things to cease using any advertisement or promotional material which misrepresents that any tape product has been recorded by the original artist(s). Further, respondents must either disclose the name of the actual recording artist or print a warning advising prospective purchasers that the product "is not an original artist recording."

Appearances

For the Commission: *Paul K. Trause.*

For the respondents: *Charles Tathem, Merrill, Tathem & Rosati,* Detroit, Mich.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Magnetic Video Corporation, a corporation, and Andre Blay, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this proceeding, the following definitions shall apply:

Original Artist: The original artist is the person who originally recorded and made popular the song(s) or album in question, or with whom the public generally identifies the song(s) in question.

Sound Alike Recording: A sound alike recording is a recording of a hit song(s) or a hit album recorded by one other than the original artist and performed in the style and manner of the original artist.

Compilation of Hits: A compilation of hits is a tape product featuring a variety of songs originally recorded and made popular by various artists.

Tape Products: Tape products include tape cartridges or tape cassettes; or, insofar as Magnetic Video Corporation produces or distributes them, phonograph records.

PAR. 2. Respondent Magnetic Video Corporation is a corporation organized, existing, and doing business under and by virtue of the Laws of the State of Michigan, with its office and principal place of business located at 24380 Indoplex Circle, Farmington Hills, Mich.

Respondent Andre Blay is an individual and an officer of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 3. Respondents are now, and for some time last past have been, engaged in the manufacture and distribution of various tape products, including compilations of hits and sound alike recordings.

PAR. 4. In the course and conduct of their business as aforesaid, respondents now cause, and for sometime last past have caused, their products when sold to be shipped from their place of business located in the State of Michigan to purchasers thereof located in various other

States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of their sound alike tape products, respondents have caused, and are now causing:

(A) Certain labels to be used on the aforesaid tape products employing the name of the original artist.

Typical of these labels, but not all inclusive thereof, are the following:

The Carole King/Gilbert O'Sullivan Sound-Alike Collection

* * * * * * *

The Sounds of Neil Diamond

* * * * * * *

The Hits of Simon & Garfunkle

* * * * * * *

Performed in the Donna Fargo Style

* * * * * * *

(B) Certain labels to be used on the aforesaid tape products bearing the likeness of the original artist, or depicting drawings similar to those appearing on the album cover of the original recording.

(C) Certain labels to be used on the aforesaid tape products which state that the album contains a compilation of hit songs.

Typical of these labels, but not all inclusive thereof, are the following:

The Best Non-Stop Hits of 1973
"Summer Breeze"

* * * * * * *

Solid Gold Hits of 1973,

Volumes I and II

* * * * * * *

Grammy Hits of 1973

* * * * * * *

(D) Certain statements and representations to appear in promotional literature, including catalogues and point-of-sale material, and in advertisements inserted in newspapers, on television and radio, to prospective purchasers and to purchasers thereof with respect to the nature of the aforesaid tape products.

Typical of such statements and representations, but not all inclusive thereof, are the following:

Charm Tapes, over 150 current

hit tapes to choose from

* * * * * * *

The Hits of Loretta Lynn

* * * * * * *

The Hits of Andy Williams

* * * * * * *

Carole King, Fantasy

* * * * * * *

20 Hit Songs of 1973

All "Grammy" Award Finalists

* * * * * * *

Performed in the Style that Made

the Songs and the Artists Famous

* * * * * * *

PAR. 6. By and through the use of the aforesaid labels, catalogues, advertisements, and other promotional materials, and statements and representations of similar import and meaning, respondents have represented, and are now representing, directly or by implication, that the aforesaid tape products feature the original artists.

PAR. 7. In truth and in fact, the aforesaid tape products are not original artist recordings.

PAR. 8. By the aforesaid practices, respondents have placed, and are now placing, in the hands of distributors and retailers the means and instrumentalities by and through which the respondents may mislead and deceive the public in the manner and as to the matters herein alleged.

PAR. 9. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, acts, and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents as herein alleged were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issued its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Magnetic Video Corporation is a corporation organized, existing, and doing business under and by virtue of the Laws of

the State of Michigan, with its office and principal place of business located at 24380 Indoplex Circle, Farmington Hills, Mich.

Respondent Andre Blay is an officer of said corporation. He formulates, directs, and controls the policies, acts, and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Magnetic Video Corporation, a corporation, its successors and assigns, and its officers, and Andre Blay, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any other corporation, subsidiary, division, or other device in connection with the sale of tape products recorded by a person or persons other than the original artist(s), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using any label, package, catalogue, or any form of advertising, promotional material or point of sale material which:

(a) Contains any likeness of an original artist(s);

(b) Contains any illustration similar to that on the album cover or tape label used in the original artist(s) recording;

(c) Implies, in any manner, that the tape product has been recorded by an original artist(s).

2. Offering for sale, selling, or distributing any tape product recorded by one other than the original artist(s), unless the tape product's package or label contains either the name(s) of the actual artist(s) or a clear and conspicuous disclosure which reads:

THIS IS NOT AN ORIGINAL ARTIST RECORDING.

(a) If the legend "THIS IS NOT AN ORIGINAL ARTIST RECORDING" is employed, that legend shall appear on the front and spine of the tape product's label in capital letters and in boldface type set in type of at least the following sizes:

Front of the package — 12-point type

Spine of the package — 8-point type

(b) If the name(s) of the actual artist(s) is(are) used in conjunction with the name(s) of the original artist(s), the name(s) of the actual artist(s) shall appear in capital letters and in boldface type on the same surface of the tape product as the name(s) of the original artist(s) appear(s). The name(s) of the actual artist(s) shall be printed in type which is at least the same size as the type size employed for the name(s) of the original artist(s).

(c) If the name(s) of the actual artist(s) is(are) not used in conjunction with the name(s) of the original artist(s), the disclosure shall comply with the requirements of Paragraph 2(a).

(d) The disclosure employed shall be a separate element of the label set in contrasting type on a solid-color background and shall not include any part of any picture design, illustration or other text; *Provided*, That if the name(s) of the original artist(s) is(are) used, the name of the actual artist(s) may be placed directly under or adjacent to the name(s) of the original artist(s).

3. Offering for sale, selling, or distributing any sound alike tape product, the title of which does not either name the actual artist or clearly disclose that the tape product is a sound alike recording, by incorporating the words, "Sounds like" or "Sound alike," or words of similar import and meaning.

4. Advertising any tape product not recorded by the original artist(s), unless respondents, in all advertisements of such tape products, either disclose clearly and conspicuously the name(s) of the actual artist(s) for each such recording, or make one clear and conspicuous disclosure which reads:

THIS IS NOT AN ORIGINAL ARTIST RECORDING

For the purposes of this section of the order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other printed periodicals; advertisements appearing on television and radio, and catalogues.

(a) If the name of each actual artist is not clearly and conspicuously disclosed, respondents shall set forth the disclosure, "This Is Not An Original Artist Recording," in all printed advertisements, in capital letters and in boldface type, set in type of at least the following sizes:

Advertisements of a trim size larger than 144 square inches ——— 24-point type

Advertisements of a trim size larger than 65 square inches but not larger than 143 square inches ——— 14-point type

Advertisements of a trim size larger than 36 square inches but not larger than 64 square inches ——— 12-point type

Advertisements of a trim size not larger than 35 square inches ——— 10-point type

The disclosure shall comply with the requirements of paragraph 2(c) of this order.

(b) In all radio and television advertisements, the disclosure shall at least be made orally. There must be no less than one half-second pause both before and after the disclosure.

It is further ordered, That respondents may continue to distribute tape products presently in inventory with labels and packaging not bearing the disclosures required by this order; *Provided*, That respondents shall affix to each and every tape product a label which contains a clear and conspicuous disclosure which reads, "NOT AN ORIGINAL ARTIST RECORDING."

(a) The disclosure shall be in boldface capital letters, set in at least 14-point type;

(b) The disclosure shall be set in black type on a bright-red background;

(c) The disclosure shall appear as a separate element, and shall not include any part of any picture, design, illustration, or other text.

It is further ordered, That respondents shall, for a period of seven years, deliver a copy of this order to all retailers or distributors known to respondents who purchase respondents' tape products from respondents.

It is further ordered, That a copy of this order be delivered to all present and future personnel of respondents engaged in the design and creation of any packaging or labels for respondents' tape products, and that respondents shall secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

COLWELL & CO., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2768. Complaint, Dec. 15, 1975 — Decision, Dec. 15, 1975

Consent order requiring a Denver, Colo., real estate company, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*

For the respondents: *John Madden, Brownstein, Hyatt, Farber & Madden,* Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Colwell & Co., a corporation, and Thomas F. Colwell and Phillip F. Foster, individually and as directors of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Colwell & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado with its principal office and place of business located at 789 Sherman St., Suite 640, Denver, Colo.

Respondents Thomas F. Colwell and Phillip F. Foster are directors of the corporate respondent. Respondent Thomas F. Colwell formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Respondent Phillip F. Foster formulates, directs and controls the acts and practices of one of the autonomous branch offices of the corporate respondent which participated in the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of housing to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of their business as aforesaid and in connection with credit sales have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondents, in certain of the above-mentioned advertisements, have stated and are stating the amount of downpayment (in dollars or as a percentage of the sale price) or the amount of an installment payment without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

(a) the cash price; [the amount of the loan;]

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Respondents, in certain of these advertisements, have stated, and are stating, the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an "annual percentage rate," using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 7. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Colwell & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 789 Sherman St., Suite 640, city of Denver, State of Colorado.

Respondents Thomas F. Colwell and Phillip F. Foster are directors of said corporation. Respondent Thomas F. Colwell formulates, directs and controls the acts and practices of the corporate respondent. Respondent Phillip F. Foster formulates, directs and controls the acts and practices of one of the autonomous branch offices of the corporate respondent. Their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Colwell & Co., a corporation, its successors and assigns, its officers, and Thomas F. Colwell and Phillip F. Foster, individually and as directors of said corporation, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist, directly or indirectly, any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. Law 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any installment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; (the amount of the loan;)

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

3. Failing, in any advertisement, to make all disclosures as required by Section 226.10 in the manner prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall within sixty

(60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

VAN SCHAACK & COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2769. Complaint, Dec. 15, 1975-Decision, Dec. 15, 1975

Consent order requiring a Denver, Colo., mortgage company, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Tommie W. Wakefield.*

For the respondent: *Davis, Graham & Stubbs*, Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Van Schaack & Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Van Schaack & Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 624 17th St., Denver, Colo.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, mortgaging, offering for sale and sale of new and used housing to the general public.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent regularly extends or arranges for the extension of consumer credit or offers to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondent, in the ordinary course of business as aforesaid and in connection with credit sales, has caused, and is causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 5. Respondent, in certain of these advertisements has stated, and is stating, the amount of the downpayment (in dollars or as a percentage of the sales price) or that no downpayment is required or the amount of an instalment payment without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2):

(a) the cash price; (the amount of the loan;)

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

PAR. 6. Respondent, in other advertisements, has stated, and is stating, the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and has not expressed said rate as an annual percentage rate, using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 7. Subsequent to July 1, 1969, respondent, in the ordinary course of business as aforesaid, and in connection with credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, has caused, and is causing, its customers to enter into consumer credit contracts for first mortgage loans. In some instances, respondent has and is providing its customers with disclosure statements, in connection with first mortgage loans, which do not accurately disclose the "annual percentage rate" to the nearest quarter of one percent, as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z.

PAR. 8. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section

108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Kansas City Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Van Schaack & Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 624 17th St., city of Denver, State of Colorado.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Van Schaack & Company, a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit, or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. Law 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price; (the amount of the loan;)

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended; and

(d) the amount of the finance charge expressed as an annual percentage rate.

2. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

3. Failing, in any consumer credit transaction, to compute and disclose accurately the annual percentage rate to the nearest quarter of one percent as prescribed by Sections 226.5(b) and 226.8(b)(2) of Regulation Z.

4. Failing, in any advertisement or consumer credit transaction, to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the form, manner and amount prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondent herein shall within sixty

(60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., ET AL.

Docket 8866. Order, Dec. 19, 1975

Granting of motion by A&P Company to file reply to complaint counsel's opposition to motion for leave to lodge documents in the record.

Granting of motion by A&P Company for leave to lodge certain documents into the record.

Appearances

For the Commission: *John J. Mathias, Edwin R. Soeffing* and *Andrew G. Stone.*

For the respondents: *Ira J. Dembrow, Cahill, Gordon, Sonnett, Reindel & Ohl,* New York City for The Great Atlantic & Pacific Tea Company, Inc. *Sidley & Austin,* Chicago, Ill. and *Walter W. Kocher,* New York City for Borden, Inc.

ORDER GRANTING REQUEST TO FILE REPLY AND GRANTING MOTION FOR LEAVE TO LODGE DOCUMENTS INTO RECORD

Respondent The Great Atlantic & Pacific Tea Company has filed a motion seeking leave to lodge in the record of this case two documents which were not entered during trial and which it claims are of relevance to the proceeding.

As a rule this is not a procedure of which we approve, since the time for presentation of evidence is at trial where it can be challenged by the other side and considered by the administrative law judge. Here, however, it appears that only a small quantity of documentation is involved, the authenticity of the tendered exhibits is not questioned, and their introduction will not impede the orderly progress of this proceeding. While we intimate no view respecting the claims made by the parties as to the significance of these documents, we will allow their lodging upon the record.

Therefore,

It is ordered, That the request of respondent The Great Atlantic & Pacific Tea Company, Inc., for permission to file a reply to complaint counsel's Opposition to Motion for Leave to Lodge be, and it hereby is, granted.

It is further ordered, That the motion of respondent The Great Atlantic & Pacific Tea Company, Inc., for leave to lodge certain documents into the record of this case be, and it hereby is, granted.

IN THE MATTER OF

PEACOCK BUICK, INC., ET AL.

ORDER, OPINION ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8976. Complaint, July 1, 1974—Final Order, Dec. 19, 1975

Order requiring a Falls Church, Va., new and used car dealer, among other things to cease misrepresenting used vehicles as new; failing to disclose previous use and advertising used as new; misrepresenting terms and conditions of purchase; and failing to disclose specific handling and service charges.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Peacock Buick, Inc., a corporation, and Dr. Norman Bernstein and Michael B. Peacock, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Peacock Buick, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at 1001 W. Broad St., in the city of Falls Church, Commonwealth of Virginia.

Respondents Dr. Norman Bernstein and Michael B. Peacock are individuals and officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including those hereinafter set forth. Their business address is the same as that of the corporate respondent.

The respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, and sale to the public of new and used motor vehicles and in the servicing and repair thereof.

PAR. 3. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused, their said motor vehicles to be sold to purchasers thereof located in various States of the United States and the District of Columbia, including the Commonwealth of Virginia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said motor vehicles in commerce, as "commerce" is defined in the Federal Trade Commission Act. Also in the course and conduct of their business, respondents have caused, and now cause, customers' notes, contracts, payments, checks, credit reports, title registrations, correspondence and other documents relating to payment of the purchase price for respondents' motor vehicles to be transmitted by various means, including but not limited to, the United States mails, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their motor vehicles, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Typical and illustrative of the statements and representations in said advertisements, published in August and September of 1970, disseminated as aforesaid, but not all inclusive thereof, are the following:

> * * * SAVE EVEN MORE NEW '70 OPELS BIG SELECTION AT CLOSE-OUT DISCOUNTS $200-$600 OFF! * * *
>
> * * * 1970 BUICKS SAVE UP TO $1600 OFF! * * *
>
> * * * PEACOCK the NUMBER 1 OPEL DEALER IN THE U.S.A * * *

PAR. 5. By and through the use of the above-quoted statements and others of similar import and meaning but not expressly set out herein, the respondents have represented, and are now representing, directly or by implication:

1. That the motor vehicles described or referred to in said advertisements are new;
2. Peacock Buick, Inc. sells more Opel motor vehicles than any other Opel dealer in the U.S.A.

PAR. 6. In truth and in fact:

1. The motor vehicles described or referred to in said advertisements, in many instances, are not new. To the contrary, they have been

driven substantially in excess of the limited use necessary in moving or road testing a new vehicle prior to its delivery to the ultimate purchaser.

2. At the time of the advertisement, Peacock Buick, Inc. did not sell more Opel motor vehicles than any other dealer and, therefore, was not the Number I Opel Dealer in the U.S.A.

Therefore, the statements and representations as set forth in Paragraphs Four and Five, hereof, were, and are, unfair, false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their said motor vehicles, respondents, directly or through their representatives and employees, have engaged in other deceptive acts and practices. Typical and illustrative, but not all inclusive, of such deceptive acts and practices are the following:

1. Respondents represented to customers that driver education motor vehicles used in high schools in the Metropolitan Washington, D.C. Area were new and/or factory official motor vehicles; by such representations, respondents misled and deceived purchasers as to the actual prior use of said driver-education motor vehicles.

2. Respondents represented to customers that preferred financial institutions have rejected their applications for credit. In many instances, the preferred financial institutions had not rejected customers' applications for credit, and in some instances, had no record of said applications being offered.

3. Respondents represented to customers that area banks would not accept customers' applications for credit unless credit life or credit accident and health insurance was first obtained. In most instances, area banks do not require that customers obtain credit life or credit accident and health insurance as a prerequisite for accepting the customers' applications for credit.

Therefore, respondents' statements and representations, and their failure to reveal in their advertisements and during their sales presentations, the material facts as to the nature and extent of such previous use of said motor vehicles, are unfair, false, misleading and deceptive.

PAR. 8. In the further course and conduct of their aforesaid business, respondents have engaged in the following acts and practices in connection with the sale of their said motor vehicles:

1. A $25 dealer handling and service charge is added to the price of respondents' used motor vehicles; the first indication that such a charge is being made, in many instances, occurs at the time the buyer receives a copy of the sales invoice and the conditional sales contract. The

purchaser, in many said instances, believes that the motor vehicle will be delivered in satisfactory condition and appearance without the imposition of additional charges. The dealer handling and service charge becomes an undisclosed cost that should have been made known prior to the consummation of the sale.

2. Respondents have repaired or repainted, or have caused to be repaired or repainted, damaged cars; said repairs or repainting hide damage that may adversely affect a vehicle's performance and life expectancy. Respondents have failed to disclose to prospective purchasers and purchasers of respondents' motor vehicles that said damage has been hidden by repairs or repainting.

Therefore, respondents' failure to disclose such material facts, prior to the time of sale, was, and is, unfair, false, misleading and deceptive.

PAR. 9. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals in the sale, service and repair of new and used motor vehicles of the same general kind and nature as that sold, serviced and repaired by respondents.

PAR. 10. The use by the respondents of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices and the failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete and into the purchase of substantial quantities of respondents' motor vehicles and services by reason of said erroneous and mistaken belief. Respondents' aforesaid acts and practices unfairly cause the purchasing public to assume debts and obligations and to make payments of money which they might otherwise not have incurred.

PAR. 11. The acts and practices of the respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE LAW JUDGE

JULY 8, 1975

Appearances

For the Commission: *Jerry W. Boykin, Michael E. K. Mpras, Michael Dershowitz* and *Frank H. Addonizio.*

For the respondents: *Basil J. Mezines* and *Gerard E. Mitchell, Stein, Mitchell & Mezines,* Wash., D.C.

PRELIMINARY STATEMENT

On July 1, 1974, the Commission issued a complaint charging the respondents, Peacock Buick, Inc. (Peacock), a corporation, and Dr. Norman Bernstein and Michael B. Peacock, individually and as officers of the corporation with having violated Section 5 of the Federal Trade Commission Act (15 U.S.C. §45).

The charges, in summary, were that the respondents had advertised or represented unfairly, falsely, misleadingly and deceptively:

(1) That "not new" cars were new;

(2) in that they had failed to disclose material facts regarding used cars they advertised and sold;

(3) that Peacock was the "Number 1" Opel dealer in the USA when it was not;

(4) that, contrary to fact, autos used in high school driver education training were new or factory official motor vehicles;

(5) that preferred financial institutions had rejected auto purchasers' applications for credit when they had not;

(6) that area banks would not accept auto purchasers' applications for credit unless credit life or credit accident and health insurance was obtained but that banks had no such requirement;

(7) that without a proper disclosure having been made, a $25 handling or service charge was and is added to the amount the customer agreed to pay for the vehicle purchased; and

(8) that vehicles had been repaired or repainted (a) to hide damage that might affect their performance and life expectancy, and (b) to influence the buyers' decision to make the purchase without disclosing that repairs had been made and repainting done.

On Nov. 5, 1974, respondents' motion for a more definite statement was denied and an answer dated December 1974, was filed. In the answer, respondents admitted that they are in commerce in competition with corporations, firms and individuals in the sale, servicing, and repair of new and used motor vehicles (Peacock Answer, p. 5, par. 9).

Respondents denied engaging in the practices charged to be violative of Section 5 of the F.T.C. Act.

Pursuant to Rule 3.31, counsel supporting the complaint filed, on Dec. 9, 1974, a request for admissions. Respondents filed an answer to the request on Dec. 19, 1974. By way of discovery, respondents moved, pursuant to the Commission's rules, for a subpoena calling for the production of all writings received by the Federal Trade Commission in response to questionnaires sent by representatives of the Commission to customers of the respondents. The request sought all exculpatory statements, written or oral, which were given by customers of the respondents to the Federal Trade Commission in response to its questionnaire. I denied the request by order dated Jan. 6, 1975, and respondents sought Commission review of that order pursuant to Commission Rule 3.23. An "Order Denying Application for Review of Ruling" was entered on Jan. 20, 1975.

The adjudicative hearings were held in Washington, D.C., from Mar. 17 thru 20, 1975. The record was closed for the reception of evidence on Apr. 15, 1975, after additional unsuccessful efforts were made, at my suggestion, to reach an agreed upon settlement and counsel decided they would not request oral argument on the terms of the order which was proposed when the complaint issued (Tr. 695).

Proposed findings, conclusions and orders together with briefs supporting their proposals were filed by counsel for both sides on May 15, 1975. Replies by each were filed on May 30, 1975.

The findings of fact made herein are based on a review of the allegations made in the complaint, respondents' answers, stipulations entered by counsel, written admissions by respondents, the evidentiary record and upon a reading of the transcript record of the testimony and consideration of the demeanor of the witnesses at the hearings. In addition, the proposed findings of fact, conclusions and orders, together with reasons and briefs in support thereof filed by both sides have been given careful consideration. To the extent not adopted by this decision in the form proposed or in substance, they are rejected as not supported by the record or as immaterial.

For the convenience of the Commission and other readers of this initial decision, the findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony, evidence and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used for this purpose:

CCPF—Complaint Counsel's Proposed Findings of Fact, Conclusions of Law and Order.

RPF—Respondents' Proposed Findings of Fact, Conclusions of Law and Order.

CX—Commission's Exhibit, followed by number of exhibit being referenced.

RX—Respondents' Exhibit, followed by number of exhibit being referenced.

Tr.—Transcript preceded by the name of the witness and followed by the page number.

FINDINGS OF FACT

RESPONDENTS' IDENTITIES

Peacock Buick, Inc. is a corporation organized under the laws of the Commonwealth of Virginia, engaged in the sale of Buick and Opel automobiles. Its principal office and place of business is located at 8590 Leesburg Pike, McLean, Va. (Admitted, Peacock Answer, p. 1).

Dr. Norman Bernstein and Mr. Michael B. Peacock, Dr. Bernstein's son (Bernstein, Tr. 687), are officers of the corporate respondent, *i.e.*, president and vice-president, respectively (Peacock, Tr. 52; RPF p. 6, par. 9). Dr. Bernstein and Mr. Peacock formulate, direct and control the acts and practices of the corporate respondent (Admitted as to Dr. Bernstein, Peacock Answer, p. 2; as to Mr. Peacock, Peacock Admissions Nos. 30 and 32; Criste, Tr. 47-48; Gould, Tr. 303; Bernstein, Tr. 688).

RESPONDENTS' BUSINESS

Respondents are now, and for approximately thirteen years have been, engaged in the advertising, offering for sale and sale to the public of new and used motor vehicles and in their servicing and repair (Admitted, Peacock Answer, p. 2; RPF p. 5, par. 6).

Respondents sell approximately 2,000 new cars and 400 to 500 used cars each year. Generally the company retails the best of these or about 20 percent of the used cars it takes in trade for new cars. The balance are sold at wholesale (Bernstein, Tr. 168).

Respondents sell the motor vehicles from their place of business in McLean, Va., to purchasers located in various States of the United States, the District of Columbia, and the Commonwealth of Virginia. They maintain and at all times relevant hereto have maintained a substantial course of trade in the motor vehicles they sell and repair, in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, Answer, p. 2). Also in the course and conduct of their business, respondents have caused, and continue to cause, customers' notes, contracts, payments, checks, credit reports, title registrations, correspondence and other documents relating to payment of the purchase price of respondents' motor vehicles to be transmitted by various means, including but not limited to, the United States mails, in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, Answer, p. 2).

RESPONDENTS' ADVERTISING AND REPRESENTATIONS

In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their motor vehicles, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, Answer, p. 2).

1. New and Used Cars

Typical and illustrative of statements and representations in Peacock's advertisements in 1970 and 1971 are the following:

> * * * SAVE EVEN MORE NEW '70 OPELS BIG SELECTIONS AT CLOSE-OUT DISCOUNTS $200-$600 OFF! * * * (CXs 11-13).

> * * * 1970 BUICKS SAVE UP TO $1600 OFF! * * * (CX 4)

> * * * PEACOCK THE NUMBER 1 OPEL DEALER IN THE USA * * * (CX 17-18)

Respondents did not falsely represent used cars to be new when they were sold to retail purchasers (Harris, Tr. 196-198; Dace, Tr. 649). One witness, a college graduate with a master's degree, testified to the contrary; but documentary evidence of the transaction, signed by her, clearly shows that the auto was used (Schmidt, Tr. 249-250; RXs 35, 36). In purchasing an automobile, customers were not pressured to hurry through the transaction (Schmidt, Tr. 260).

If the vehicle was not new, *e.g.*, a company official car, demonstrator, or if it was a used vehicle such as a trade-in, it was and is respondents' policy that such fact would be disclosed (Peacock, Tr. 106; Garrison, Tr. 289; Montgomery, Tr. 326; Graber, Tr. 362; McKay, Tr. 382).

The purchaser of a car that was not "new" invariably signed documents both at the time the order was placed and prior to taking delivery, which reflected that the vehicle had been used (RX 35 and 36); however, material facts as to the nature of the prior use were not always disclosed, *e.g.*, car rental not disclosed (Montgomery, Tr. 325; Funkhauser, Tr. 412).

Respondents did not represent to customers that driver education motor vehicles used in high schools in the Metropolitan Washington, D.C. Area were new or factory official motor vehicles; however, they did not always disclose to customers that some of the vehicles they sold had been used in a driver education program (Huntley, Tr. 335; Bernstein, Tr. 181; Meador, Tr. 392). On occasion such a disclosure was made (Chandley, Tr. 349; Splendorio, Tr. 418). Records of the sales of such vehicles reflect that they were sold as "used" automobiles (CX 27A, 27B; RX 35, RX 36; CX 83A; CX 38D; CX 100).

If an unused portion of a manufacturer's warranty remained, it was provided to the buyer (Huntley, Tr. 333; Graber, Tr. 362).

2. Discounts

Respondents' representations in advertisements, such as those described above, that the motor vehicles offered were new and that discounts of from $200 to $1600 off the list price were available, were true (Answer, p. 3; Peacock, Tr. 59; Gould, Tr. 305; Bernstein, Tr. 154, 692; Dace, Tr. 649).

3. No. 1 Opel Dealer

The challenged representation by Peacock "* * * Number I Opel Dealer in the USA" (Complaint, par. 6, p. 2) had a reasonable basis in fact. Amongst the top twenty dealers, Peacock sold the largest number of Opels in the U.S. in July 1970 (RX 14) and in the first quarter of 1971 (Peacock, Tr. 93; CX 86; RXs 32 and 33). The representation was discontinued when respondents learned that they no longer were No. I (Peacock, Tr. 135; Bernstein, Tr. 675, 676). Respondents have not advertised their standing in Opel sales for approximately four years because they are no longer among the top ten Opel dealers (Bernstein, Tr. 676).

4. Financing of Autos

Respondents did not and do not make false representations to customers regarding acceptance or rejection of the customers' applications for credit by lending institutions. They did and do make a judgment as to which lending institutions probably would extend credit (Peacock, Tr. 112) and apprise customers as to the identity of those institutions to whom formal applications for credit are submitted and of the result (Spear, Tr. 520-521; RX 11).

They also, to avoid establishment of a record that a formal application by the individual had been rejected, made and make informal inquiries of lending institutions without disclosing the potential borrower's identity in order to ascertain the lender's attitude toward a loan to the individual on the basis of general information as to his or her credit worthiness (Spear, Tr. 514-516).

Respondents did and do attempt to arrange customers' financing of the motor vehicles sold but did not and do not disclose the material fact to the customers that it is in Peacock's financial interest to arrange for the financing with lending institutions (Peacock, Tr. 111; Mathis, Tr. 315).

There is inadequate evidence in the record to establish what constitutes a "preferred" financial institution (Complaint, par. 7, p. 2). One witness who said that she preferred to finance with General Motors Acceptance Corporation (GMAC) testified a salesman for an auto dealership in Baltimore, Md., with which she cancelled her order, had told her GMAC had approved her credit application (Schmidt, Tr. 269). The manager of the GMAC office serving Peacock Buick, however, testified he had no written record of an application on file (Latta, Tr. 286-287; CX 22L). Respondents' credit manager testified that the witness was a marginal credit risk due to her scant credit experience and newness to the Metropolitan Washington, D.C. Area and to her job and that he ascertained by telephone call that submittal of an application for credit to GMAC for a person with that credit background would be a useless act (Spear, Tr. 519, 523-524).

5. Credit Accident, Health and Life Insurance

Respondents' salesmen did represent orally that area banks would not accept customers' applications for credit unless credit life or credit accident and health insurance were first obtained (Lanpher, Tr. 366-367); however, the standard installment sales contract issued to each customer reflected and reflects that credit life or credit accident and health insurance was and is optional (RX 37; Spear, Tr. 516; Bernstein, Tr. 683).

Respondents did attempt to sell credit life, accident and health insurance to customers who financed their motor vehicles through Peacock (Peacock, Tr. 70, 109; Mathis, Tr. 314; Graber, Tr. 360). They had customers sign a form acknowledging that it was optional (Peacock, Tr. 70, CX 80E). Respondents did not and do not disclose to auto buyers the material fact that it was or is in Peacock's financial interest to include the sale of such insurance in the financing arrangements made with lending institutions (Peacock, Tr. 111).

6. Handling and Service Charge

Respondents did not disclose the material fact to customers at the time they contracted to purchase the motor vehicle that there would be a handling and service charge (usually $25) added to the purchase price of used motor vehicles (Peacock Admissions 50 and 51). The $25 or lesser charge was and is added to the sales invoice (CX 24A) and conditional sales contract which the customer receives when he arrives at respondents' place of business to take delivery of the motor vehicle (Peacock Admission 51; Peacock, Tr. 74; Lanpher, Tr. 365; Glasser, Tr. 668).

Peacock salesmen and representatives do not orally disclose the dealer handling and service charge, usually $25, during the sales negotiations. It is only after the consummation of the transaction, when delivery is taken and various documents received that written notice of such charge is given to purchasers. Even at that point, the charge is not pointed out and if by chance a purchaser does notice it, there is little opportunity to either eliminate it or to reconsider the purchase (CCPF, 52-53).

7. *Damaged and Repaired Autos*

Respondents have not repaired or repainted damaged cars which repairs and repainting "* * * hide damage that may affect a vehicle's performance and life expectancy" (complaint, par. 8 p. 2, first sentence.). Cars requiring such extensive repairs are not sold at retail by respondents (Peacock, Tr. 67; Bernstein, Tr. 161, 162, 168, 170, 172, 684-686).

Although several witnesses testified they had mechanical difficulties with their cars (Meador, Tr. 395; Splendorio, Tr. 421), the connection between those difficulties and the prior use of the car and whether the damage affected its performance and life expectancy was not convincingly established.

Patrick Goss, complaint counsel's expert witness, testified that the cars purchased by four customers suffered damage which affected their life expectancy and performance (Goss, Tr. 438, 442-445). However, Mr. Goss himself had no opportunity to observe the condition of these cars either before or after repairs were made (RPF, p. 30). Mr. Goss' conclusion that the repairs were improperly done was based on his assumption that there were obvious indications that repairs had been done (Goss, Tr. 466). According to Mr. Goss himself, if repair work is not visible and it has been done by a good repair shop, such work should not affect a car's life expectancy or performance (Goss, Tr. 474) (RPF, pp. 30-31). Men who supervised the repairs and saw the vehicles testified that the cars had suffered superficial damage only and that the repairing and repainting was done to new car standards (Lamb, Tr. 580-588; Bannister, Tr. 604-614).

Respondents have not disclosed and do not disclose the material fact to prospective purchasers or actual purchasers that damage has been repaired or that repainting has been done (Garrison, Tr. 294; Chandley, Tr. 349; Meador, Tr. 392-393; Bernstein, Tr. 158, 161, 685, 686). In the instances regarding which evidence was adduced, the damage was not convincingly shown to be so severe that it probably would adversely affect the vehicle's performance and life expectancy even though the repair invoice for the most severe damage indicated that it cost more than $350 to repair. The face amounts on the invoices related to the repair of such vehicles, varied from a low of $19.20 (RX 38) to a high of $368.50 (RX 42) with most of them costing less than $150 (RXs 39-41, 44-46).

VIOLATIONS OF SECTION 5 OF THE F.T.C. ACT

The use by the respondents' salesmen-employees of the unfair, false, misleading and deceptive statements, representations, acts and practices regarding the need for credit life or accident and health insurance before credit could be obtained and the failure to disclose material facts in timely fashion, *e.g.*, the $25 or less handling and service charge, as aforesaid, has had and now has the capacity and tendency to mislead members of the purchasing public (1) into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and (2) into the purchase of substantial quantities of respondents' motor vehicles and services by reason of said erroneous and mistaken belief.

Respondents failed to disclose the material facts adequately in some instances or at all in other instances, that:

(1) It was and is in Peacock's financial interest to arrange for the financing of purchasers' automobiles.

(2) It was and is in Peacock's financial interest to include the sale of credit life, accident and health insurance to purchasers who finance their motor vehicles through Peacock.

(3) A handling or service charge, usually $25, would be added to the purchase price of used motor vehicles.

(4) Damaged automobiles have been repaired and repainted prior to sale to the purchaser.

Respondents' aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices regarding the need for credit life or accident and health insurance before credit could be obtained and the failure to disclose material facts as indicated, unfairly cause the purchasing public to assume debts and obligations and to make payments of money which they might otherwise not have incurred (CCPF, pp. 53-54).

Respondents at all times pertinent hereto have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals in the sale, servicing and repair of new and used motor vehicles of the same general kind and nature as are sold, serviced and repaired by respondents (Admitted, Answer p. 5). As a result, the aforesaid activities unfairly deprive respondents' competitors of trade they might have enjoyed or enjoy but for respondents' violations of Section 5 of the Federal Trade Commission Act. The competitor is prejudiced when business that would have come to him is diverted to another whose methods are less scrupulous in the conduct of his business. *Federal Trade Commission* v. *Algoma Lumber Co., et al.*, 291 U.S. 67, 78 (1934).

DISCUSSION

COMMISSION JURISDICTION

Respondents have at all times relevant hereto been engaged in interstate commerce within the intent and meaning of Sections 4 and 5 of the Federal Trade Commission Act. There is ample evidence in the admissions by the respondents in the record that they advertised and otherwise engaged in commerce as that term is defined in the Federal Trade Commission Act.

INDIVIDUAL ACCOUNTABILITY OF DR. BERNSTEIN AND MR. PEACOCK

In appropriate circumstances the individual respondents, Dr. Norman Bernstein and Mr. Michael B. Peacock, could be held individually responsible and subject to a cease and desist order for the improper corporate acts and practices of the corporate respondent Peacock Buick, Inc. The Commission's authority in this respect is clear. It is well settled that the Commission may properly name officers, directors, and sole stockholders of corporate respondents in their official as well as their individual capacities in order to prevent the evasion of F.T.C. orders. *Federal Trade Commission* v. *Standard Education Society, et al.*, 86 F.2d 692 (2d Cir. 1936) *reversed on other grounds*, 302 U.S. 112, 120 (1937); *Rayex Corporation* v. *Federal Trade Commission*, 317 F.2d 290, 295 (2d Cir. 1963); *Abel Allan Goodman* v. *Federal Trade Commission*, 244 F.2d 584, 585 (9th Cir. 1957); *Standard Distributors, Inc., et al.* v. *Federal Trade Commission*, 211 F.2d 7, 14-15 (2d Cir. 1954) (CCPF, p. 8). As the individuals ultimately responsible for every aspect of the firm's operations, both Dr. Bernstein and Mr. Peacock are accountable for the illegal acts and practices found herein. In *John A. Guziak* v. *Federal Trade Commission*, 361 F.2d 700, 704 (8th Cir. 1966), the court held that an individual who was the motivating and controlling force behind the corporation was responsible for its activities and that he should be enjoined from engaging in similar activities in the future.

Since Peacock Buick is a relatively small, family owned and operated business and corrective action (Bernstein, Tr. 148-149, 153-154, 174-177) was taken when purchasers' complaints were called to their attention, I do not believe subjecting them to a Federal Trade Commission order to cease and desist as individuals or in their capacity as corporate officials is called for in this case. To subject them to such an order would be a good example of "administrative over-kill." I do not wish to create any such example in this case or to stigmatize them on the basis of the evidentiary record in this matter. Their testimony at the hearings was straightforward, not evasive and not contrary to fact. See *Pati-Port, Inc., et al.* v. *Federal Trade Commission*, 313 F.2d 103, 104 (4th Cir. 1963).

ORAL MISREPRESENTATIONS

Oral misrepresentations made by a respondent's agents or representatives, *i.e.*, the auto salesmen here, have long been held to be in violation of the Federal Trade Commission Act. *International Art Company* v. *Federal Trade Commission*, 109 F.2d 393 (1940); *Perma-Maid Co., Inc.* v. *Federal Trade Commission*, 121 F.2d 282 (1941); *Parke, Austin & Lipscomb, Inc., et al.* v. *Federal Trade Commission*, 142 F.2d 437 (1944); *Consumers Home Equipment Co., et al.* v. *Federal Trade Commission*, 164 F.2d 972 (1947); *National Trade Publications Service, Inc., et al.* v. *Federal Trade Commission*, 300 F.2d 790 (1962) (CCPF, p. 41).

FAILURE TO DISCLOSE MATERIAL FACTS

It is an unfair, false, misleading and deceptive act and practice to fail to disclose, prior to the time of sale, relevant and material facts where such information might be important to the prospective customer in making his choice as to whether to make a purchase. *Federal Trade Commission* v. *Colgate-Palmolive Co., et al.*, 380 U.S. 374 (1965); *Spiegel, Inc.* v. *Federal Trade Commission*, 494 F.2d 59, 62 (7th Cir. 1974). See also, *In the Matter of Main Line Lumber and Millwork Company, et al.*, 56 F.T.C. 17 (1959), where the Commission prohibited respondent from stating prices for certain appliances, when there were, in fact, extra costs that purchasers would be required to pay separately and at a later date (CCPF, p. 52).

Both Congress and the courts have clearly established a policy calling for disclosure of information so that consumers can be better informed and compare the costs of competing products (*e.g.*, Fair Packaging and Labeling Act, 80 Stat. 1296, 15 U.S.C. §1451, *et seq.*, Truth in Lending Act, Pub. Law 90-321, 15 U.S.C. §1601, *et seq.*, *Leon A. Tashof* v. *Federal Trade Commission*, 437 F.2d 707 (D.C. Cir. 1970); *Montgomery Ward & Co., Inc.* v. *Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967); *Spiegel, Inc., supra*) (CCPF, p. 52).

The Commission has the authority to require disclosure of material facts when a respondent advertises misleadingly due to a failure to reveal facts material in the light of the representations made. *All-State Industries of North Carolina, Inc., et al.* v. *Federal Trade Commission*, 423 F.2d 423 (4th Cir. 1970); *Joseph L. Portwood Co., et al.* v. *Federal Trade Commission*, 418 F.2d 419, 424 (10th Cir. 1969); *Leon A. Tashof* v. *Federal Trade Commission, supra*, n. 37 (D.C. Cir. 1970); *Ward Laboratories, Inc., et al.* v. *Federal Trade Commission*, 276 F.2d 952, 954 (2d Cir. 1960), *cert. denied*, 364 U.S. 827.

There is ample precedent for the proposition that the Commission may require affirmative disclosures where necessary to prevent deception. Thus, the failure to disclose material facts, which if known to prospective purchasers would influence their decision as to whether to purchase, is an unfair trade practice in violation of Section 5. *Haskelite Mfg. Corporation* v. *Federal Trade Commission*, 127 F.2d 765 (7th Cir. 1942); *L. Heller & Son, Inc., et al.* v. *Federal Trade Commission*, 191 F.2d 954 (7th Cir. 1951); *Federal Trade Commission* v. *Colgate-Palmolive Co., et al., supra; The J. B. Williams Company, Inc., et al.* v. *Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967); *S.S.S. Company, Inc., et al.* v. *Federal Trade Commission*, 416 F.2d 226, 231 (6th Cir., 1969). The Commission may utilize its accumulated expertise to determine what facts are material to consumers and whether such information has been withheld. *Pfizer Inc.*, F.T.C. Dkt. 8819, 81 F.T.C. 23 (1972). In my view, purchasers should be specifically informed when a seller of an auto gains financially, *i.e.*, receives a "kickback," when he arranges for the financing of the auto or sells credit health, life or accident insurance.

It is not a violation of a respondent's First Amendment rights to require affirmative disclosure of material facts. They are free to advertise; but they are prohibited from making false and misleading statements—*e.g.*, failing to disclose material facts—which they have no constitutional right to disseminate. *The Regina Corporation* v. *Federal Trade Commission*, 322 F.2d 765, 770 (3d Cir. 1963); *S.S.S. Company, Inc., et al.* v. *Federal Trade Commission, supra.*

CONCLUSIONS

The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondents.

The respondents at all times relevant hereto have been engaged in interstate commerce within the intent and meaning of Sections 4 and 5 of the Federal Trade Commission Act.

The complaint in this matter sets forth a cause of action which is in the public interest to pursue.

The acts and practices of the respondent as found above under the caption "Violations of Section 5 of the F.T.C. Act" (pp. 11-13) were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair or deceptive acts and practices in or affecting commerce, and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

THE REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to insure discontinuance of the unlawful practices found and may require affirmative disclosure of any material facts, which if known to the prospective customer, might affect his choice of whether to do business with a respondent. The Commission is not limited to the exact nature of the specific violations in devising suitable order provisions to protect the public interest. *Federal Trade Commission* v. *Colgate-Palmolive Co., et al.*, 380 U.S. 374, 392 (1965); *Federal Trade Commission* v. *National Lead Co., et al.*, 352 U.S. 419, 428-430 (1957); *Federal Trade Commission* v. *Rubberoid Co.*, 343 U.S. 470, 473 (1952).

The Commission's broad discretion only is limited by the requirement that the remedy must be reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946); *Niresk Industries, Inc., et al.* v. *Federal Trade Commission*, 278 F.2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883.

The Commission may order both affirmative acts and affirmative disclosures by respondent in order to bring an end to and to prevent a recurrence of illegal acts and practices. *Federal Trade Commission* v. *Colgate-Palmolive, supra; American Cyanamid Company* v. *Federal Trade Commission* 363 F.2d 757 (6th Cir. 1966), 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

The central purpose of Section 5 of the Federal Trade Commission Act is to abolish the rule of *caveat emptor*, *i.e.*, let the buyer beware, which for a great many years had governed business transactions between vendors and purchasers. *Federal Trade Commission* v. *Sterling Drug, Inc., et al.*, 317 F.2d 669, 674 (2d Cir. 1963).

The Commission's duty, as eloquently expressed by Judge Learned Hand, is to "discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop." *Federal Trade Commission* v. *Standard Education Society*, 86 F.2d 692, 696 (2d Cir. 1936), *reversed on other grounds*, 302 U.S. 112 (1937).

It is well established that the Commission's authority in issuing cease and desist orders is not limited to issuing prohibitory injunctions, but extends to orders in the nature of mandatory injunctions compelling the performance of specific acts. Several examples of such orders upheld by the courts are those requiring affirmative disclosures in advertising. *The J. B. Williams Co., Inc., et al.* v. *Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967); requiring licensing of a patent used illegally, *American Cyanamid Co.* v. *Federal Trade Commission, supra;* and requiring divestiture in antitrust cases grounded solely upon Section 5 of the Federal Trade Commission Act rather than Section 7 of the Clayton Act; *L. G. Balfour Co., et al.* v. *Federal Trade Commission*, 442 F.2d 1 (7th Cir. 1971); *Golden Grain Macaroni Company* v. *Federal Trade Commission*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 467 (1973), (CCPF, p. 55).

An indication of the scope of the Commission's authority in fashioning appropriate orders is found in *All-State Industries of North Carolina, Inc., et al.* v. *Federal Trade Commission*, 423 F.2d 423 (4th Cir. 1970), *cert. denied*, 400 U.S. 828 (1970). There, the Court of Appeals upheld a Commission order requiring petitioners to disclose orally prior to sale, and in writing on any instrument of indebtedness, that such instrument, at the company's option and without notice, could be assigned to a finance company against whom purchasers' claims or defenses might not be available. And, in *Arthur Murray Studio of Washington, Inc., et al.* v. *Federal Trade Commission*, 458 F.2d 622 (5th Cir. 1972), the Fifth Circuit Court of Appeals upheld a Commission order requiring petitioners to post in a prominent place in each place of business a copy of the cease and desist order, with the notice that any customer or prospective customer may receive a copy on request (CCPF, pp. 55-56).

THE ORDER HERE

In fashioning the order in this proceeding, which varies from the "Notice of Order"* contained in the complaint, I have taken into account (1) the violations of law which the record establishes, consisting of conduct which the Commission has declared over the years to be unlawful, (2) the fact that this order must be designed to protect the public which includes the unthinking, the inadequately educated and the credulous (see *Charles of the Ritz Dist. Corporation* v. *Federal Trade Commission*, 143 F.2d 676, 679 (2d Cir. 1944)), and (3) subject to the reasonable-relationship-of-remedy-to-unlawful-practices-found precept adverted to above, the fact that "* * * once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States* v. *E. I. du Pont de Nemours [Co., et al.*, 366 U.S. 316, 334 (1961).

The order now calls for disclosure of material facts which might influence a purchaser's decision to buy and also calls for a report to the Commission only when the corporate respondent leaves or enters the field of auto retailing. These provisions have been added to the "Notice Order" attached to the complaint as issued.

In connection with the differences between the "Notice Order" of the complaint and the order in this initial decision, the last paragraph of the Notice (p. 7) reads, in pertinent part, as follows:

> If however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Peacock Buick, Inc., a corporation, and Dr. Norman Bernstein and Michael B. Peacock, individually and as officers of said corporation might be inadequate to fully protect the consuming public, or to protect competitive conditions within the motor vehicle retailing industry, the Commission may order such other relief as it finds necessary or appropriate.

I believe some other relief to be appropriate. To this end, provisions calling for disclosure of the nature of known prior use were extended. Also, (1) the fact that repairs costing more than $50 have been made to cars offered for sale, and (2) the fact that it is in Peacock's financial interest to arrange financing, and credit life, health and accident insurance are to be affirmatively disclosed. The "Notice Order" provision (p. 11, par. (e)) applicable to Dr. Bernstein and Mr. Peacock in their corporate and individual capacities has been deleted.

ORDER

It is ordered, That respondent Peacock Buick, Inc., a corporation, its successors and assigns and its officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution, service and repair of new and used motor vehicles, or any other products or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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* Not published in the F.T.C. Volumes of Decisions.

1. Failing to disclose orally, and in print on any purchase order the customer signs, in a type size at least the same as that comprising the bulk of the text, the nature or extent of previous use or condition of any new or used vehicle displayed, offered for sale or sold, which previous use or condition resulted from a sale or lease of the vehicle respondent negotiated or of which he has knowledge, *e.g.*, student driver training, auto rental, personal use.

2. Offering for sale or selling any motor vehicle of the current or previous model year which has been damaged and repaired at a dealer's cost in excess of $50.00 without disclosing, both orally and on any purchase order the customer signs in type size at least the same as that comprising the bulk of the text, the nature of the damage sustained by the vehicle and the dealer cost to repair it.

3. Representing, contrary to fact, orally or in writing, directly or by implication, that customers, as a prerequisite for obtaining customer credit, must obtain credit life or credit accident and health insurance before a particular lending institution will extend credit; or misrepresenting, in any manner, the conditions or restrictions under which consumer credit will be extended.

4. Failing to disclose, orally and on the application for financing, in a type size at least the same size as that comprising the bulk of the text, that area lending institutions which finance customers' purchases compensate respondent for loans it arranges for such purchasers.

5. Failing to disclose, both orally and on the application the customer signs for credit life and/or credit accident and health insurance coverage, in a type size at least the same size as that comprising the bulk of the text, that such insurance is optional and that, if purchased through the respondent that the insurer compensates the respondent.

6. Failing to disclose, both orally and on any purchase order the customer signs, in a type size at least the same size as that comprising the bulk of the text, the precise amount of handling and service charges which will be added to the cost of respondent's used motor vehicles.

It is further ordered:

(a) That respondent shall forthwith distribute a copy of this order to each of its operating divisions;

(b) That respondent shall deliver a copy of this order to cease and desist to all present and future personnel engaged in the offering for sale, or sale, of any motor vehicle, and in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondent secure a signed statement acknowledging receipt of said order from each such person; and

(c) That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

Complaint in this matter was issued July 1, 1974, charging respondents Peacock Buick, Dr. Norman Bernstein, and Michael B. Peacock with unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) in connection with the sale of new and used automobiles. Among the charges were that respondents (1) advertised used cars as new; (2) represented to customers that automobiles previously used for driver education were in fact new or had been used only by factory officials; (3) misrepresented that credit life insurance was required in order to obtain automobile financing; (4) misrepresented that area lending institutions had rejected applications for credit when such was not the case; (5) failed to disclose to prospective purchasers that automobiles had been materially damaged and repaired prior to purchase; (6) failed to disclose the existence of a $25 service charge on the purchase of used cars when quoting the price of those cars; and (7) represented that Peacock Buick was the "No. 1 Opel Dealer in the United States" when such was not the case.

Hearings were held before an administrative law judge (ALJ) who prepared an initial decision which dismissed certain counts and sustained others including, in respondents' view, some which were not in the complaint to begin with. The ALJ recommended an order diverging in significant respects from the notice order originally proposed by the Commission. As the law judge himself foresaw (Tr. 693-94), his solomonic approach has placated neither side, both of whom have filed appeals challenging each conclusion of the initial decision which favors the other. While it is tempting to conclude that a result which displeases two antagonists so thoroughly must have much to commend it, our own review of the record reveals the need for substantial modification of the ALJ's conclusions. Slavish, unreasoned adherence to a notice order is not a virtue, and we applaud, as a general matter, the law judge's independent analysis of the appropriate relief. We have concluded, however, that certain of his recommendations are inappropriate in light of the facts before us. In addition, the Commission would have benefited from a more extensive analysis by the judge of the record evidence which he considered in drawing his conclusions. Our own review and disposition of contested issues follows:

I. ADVERTISING USED CARS AS NEW

The complaint charged that respondents had employed media advertising which represented that new cars were for sale at various discounts, when in fact the cars to which those advertisements referred were in some cases used. Illustrative of the challenged advertisements were: 1970 Opels; Close-Out Sale; $200-$600 Off! (CX 7)[1] Save Even More! New '70 Opels At Final Close-Out; Discounts! $200-$600 Off (CX 13) 1970 Buicks Save Up to $1600 Off! (CX 4; I.D. p. 6[p. 1539, herein])

Both sides recognize that the above advertisements, run during the latter part of 1970, should be construed to offer *new* cars at the indicated discounts. This is self-evident with respect to advertisements that refer explicitly to "new" cars. With respect to those that advertised merely "1970" cars, at a time when 1971 model year cars had come on the market, the reasonable expectation of many consumers would be that 1970 cars not advertised as "used" were in fact "new"[2] and thus an advertisement for late model used cars should include an affirmative designation that they are used.

The record reflects some confusion on the part of counsel as to what proof was necessary to prove or disprove the complaint allegations. In our view, an advertisement such as "1970 Opels; $200-$600 Off" represents that the consumer upon going to the dealer will find there a significant number of new, 1970 Opels, including some at discounts of

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[1] The following abbreviations are used herein: I.D. p.—Initial Decision (Page No.) Tr.—Transcript of Testimony (Page No.) CX—Complaint Counsel's Exhibit (No.) RX—Respondents' Exhibit (No.) RA—Respondents' Answer to Requests for Admissions (No.)

[2] The complaint defined a car as no longer being new once it has been "used in any manner other than the limited use necessary in moving or road testing a new vehicle prior to delivery of such vehicle to the customer."

$600. The fact that the dealer may also have available late model used cars at similar discounts from new list price[3] does not render the advertising false, assuming no effort is made to convince the consumer upon arrival that the late model used cars are in fact the new cars promised in the advertisement, and assuming that the new cars are, in fact, not being used merely as "bait" to induce the purchase of a larger number of more plentiful or attractive used cars.

At trial, respondent Peacock testified that the advertisements challenged referred solely to new cars (Tr. 59), and respondent Bernstein averred that when those advertisements were run respondents did have available for sale new cars at the indicated discounts (Tr. 680-82).

Complaint counsel relied entirely for their case upon a response to an order to file a Special Report, served upon respondents by the Commission. Question 13 of that report read:

> State for each year whether your firm utilized price reduction figures in the advertising of its automobiles; for example, advertising automobiles from $200 to $2000 Off. If so, were current model used cars offered for sale under such advertisements? If so, did the larger of the two price reduction figures, *i.e.*, $2000 Off, refer to current model used cars? (CX 1(c))

The response of Peacock Buick, filed by its secretary under oath was:

> Yes, our firm has used price reduction figures in our advertising of automobiles, and current model used cars were offered for sale at these times, and the larger of the price reduction figures did refer to current model used cars. (CX 2)

Obviously, this response should give pause. Clearly it is false and misleading to offer "1970 Opels, $200-$600 Off" or "Buicks Up to $1600 Off" when, in fact, those Opels at $600 off or those Buicks at $1600 off are not new. As noted before, however, individual respondents in sworn testimony asserted that in fact new cars were available for sale at the higher advertised discounts, and the law judge believed them.

If it were respondents' burden to show by a preponderance of the evidence that they did not advertise falsely, their response to the 6(b) questionnaire might well lead us to conclude they had failed to carry it. Here, however, it was complaint counsel's burden to prove the falsity of specific challenged claims. In the face of a clear conflict in testimony, we believe it was incumbent upon counsel to go further in their proof than mere reliance on the 6(b) questionnaire, which did not after all refer by its terms to the particular claims challenged in the complaint. Some further evidence as to whether or not respondents did, in fact, have new cars available at the higher advertised discounts would have been germane. So would be evidence to indicate that customers drawn by the new car ads to the Peacock lots were immediately shown those used cars to which the ads allegedly referred. The record, however, is barren of evidence which would help to resolve the conflict between testimony and questionnaire. Instead, complaint counsel appear willing to concede that Peacock may indeed have had available for sale new cars at the advertised discounts, but argue only that the ads also "referred" to used cars. Under the circumstances we must conclude that the available evidence preponderates in neither direction and the ALJ's dismissal of the false advertising count is affirmed.

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[3] During the period covered by the complaint allegations it appears that some kinds of Opels were in short supply, and thus respondents were able to sell certain late model used cars for the same discount from list price as they offered on some new cars.

II. ORAL MISREPRESENTATIONS

While we do not conclude that respondents represented used cars as new in their media advertising, we believe that complaint counsel have demonstrated by a preponderance of the evidence that in some instances respondents' sales representatives did expressly misrepresent, and failed to disclose, prior use of late model used cars in oral presentations to consumers.[4]

Mr. James Huntley testified that he was shown an Opel 1900 Coupe bearing a new car sticker (CX 99) and was told by a salesman that it had previously been used by a factory official. (Tr. 330-31) Mr. Huntley testified that he received the impression that the car was a "new car that had been used by the company during that period of time." (Tr. 332) Mr. Huntley's testimony was uncontradicted, and we find no reason to disbelieve it.[5] In fact, the car he was shown had been previously used for driver education by the Fairfax County School Board (Tr. 334; CX 33-A).

Mrs. Violet Funkhauser testified that her salesman informed her that a car she sought to purchase was a "demonstrator." The car had in fact been used as a rental car by Budget Rent-A-Car prior to sale by Peacock. (Tr. 411; CX 37A) The salesman who had sold the car to Mrs. Funkhauser denied that he would have made the misrepresentation to which she testified, however he had no specific recollection of the transaction (Tr. 659-60; see also Tr. 322-23).

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[4] The ALJ concluded that respondents had failed to disclose the prior status of late model used cars, but that there had been no affirmative misrepresentations of prior status. (I.D. p. 7[p. 1539, herein]) Unfortunately, the initial decision contains almost no evaluation of consumer testimony relating directly to affirmative misrepresentations. The facts that it was not respondents' general policy to misrepresent, and that in many cases there may have been no misrepresentations, do not in themselves negate direct testimony that in particular cases misrepresentations did occur. See *Basic Books, Inc. v. Federal Trade Commission*, 276 F.2d 718, 720-21 (7th Cir. 1960). Our evaluation of this testimony leads us to differ with the ALJ.

[5] Respondents point out that the financing agreement which Mr. Huntley signed indicated that his car was "used," as did agreements signed by other witnesses. Obviously this subsequent disclosure, to which witnesses did not always pay particular attention, could not cure prior misrepresentation. Moreover, the simple disclosure, even if observed by a customer, would not be sufficient to dispel a misrepresentation as to the particular prior use, *e.g.*, factory official vs. driver education.

Mr. James F. Garrison testified that his salesman informed him that a car, in fact previously used as a demonstrator, had been used by a company official, or factory representative (Tr. 288-89). This testimony was uncontradicted.

Mr. Edward Meador testified that he was informed by a salesman that an automobile, in fact previously used for driver education, had been owned by a senior engineer with the Fairfax County Water Authority (Tr. 390). The salesman was called by respondents. While he denied that he had ever misrepresented the prior status of automobiles, his testimony does not reflect anywhere near the same detailed recollection of the transaction in question as did Mr. Meador's (Tr. 624, 626; 388-391).

Our review of the foregoing evidence eliminates the need for us to determine whether express misrepresentations occurred in the case of Diana Kaste Schmidt, who testified that she was led to believe that a driver education car which she purchased was in fact new (Tr. 234-40, 243, 278-280). The record indicates that the witness arrived at the dealership seeking a new car. When an appropriate model proved unavailable, she was shown a driver education car, located on the new car lot.

There is dispute in the record between the consumer and the salesman as to what the consumer was told regarding this car. The salesman testified that he informed the purchaser that the car was used, and did not represent that the car was "new." (Tr. 549) Whatever representations were made, it is apparent in viewing the testimony as a whole that the transaction was less than a model of candor and clarity, and the customer clearly left the dealership entirely unaware that she had purchased a car used for driver education. We believe the testimony of Ms. Schmidt and Mr. Dubin does illustrate how, absent a clear and early disclosure of the prior use of a late model car, deception can result from the setting in which a sale is made and the expectations of the buyer—whether intent to deceive exists or not.

Respondents object to the introduction by complaint counsel of evidence which they contend did not conform to the boundaries of the complaint. They also protest the law judge's finding that Peacock violated the law by failing to disclose the prior use of its late model used cars. Respondents contend that the complaint alleged only a very specific form of affirmative misrepresentation, and that findings relating to other misrepresentations, or to deceptive failure to disclose are unwarranted. We cannot agree. Paragraph Seven of the complaint read in relevant part:

> In the further course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their said motor vehicles, respondents, directly or through their representatives and employees, have engaged in other deceptive acts and practices. Typical and illustrative, but not all inclusive, of such deceptive acts and practices are the following:
>
> 1. Respondents represented to customers that driver education motor vehicles used in high schools in the Metropolitan Washington, D.C. Area were new and/or factory official motor vehicles; by such representations, respondents misled and deceived purchasers as to the actual prior use of said driver-education motor vehicles.
>
> * * * * * * *
>
> Therefore, respondents' statements and representations, and their failure to reveal in their advertisements and during their sales presentations, the material facts as to the nature and extent of such previous use of said motor vehicles, are unfair, false, misleading and deceptive.

At the very least, we believe the complaint clearly placed respondents on notice that they were charged with violations in misrepresenting the prior use of driver education cars, and in failing to disclose affirmatively the prior use of those cars. The testimony of at least two of the witnesses described hereinabove, Messrs. Huntley and Meador, falls clearly within the confines of this most narrow construction of the complaint.[6] With respect to the evidence introduced regarding respondents' misrepresentations of the prior status of rental automobiles and demonstrators we believe this is clearly relevant to a showing that the misrepresentation and nondisclosure of prior use alleged by the complaint was not an isolated occurrence, and that an order provision would be appropriate. While the complaint language clearly obligated complaint counsel to introduce evidence with respect to misrepresentation or nondisclosure of the status of driver education cars, which they did, we think that read in conjunction with the notice order it adequately apprised respondents that other evidence might be introduced bearing on the general issue of nondisclosure or misrepresentation of prior use. Certainly respondents have shown no way in which they were injured by the introduction of testimony concerning rental cars and demonstrators; to the extent possible they cross-examined tenaciously and introduced rebuttal witnesses.

In sum, while we think that record evidence relating only to driver education cars was sufficient to sustain the allegations of the complaint, and to justify the order provisions, we do not believe it was improper for the administrative law judge or the Commission to rely on evidence pertaining to rental cars and demonstrators in reaching conclusions as to the necessity for an order.

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[6] While Mr. Meador testified that he was informed that his car had been previously used by a Fairfax County official (as opposed to the example of a factory official used in the complaint), we cannot see any significance in this variance, particularly inasmuch as respondents had every opportunity to rebut Mr. Meador's testimony, and introduced a witness in an effort to do so.

We have entered order language basically paralleling paragraphs 1-4 and 6 of the notice order (paragraphs I(1)-I(5) of the order herein). These prohibit misrepresentations that used cars are new, and misrepresentations of the prior use of used cars. The order provisions also require affirmative disclosure in advertising and on the lot of the prior use of late model used cars, *e.g.*, driver education car, rental car, demonstrator. Such affirmative disclosure is necessary for two reasons: (1) to prevent any recurrence of past misrepresentation of the prior use of automobiles, and (2) to remedy the deceptive failure to disclose prior use of late model used cars.

Much of the deception and confusion which resulted in the cases of some consumers could have been readily cured had respondents simply made a clear affirmative disclosure of the prior use of their used cars, rather than waiting for consumers to guess or ask the right question. A sales agent may be under general instructions not to misrepresent, or, indeed, to disclose affirmatively the prior use of vehicles, but such general directives have a way of paling in the face of a hesitant buyer or a shortage of popular models. There is no chance for a salesperson to take liberties with the facts when they are clearly spelled out at the point of initial buyer contact with the car. Conspicuous designation of cars as "driver education," "rental," and the like is necessary to avoid the deception that has occurred here, and it is well established that the Commission may require the relief necessary to ensure that past violations are not repeated, *e.g.*, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 708 (1948); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946); *Haskelite Mfg. Co.* v. *Federal Trade Commission*, 127 F.2d 765 (7th Cir. 1942).

In addition, we think it is clear that even in the absence of affirmative misrepresentations, it is misleading for the seller of late model used cars to fail to reveal the particularized uses to which they have been put. The record indicates beyond doubt that many consumers have a strong aversion to automobiles which have been used in certain ways, for example, driver education and multidriver rental. Rightly or wrongly, some consumers believe that such prior use substantially impairs the value of a car, perhaps by heightening the chances that it has been driven abusively. As one witness replied when asked his reaction to the discovery that his car had been used for driver education, "The image that conjures up in my mind is one of gears being stripped * * *." (Tr. 392; see also Tr. 248, 325, 335, 412).

When a late model used car is sold at close to list price, as were those involved here, the assumption likely to be made by some purchasers is that, absent disclosure to the contrary, such car has *not* previously been used in a way that might substantially impair its value. In such circumstances, failure to disclose a disfavored prior use may tend to mislead, and is, therefore, prohibited by Section 5. See, *e.g., Brite Mfg. Co.* v. *Federal Trade Commission*, 347 F.2d 477 (D.C. Cir. 1965); *Kerran* v. *Federal Trade Commission*, 265 F.2d 246, 248 (10th Cir. 1959), *cert. denied* sub nom.; *Double Eagle Refining Co.* v. *Federal Trade Commission*, 361 U.S. 818; *L. Heller and Son, Inc.* v. *Federal Trade Commission*, 191 F.2d 954, 956, (7th Cir. 1951). For this reason as well, we believe that an order requiring disclosure of the prior use of late model used cars is appropriate.[7]

III. REPRESENTATIONS THAT CREDIT LIFE INSURANCE IS MANDATORY

The complaint alleged that respondents represented to their customers that area lending institutions required the customers to accept credit life insurance, when, in fact, they did not. The effect of such a misrepresentation may be that a consumer ends up paying $150 or more for a product he or she would not choose to purchase in the absence of the misrepresentation. The administrative law judge found that the complaint allegations had been sustained, and we agree.

It was respondents' practice to present consumers with a filled-in contract, ready for signature. At times this contract might include a charge for credit life insurance entered without the customer's knowledge or prior approval (Tr. 69, 517). While individual respondents testified that it was not their policy to force consumers to accept credit life insurance, or to misrepresent the necessity for it, customer testimony does indicate that in some instances consumers were told by respondents' salesmen that they would have difficulty obtaining, or could not obtain, financing without accepting credit life insurance (Tr. 360-61, 367, 375). In other cases there was apparently no explicit misrepresentation, however considerable pressure was placed upon customers to accept credit life insurance (Tr. 315-19). Credit life insurance was in fact not required by area lending institutions as a prerequisite for financing (RA 48).

Respondents argue that the contracts which consumers signed indicated that credit life insurance was not required for financing, and this disclosure obviated the possibility of any deception. We disagree. It is clear from consumer testimony that oral deception was employed in some instances to cause consumers to ignore the warning on their sales agreement and accept credit insurance, despite a preference to avoid it. The fact that in certain instances consumers were able, after considerable exertion, to obtain deletion of the credit life requirement is also not a defense to the prior deception and high pressure selling which occurred and which led to the necessity for a battle in the first place.[8]

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[7] Respondents claim that they already make such disclosures, as illustrated by RX 29, showing a car in the showroom with a large sign proclaiming "Rental Car" on top. This form of conspicuous disclosure is certainly commendable, however, in view of lapses which led to the complaint, we believe that an order requiring affirmative disclosure in all cases is required.

In addition to the general relief prescribed by the notice order, the administrative law judge recommended an order provision which would require respondents to disclose the fact that they profit from the sale of credit life insurance. Testimony indicated that Peacock Buick received 50 percent of the premiums from credit life insurance sold to customers (Tr. 530). The administrative law judge appears to have concluded that respondents committed a separate violation by failing to disclose this fact. We do not agree that, standing by itself, respondents' failure to disclose their pecuniary interest in the sale of credit life insurance was deceptive. Moreover, it was not alleged as a violation in the complaint. Under the circumstances we will omit this portion of the law judge's recommended order.[9]

IV. MISREPRESENTATION THAT CREDIT APPLICATION HAS BEEN REJECTED BY PREFERRED LENDING INSTITUTION

The complaint alleged that respondents misrepresented to individuals that area lending institutions had rejected credit applications for automobile financing. The harm in such a practice is that it may enable a vendor to divert a customer from the customer's preferred lender to a more expensive source of funds. A vendor's motive for engaging in this practice may be that he can earn an extra profit if he is allowed to arrange financing with a lender with whom he deals customarily, instead of one preferred by the borrower.

At trial complaint counsel introduced a witness who testified that she sought financing from GMAC and was informed that her application for credit had been turned down (Tr. 242). Thereafter she agreed to financing with a bank suggested by respondents at an annual percentage rate of 13.94 percent. A witness from GMAC testified that the company had received no formal credit application on behalf of the consumer (Tr. 286-87). In defense, respondents introduced testimony to demonstrate that it was their practice on occasion to solicit informal credit opinions from lenders, by providing the details of a prospective borrower's financial status without giving the borrower's name (Tr. 515-16). Respondents' witness testified that he had followed this practice in the case of complaint counsel's witness. The judge apparently believed this testimony and rejected the complaint charge.

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[8] We also reject respondents' argument that the Commission lacks jurisdiction to regulate their misrepresentations regarding the necessity of credit life insurance because of the *McCarran-Ferguson Act*, 15 U.S.C. §§1011-1015. A statement by a seller regarding the need for insurance in order to obtain financing is not part of the "business of insurance" as that term is used in the Act. Moreover, the practice in question is apparently not subject to regulation by the Commonwealth of Virginia, in which respondents do business, 15 U.S.C. §1012.

[9] There may well be circumstances in which the disclosure of financial interest is a necessary element of relief for related misrepresentations. For instance, in the case at bar it appears that when salesmen did not flatly misrepresent the need for credit life insurance they did advocate its purchase with a zeal borne in part no doubt by the profit to be made. The precise point at which zealous advocacy becomes unacceptable pressure and deception is often hard to determine, and the best way to solve the problem may well be simply to arm consumers with the information necessary to evaluate a sales pitch with the requisite skepticism. This may involve disclosure that the vendor has a financial interest, something that might not be apparent to the consumer in the case of credit insurance. On the record before us, however, we believe that a prohibition of explicit and implicit misrepresentations, as well as oral and written disclosure of the non-necessity of insurance should be sufficient to prevent recurrence of the violation.

Complaint counsel argue that respondents' position is inherently contradictory, and not credible. Respondents' witness sought to explain Peacock's practice of seeking formal credit checks in terms of solicitude for the borrower's credit record, which respondents professed to fear might be damaged if a formal application was rejected. We agree with complaint counsel that this justification is suspect in view of the fact that respondents did submit formal credit applications to some area lenders, without an advance check, and some of these applications were rejected. On the other hand, it nonetheless seems quite plausible to us that an automobile dealer would follow the procedures outlined by respondents' finance manager, that is, seeking informal advice in some instances merely because it may be cheaper and faster to make a telephone check of some lenders when a number are to be contacted.

Of course, respondents' procedure is subject to abuse. Facts conveyed orally may be presented selectively to a customer's preferred lender to elicit a rejection, and the entire process may thereby be biased in favor of the selection of the seller's favored loan institution. There was, however, no pattern of this sort suggested by complaint counsel's evidence, which involved the experience of only one consumer. On balance we must conclude that this allegation of the complaint was not proven by a preponderance of the evidence.[10] We have deleted that portion of the ALJ's recommended order which would require respondents to disclose their pecuniary interest in financing arrangements, for the same reasons noted in Section III of this opinion, *infra*.

V. FAILURE TO DISCLOSE DAMAGE TO USED AUTOMOBILES

The complaint alleged that respondents repaired or repainted damaged cars to hide damage that might adversely affect a vehicle's performance and life expectancy, and that respondents did not disclose such damage to prospective purchasers. The complaint clearly alleged a violation of law, but the violation alleged was not proven at trial.

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[10] We note, however, that it would seem a sound practice for respondents to inform consumers in instances in which "rejection" of a credit application has been based merely on a telephone check. As is evident from the record, some consumers might well prefer to have a formal application submitted in such cases, and allowing this option would prevent the appearance of deception which was created by the procedures here.

Complaint counsel called an automotive expert who testified that in his opinion respondents may indeed have sold used cars which had been previously damaged in a way that could affect future performance or durability. (Tr. 439) Complaint counsel's witness, however, relied entirely on inferences drawn from repair invoices. In defense, respondents introduced witnesses from the body shops which had repaired the automobiles in question (Tr. 586, 601). They testified that the repairs had been performed to new car specifications and that the damage repaired would not affect the performance or life expectancy of the cars. Further testimony indicated that it was respondents' practice to wholesale a substantial fraction of used cars which came into their possession, including those cars that were damaged in ways that could impair performance or life expectancy (I.D. p. 10[p. 1542, herein]). The administrative law judge weighed the conflicting testimony and concluded that complaint counsel had failed to prove that respondents sold cars previously damaged in ways that might impair performance or life expectancy. Complaint counsel do not appear to challenge this finding of the administrative law judge on appeal, and we see no reason to disturb it.

Despite the foregoing, the administrative law judge ordered respondents to disclose to consumers any damage in excess of $50 to an automobile which respondents had caused to be repaired, or of which they were otherwise aware. The judge concluded that failure to disclose prior damage to an automobile, even if it did not affect performance, constituted a violation of Section 5.

We agree with the law judge that there are circumstances in which the failure to disclose prior damage to an automobile may be deceptive, even when it does not impair performance or life expectancy, but we do not believe that the judge's proposed remedy is appropriate given the facts of this case. It is clear from the record that consumers do care about the prior repair record of an automobile they are purchasing. Even damage which does not, in the view of experts, affect the performance or life expectancy of an automobile, may nonetheless affect the willingness of a consumer to buy the automobile which has sustained it. Indeed, several witnesses in the instant case testified that their own purchasing decisions would have been altered had they been aware of damage sustained by the used cars they were purchasing (Tr. 392-93, 294, 335, 351, 381, 420). To the extent that consumers may believe, or expect, that automobile dealers will not sell them late model low mileage used cars without disclosing that they have incurred substantial damage, the failure to do so is obviously misleading, and in violation of Section 5.

At the same time, it is also clear that some sorts of minor repairs made to automobiles may well not prove material to consumer purchasing decisions, disclosure of them is not expected, and, therefore, nondisclosure is not a deception. It is also clear that a resolution of this issue has substantial implications for the sale of new cars. Respondent Peacock testified that due to mishaps during delivery, it was necessary for respondents to make minor repairs to perhaps 50 percent of the new cars they received (Tr. 573). The order proposed by the ALJ would presumably cover these cars, to the extent that damage exceeded $50, as well as the late model used cars which were the subject of the trial.

While we share the law judge's concern for a very genuine industrywide problem, we do not believe that evidence presented at this trial is sufficient to permit a precise definition of the deceptive practice or the formulation of an appropriate remedy. Moreover, the violation which the law judge proposes to remedy was not clearly pleaded in the complaint. Under these circumstances we believe that a resolution should await a more comprehensive record, generated with the aid of respondents who are on more precise notice as to the nature of the violation under attack.[11]

VI. FAILURE TO DISCLOSE SERVICE CHARGE

It was respondents' practice to add a handling and service charge, usually $25, to the purchase price of used motor vehicles. (R.A. 50-51; CX 19-27) This charge was not disclosed to purchasers during sales negotiations over the price of the used car. (Tr. 74-75) Generally the service charge would simply appear on the sales invoice and conditional sales contract which the customer received when he or she arrived at respondents' place of business to take delivery of the vehicle (I.D. p. 10[p. 1542, herein]).

The ALJ found this practice in violation of Section 5. We entirely agree. Price is perhaps the most material factor in a consumer's decision to purchase a car, new or used. Failure to disclose a "service charge" when a price is quoted is in essence a misrepresentation of the price. The fact that the service charge is eventually disclosed, at the time the consumer arrives to finalize the deal, does not eliminate the harmful effects of the prior deception. It is a matter of common sense and experience that having engaged in an initial round of bargaining over the purchase of an automobile, having reached a tentative agreement, and having returned to the dealership for the final signing of papers, many consumers will find themselves reluctant to back out, even if certain material changes are made in the terms which might have affected purchasing decisions had they been known earlier. Addition of a "service charge" at this late stage in a deal has the effect, whatever respondents may have intended, of exploiting this vulnerable position of a buyer who has already invested considerable effort in a transaction and for that reason is not likely to change his or her mind, even when the price ends up somewhat higher than expected. The practice is clearly deceptive and injurious.[12]

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[11] It should be noted that the language contained in the notice order issued with the complaint, and the language contained in the consent order in *Lustine Chevrolet*, Dkt. 8974 (Nov. 25, 1975 [86 F.T.C. 1196]) would merely require disclosure of damage to the extent it affects performance or life expectancy. This order provision could not be justified on the record before us.

Complaint counsel object to the order entered by the administrative law judge, which required oral and written disclosure of the service charge but omitted the notice order's requirements that such disclosure occur prior to the signing of the completed retail order for a used car, and its requirement that such disclosure occur in all advertising of used cars. We agree with respondents that the notice order is unduly broad to the extent it may be construed to require mention of the service charge in advertisements for used cars which do not quote prices. We have modified the order language to require written and oral notification of service charges prior to the signing of a completed retail order, and in all advertisements for automobiles which mention price.[13] We note that nothing in this provision prevents respondents from including the overhead costs covered by their "service charge" in the total retail price they quote to consumers for their cars, just as all other components of overhead are included in the quoted price.

VII. "NO. 1 OPEL DEALER IN THE UNITED STATES"

Respondents agreed that Peacock's claim of "No. 1 Opel Dealer in the United States" should be construed to represent that Peacock had sold more Opels than any other dealer during the applicable period. (Tr. 63) A claim of this sort may be a powerful selling tool, since some consumers believe they can obtain better selection of cars, better prices, or better service at the largest dealer. (Tr. 125-26, 235-36) The record indicates that respondents advertised in September 1971 that

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[12] Respondent Peacock testified that if a customer protested, the service charge would be dropped. (Tr. 73) If true, this obviously does not excuse the prior deception, or eliminate its harm, since some consumers under the circumstances are not likely to protest, while others may not even notice the addition. (Tr. 365-66) Respondents also argue that this practice was common among area car dealers at the time of complaint. This clearly is no defense. Moreover, the Commission has obtained consent orders from several automobile dealers in the Washington, D.C. Metropolitan area proscribing the post-bargain addition of undisclosed service charges; *e.g.*, *Lustine Chevrolet*, Dkt. 8974 (Nov. 25, 1975 [86 F.T.C. 1196]), and *Rosenthal Chevrolet*, Dkt. 8975 (Sept. 30, 1975 [86 F.T.C. 777]).

[13] We have broadened the order to apply to the sale of new cars as well as used. There can be no justification for "low-balling" in the sale of any car, and this broadening is necessary to prevent recurrence of the practice in a different guise.

Peacock Buick was the No. 1 Opel Dealer in the United States. (CX 17, 18) At the time of the advertisement the claim was untrue, since the last month in which Peacock had been first in sales was March 1971. (CX 84-95; Tr. 213-14)

Testimony further indicated that sales figures were compiled monthly by the Buick Motor Division, indicating the top 20 Opel dealer rankings. These documents were available to any Opel dealer upon request. (Tr. 130) Respondents apparently did not check monthly to determine whether they retained their ranking, but instead waited for notification from Buick. In September 1971 they were notified by the Buick Motor Division that the Federal Trade Commission was investigating their advertising claims, and that they were not number 1. (Tr. 675-76, 689) Thereafter they ceased this claim.

The ALJ found no violation, reasoning that respondents had believed in good faith that they were number 1 up until the time they ceased their false advertising.

We do not agree with the judge's conclusion. Respondents publicized a claim which was untrue and deceptive at the time it was made. This alone constituted a violation even though respondents may have had no intention to mislead. *Gimbel Brothers, Inc.* v. *FTC*, 116 F.2d 578, 579 (2nd Cir. 1941). The ALJ appears to have concluded that respondents had a "reasonable basis" for their advertisements, and that their falsity was thereby excused. As a matter of law this is simply incorrect. *National Dynamics Corp., et al.*, 82 F.T.C. 488, 553 (1973), *aff'd, remanded as to order*, 492 F.2d 1333 (2nd Cir.), *cert. denied*, 419 U.S. 993 (1974).

Moreover, with respect to the reasonableness of respondents' continued reliance on the March dealer rankings, we cannot view the matter quite so charitably as the ALJ. It was obvious from respondents' own experience prior to March 1971 that relative dealer rankings were subject to periodic change. They further knew, or should have known, that new rankings were compiled approximately once each month, and that the truth of their September 1971 claims could, therefore, have been easily verified by a call to the Buick Motor Division (Tr. 130-31). It is the duty of each advertiser, and not the Federal Trade Commission, to ensure that advertising claims are truthful when they are made. In this case we believe it was respondents' obligation to seek the most recent reasonably available evidence bearing on their claim before they continued to make it. To allow advertisers to rely, for a reasonable basis, on outmoded data can only encourage deception. We will enter the notice order provision pertaining to misrepresentations of dealer size (Par. I(9) of order).[14]

VIII. LIABILITY OF INDIVIDUAL RESPONDENTS

The administrative law judge excluded the individual respondents from the coverage of his recommended order. Peacock is a small family owned business and it is not contested that the individual respondents, president and vice-president of the corporation, formulated, directed, and controlled the acts and practices of the corporation during the time covered by the complaint (I.D. p. 5[p. 1538 herein]; RA 30-32; Tr. 47-48, 303).

With respect to the particular violations found by the Commission, the individual respondents clearly played a significant role. They were fully responsible for Peacock's advertising and for its policies with respect to imposition of a service charge on used cars. While it appears that Messrs. Peacock and Bernstein instructed their sales personnel not to misrepresent the prior use of used cars, they did acquiesce in the non-disclosure of prior use which occurred in a number of cases.

The administrative law judge recommended no order against individual respondents because in his view their testimony was "straightforward" and "not evasive" and they had attempted to settle complaints when presented with them. The law judge concluded it would be inappropriate to "stigmatize" the individuals with liability and refused to commit what he deemed "administrative over-kill." (I.D. p. 14[p. 1545, herein])

In reaching his conclusions we believe the ALJ gave too great weight to factors that are of slight relevance, while neglecting considerations of greater import. Respondents may take pride in those portions of the record which reflect favorably upon their character and business practices. In evaluating the propriety of individual liability, however, the Commission's duty is not to determine whether respondents are "good guys" or "bad guys" and act on that basis. What is relevant is whether individual liability may be necessary to prevent recurrence of the particular violations for which named individuals have been responsible. Here, the corporate respondent is small and under total control of the individuals. Were they to constitute a new dealership that did not qualify technically as a "successor corporation" to Peacock, an order against Peacock alone would be of no effect. Under these circumstances we believe that imposition of individual liability is necessary and in accord with extensive prior precedent and Commission practice, *e.g., Standard Educators, Inc., et al.* v. *Federal Trade Commission,* 475 F.2d 401 (D.C. Cir. 1973); *Standard Distributors, Inc., et al.* v. *Federal Trade Commission,* 211 F.2d 7, 14-15 (2nd Cir. 1954); *Coran Bros. Corp., et al.,* 72 F.T.C. 1, 24-25 (1957).

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[14] Respondents point out that the complaint challenged their misrepresentation of status in September 1970, rather than September 1971, the year to which the proof related. The complaint did, however, allege a continuing misrepresentation and respondents were apprised some months before the commencement of hearings that proof would be introduced relating to representations in September 1971. They had every opportunity to defend the charges with respect to September 1971, and we can detect no injury whatsoever from this mechanical defect in the complaint.

An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals of complaint counsel and respondents' counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part both appeals:

It is ordered, That the initial decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission to the extent not inconsistent with the accompanying Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

It is ordered, That respondents Peacock Buick, Inc., a corporation, its successors and assigns and its officers, and Dr. Norman Bernstein and Michael B. Peacock, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution, service and repair of new and used motor vehicles, or any other products or services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

1. Representing, orally or in writing, directly or by implication, that any vehicle is new when it has been used in any manner, other than the limited use necessary in moving or road testing a new vehicle prior to delivery of such vehicle to the customer.

2. Offering for sale or selling any vehicle of the current or previous model year, which has been used in any manner, other than the limited

use referred to in paragraph 1 above, without orally disclosing, prior to any sales presentation, the nature of such previous use of said vehicle, *e.g.*, "student driver training car, rental car, demonstrator."

3. Advertising any vehicle of the current or previous model year which has been used in any manner, other than the limited use referred to in paragraph 1 above, without clearly and conspicuously disclosing in any and all advertising thereof the nature of such previous use of said vehicle, *e.g.*, "student driver training car, rental car, demonstrator."

4. Displaying, offering for sale or selling any vehicle of the current or the previous model year which has been used in any manner, other than the limited use referred to in paragraph 1 above, without clearly and conspicuously disclosing by decal or sticker affixed to the inside of the side window containing the manufacturer's suggested retail price or "Monroney sticker," or if space is not available thereon, in close proximity thereto, so as to be clearly visible, the nature of such previous use of said vehicle. Said decal or sticker shall also contain the following statement: "FOR EXACT MILEAGE, SEE ODOMETER." If no "Monroney sticker" is affixed to a vehicle subject to this paragraph, the prescribed decal or sticker shall be affixed to the right rear window.

5. Misrepresenting, orally or in writing, directly or by implication, the nature or extent of previous use or condition of any vehicle displayed, offered for sale or sold.

6. Representing, orally or in writing, directly or by implication, that customers, as a prerequisite for obtaining consumer credit, must obtain credit life or credit accident and health insurance; misrepresenting, in any manner, the conditions or restrictions under which consumer credit will be extended.

7. Failing to disclose orally prior to the time of the signing of any authorization for insurance coverage, and before the cost of credit life and/or credit accident and health insurance is computed and included within any disclosure statement or retail motor vehicle installment contract, that such insurance is optional; failing to disclose in writing, on the application each customer signs for credit life and/or credit accident and health insurance coverage, in a type size at least the same size as that comprising the bulk of the text, that such insurance is optional.

8. Failing to disclose, both orally and in writing, prior to the signing of the completed retail order for a motor vehicle, and in any and all advertising of such vehicles which mentions the price of a vehicle, the precise amount of any handling and service charges which will be added to the cost of the motor vehicle.

9. Representing, orally or in writing, directly or by implication, that respondent Peacock Buick, Inc., is the number 1 Opel dealer in the

United States, or using words of similar import, unless it does occupy such sales position as of the date referred to in such representation, or if no date is stated, at the time of the aforesaid representation as verified by the most recently prepared manufacturer's delivery records; misrepresenting in any manner the size, status or sales position of respondents' dealership.

II

It is further ordered:

1. That respondents forthwith distribute a copy of this order to each of their operating divisions;
2. That respondents deliver a copy of this order to cease and desist to all present and future personnel engaged in the offering for sale, or sale of any motor vehicle, and in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person;
3. That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order;
4. That each individual respondent promptly notify the Commission of each change in his business or employment status, including discontinuance of his present business or employment, and each affiliation with a new business or employment for a period of ten (10) years after the effective date of this order. Such notice shall include the address of the business or employment with which each respondent is newly affiliated and a description of the business or employment, as well as a description of the respondent's duties and responsibilities in that business or employment.

It is further ordered, That respondents shall, within sixty (60) days after the effective date of the order served upon them, file with the Commission a report, in writing, signed by respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

SIMEON MANAGEMENT CORPORATION, ET AL.

Docket 8996. Order, Dec. 19, 1975

Affidavit of respondent Darrel P. Simpson treated as motion to reopen default decision, and matter remanded to administrative law judge for a hearing and determination of the motion.

Appearances

For the Commission: *Alfred Lindeman* and *Paul D. Hodge.*

For the respondents: *Marvin Gross, Grayson & Gross, Inc.*, Los Angeles, Calif. for Simeon Management Corporation and Simeons Weight Clinics Foundation. *Pro se* for Medical Weight Loss, Inc. *Robert M. Aran* for Darrel P. Simpson. *David L. Cunningham*, Sausalito, Calif. for Bariatric Medical Clinics Management Corporation. *Leo Shaw*, San Diego, Calif. for Harvey J. Lobelson. *Josef D. Cooper, Cooper and Scarpulla*, San Francisco, Calif. for C.M. Norcal, Inc., HCG Weight Clinics Foundation, Peter J. Marengo, III and Joseph Costa.

ORDER REMANDING MATTER TO ADMINISTRATIVE LAW JUDGE AS TO ONE RESPONDENT

On Jan. 7, 1975, the administrative law judge filed an initial decision as to three respondents, J. William Byrd, Medical Weight Loss, Inc., and Darrel P. Simpson. The decision was predicated on their failure to answer the complaint.[1] By letters to Charles A. Tobin dated Feb. 25, 1975, and Mar. 13, 1975, counsel for respondent Simpson asserted that Mr. Simpson had not been served with the complaint and that, at the time he was served with the Jan. 7, 1975 initial decision, he was unaware of the contents of the complaint.

On Oct. 7, 1975, the Commission denied Mr. Simpson's request without prejudice to the submission of a motion supported by an affidavit by Mr. Simpson. Mr. Simpson has now filed an affidavit and upon consideration of the affidavits of Mr. Simpson and Alfred Lindeman, Esq., complaint counsel,

It is ordered, That the aforesaid affidavit of Darrel P. Simpson be treated as a motion to reopen the default decision entered in this matter;

It is further ordered, That this matter be remanded to the administrative law judge as to respondent Simpson for a hearing and determination of the aforesaid motion.

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[1] The law judge filed an initial decision as to the remaining respondents on June 18, 1975. The Commission heard oral argument on respondents' and complaint counsel's cross-appeals on Oct. 9, 1975.

IN THE MATTER OF

PORTER & DIETSCH, INC., ET AL.

Docket 9047. Order, Dec. 19, 1975

Denial of motion for issuance of supplementary corrective news release.

Appearances

For the Commission: *Dean A. Fournier, Alan H. Melnicoe* and *William H. Patton.*

For the respondents: *Albert A. Carretta, Browne, Beveridge, DeGrandi and Kline,* Wash., D.C. for Porter & Dietsch. For Pay N'Save Corporation, *pro se.*

ORDER DENYING MOTION FOR ISSUANCE OF SUPPLEMENTARY CORRECTIVE NEWS RELEASE

This matter is before us on the motion of respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth, requesting the issuance of a "supplementary corrective news release." The administrative law judge certified the motion to the Commission on Dec. 4, 1975, together with his recommendation that the motion be denied.

The news release published by the Office of Public Information on Aug. 27, 1975, failed to include the usual caveat that the Commission issues a complaint when it "has reason to believe" that the law has been violated and a proceeding is in the public interest, and that the issuance of a complaint simply marks the beginning of a formal proceeding in which the allegations will be ruled upon after a public hearing. On Oct. 7, 1975, the Commission issued an order [86 F.T.C. 896] granting respondents' prior motion seeking the issuance of a corrective news release. The corrective release issued on Oct. 14, 1975.

Respondents now claim that the corrective release was insufficient and that still another release should issue. They ask that the supplementary release include, *inter alia*, a more elaborate caveat and state that the news release issued by the Seattle Regional Office on Aug. 27, 1975, improperly listed the names of eight drug chains other than respondent Pay N' Save selling the "X-11 Reducing Plan."

Respondents' rights were not violated by the press releases issued on Aug. 27, 1975 and Oct. 14, 1975. Accordingly,

It is ordered, That the aforesaid motion be, and it hereby is, denied.

IN THE MATTER OF

STANDARD OIL COMPANY (INDIANA), ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7, OF THE CLAYTON ACT

Docket C-2770. Complaint, Dec. 19, 1975—Decision, Dec. 19, 1975

Consent order requiring a Chicago, Ill., petroleum refiner, among other things to guarantee access for at least 20 years by independent refiners to crude oil reserves that respondent is purchasing from Pasco, Inc., in Wyoming. The order further requires Pasco and Studebaker-Worthington which owns over 55 percent of Pasco, to seek Commission approval prior to selling any of the remaining Pasco assets including its Sinclair, Wyo. refinery.

Appearances

For the Commission: *Steven A. Newborn* and *James W. Olson.*

For the respondents: *William R. Jentes, Kirkland & Ellis,* Chicago, Ill. for Standard Oil Company (Indiana) and Amoco Production Company, *John B. Hartigan,* New York City for Studebaker-Worthington, Inc. and *R. Bruce MacWhorter, Shearman & Sterling,* New York City for Pasco, Inc.

COMPLAINT

The Federal Trade Commission having reason to believe that Standard Oil Company (Indiana), a corporation subject to the jurisdiction of the Commission, acting through its subsidiary, Amoco Production Company, a corporation subject to the jurisdiction of the Commission, has acquired assets of Pasco, Inc., a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18), and has, with Studebaker-Worthington, Inc., and Pasco, Inc., corporations subject to the jurisdiction of the Commission, violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45), and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. §21) and Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), stating its charges as follows:

I. *Respondents*

A. Respondent, Standard Oil Company (Indiana) (hereinafter "Standard"), is a corporation chartered, existing, and doing business under and by virtue of the laws of the State of Indiana, with its corporate offices located at 200 E. Randolph Dr., Chicago, Ill.

B. Standard, through its subsidiaries, is engaged worldwide in crude oil and natural gas exploration, production, purchasing, and transportation, and in manufacturing, transporting, and marketing petroleum products, chemicals, plastics, and fertilizers, and has interests in minerals and real estate.

C. In 1974, Standard had total revenues of approximately $10.2 billion, a net income of $970 million and approximately $8.9 billion in assets, making it the 13th largest industrial corporation in sales and the 12th largest in assets. Standard is the nation's sixth largest petroleum company in assets and ranks fourth domestically in crude oil production, with approximately 5 percent of the nation's total.

D. Standard is a leading company in crude oil production, transportation, and refining, and in the marketing of refined petroleum products in Petroleum Administration for Defense District IV (hereinafter District IV), comprised of the five Rocky Mountain States: Colorado, Idaho, Montana, Utah, and Wyoming.

E. Amoco Production Company (hereinafter "Amoco") is now, and was at the time of the acquisition hereinafter set forth, a corporation chartered, existing, and doing business under and by virtue of the State of Delaware, with its principal place of business located at 200 E. Randolph Drive, Chicago, Ill. Amoco, prior to and following the acquisition hereinafter set forth, was and is a wholly-owned subsidiary of Standard and was and is operated under the direction and control of Standard. Amoco, prior to and following the acquisition hereinafter set forth, carries out Standard's domestic exploration for and production of petroleum.

F. Respondent Studebaker-Worthington, Inc. (hereinafter "Studebaker"), is a corporation chartered, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate offices located at 530 Fifth Ave., New York, N.Y.

G. Studebaker, through its subsidiaries, is principally engaged in the manufacture and sale on a worldwide basis of consumer and consumer durable products, electrical, automotive, and petroleum products, industrial and power products consisting primarily of turbines, pumps, and compressors, and control and meter products.

H. In 1974, Studebaker had total revenues of approximately $1.3 billion, a net income of approximately $9.7 million, and approximately $637 million in assets.

I. Respondent Pasco, Inc. (hereinafter "Pasco"), is a corporation chartered, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal executive office located at 530 Fifth Ave., New York, N.Y.

J. Pasco is a 55.5 percent owned subsidiary of Studebaker.

K. In 1972, Pasco purchased certain former Sinclair Oil Company properties from Atlantic Richfield, including interests in production, a refinery, pipelines, and retail gasoline outlets. These petroleum operations are Pasco's sole business.

L. In 1974, Pasco had total revenues of approximately $210 million and a net income of approximately $13 million.

M. In 1974, in District IV, Pasco was one of only two fully integrated petroleum companies which did not rank in the top 20 nationally in crude production. Pasco ranked 11th in crude production, 9th in gasoline marketing, and 8th in crude pipelines in District IV.

N. At all times relevant herein, Standard, Amoco, Studebaker, and Pasco sold and shipped their products in interstate commerce throughout the United States and were and are now engaged in commerce as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

II. *The Acquisition*

O. On Apr. 4, 1975, an offer was made by Standard for certain crude oil producing properties of Pasco; and by May 1, 1975, an agreement had been conditionally reached whereby Pasco was to sell seven oil and gas fields, which constitute all of Pasco's currently producing properties, and two gas processing plants to Standard for approximately $225 million.

P. Pursuant to the sales contract, Standard agrees to dedicate to the Sinclair refinery 75 million barrels of crude oil or the entire production of the acquired properties until 1983, whichever is later.

III. *Trade and Commerce*

Q. The relevant geographic market is District IV.

R. The relevant product market is the production and sale of crude oil. Shares in the relevant market may be determined by examining either current production or reserves.

S. Prior to the aforesaid acquisition, Standard and Pasco were substantial and actual competitors in the production and sale of crude oil.

IV. *Effects of the Acquisition*

T. The effects of the aforesaid acquisition may be to substantially lessen competition or to tend to create a monopoly in the production and sale of crude oil in District IV, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18); and the effect of the agreement by which Studebaker, through its subsidiary Pasco, and

Standard, through its subsidiary Amoco, undertook to eliminate the actual competition between Pasco and Amoco may be to unreasonably restrain trade and to hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45). These effects may occur in the following ways, among others:

1. Substantial actual competition between Standard and Pasco will be eliminated;
2. The restraining influence of Pasco as a substantial, independent, fully integrated competitor will be eliminated;
3. Concentration in the production of crude oil will be increased to the detriment of actual, as well as potential, competition.
4. Additional mergers and acquisitions in the relevant market may be encouraged;
5. The combination of Standard and Pasco may so increase Standard's production and sales capability in the relevant market as to provide it with a decisive competitive advantage in the relevant market to the detriment of actual and potential competition.
6. Refiners of crude oil may be denied the benefits of price competition between Standard and Pasco;
7. Competitors of Standard in the refining of crude oil may be foreclosed from access to the crude oil presently produced by Pasco; and
8. A Pasco dependent on Standard for crude oil may be less willing to sell refined petroleum products to independent retail marketers who compete with Standard.

V. *The Violation Charged*

U. The acquisition by Amoco, acting under the direction and control of Standard, of certain crude oil producing properties of Pasco constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18).

V. The acquisition by Amoco, acting under the direction and control of Standard, of certain crude oil producing properties of Pasco constitutes an unfair method of competition in commerce and an unfair act or practice in commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45).

W. The sale by Pasco, acting under the direction and control of Studebaker, of certain crude oil producing properties to Amoco constitutes an unfair method of competition in commerce and an unfair act or practice in commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended (15 U.S.C. §45) and respondents Standard Oil Company (Indiana) and Amoco Production Company with violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18); and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

"Amoco" shall mean respondent Amoco Production Company, a Delaware corporation.

"Pasco" shall mean respondent Pasco, Inc., a Delaware corporation.

"Studebaker" shall mean respondent Studebaker-Worthington, Inc., a Delaware corporation.

"District IV" shall mean Petroleum Administration for Defense District IV, which consists of the States of Colorado, Idaho, Montana, Utah, and Wyoming.

"Independent Refiner" shall mean a credit-worthy refiner in District IV, which is not (a) one of the 20 largest producers of crude oil and natural gas liquids in the United States measured in barrels of production; (b) one of the 20 largest petroleum refiners in the United States measured in terms of refining capacity; (c) a company which either produces over ten (10) percent of the total crude oil and natural gas liquids produced in District IV; or (d) a company which has over fifteen (15) percent of the total refining capacity in District IV.

"Sinclair Refinery" shall mean the refinery located in Sinclair, Wyo.

"Agreement of Sale and Purchase" shall mean the Agreement of Sale and Purchase between Pasco and Amoco, a copy of which will be filed with the Secretary of the Commission.

"Crude Oil Dedication Agreement" shall mean the Crude Oil Dedication Agreement between Pasco and Amoco, appended as Exhibit

D-1 (including Annex A) to the Agreement of Sale and Purchase and a copy of which will be filed with the Secretary of the Commission.

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents had committed the aforesaid violations, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Proposed respondent Standard Oil Company (Indiana), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 200 E. Randolph Dr., Chicago, Ill.

2. Proposed respondent Amoco Production Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 200 E. Randolph Dr., Chicago, Ill.

3. Proposed respondent Pasco, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal executive office located at 530 Fifth Ave., New York, N.Y.

4. Proposed respondent Studebaker-Worthington, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 530 Fifth Ave., New York, N.Y.

5. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For purposes of this order, the following definitions shall apply:

"Standard" shall mean respondent Standard Oil Company, an Indiana corporation, its subsidiaries, and affiliates.

"Crude Oil Supply Agreement" shall mean an agreement in the form appended to this order as Exhibit A.

"Dedicated Oil" shall mean the crude oil which Amoco is required to sell Pasco or its assignees pursuant to the Crude Oil Dedication Agreement and this order and the crude oil, if any, which Amoco is required to sell Independent Refiners pursuant to this order.

"Recognized Poster" shall mean Continental Oil Company, Exxon

Company, U.S.A., Marathon Oil Company, and Union Oil Company of California as long as they post prices for and purchase Wyoming crude oil of like grade and gravity to the Dedicated Oil, and any other refiner or its affiliate (except Standard) which shall regularly post prices for and purchase at least 3,000 barrels per day of Wyoming crude oil of like grade and gravity or a volume comparable to the volume of Dedicated Oil when the production of such oil falls below 1,000 barrels per day.

"Pasco Downstream Assets" shall mean all assets of Pasco other than the assets sold to Amoco pursuant to the Agreement of Sale and Purchase.

All other terms used in this order which are defined in the Agreement of Sale and Purchase or in the Crude Oil Dedication Agreement shall have the same meanings in this order as in those Agreements.

All respondents shall be released from the provisions of this order if Pasco notifies the Commission in writing that the transactions contemplated by the Agreement of Sale and Purchase have not and will not be consummated and that Pasco does not contemplate selling any substantial portion of its assets to Amoco or Standard.

I

It is ordered, That Amoco shall grant Pasco the exclusive right to purchase all of the Dedicated Oil in accordance with and subject to the Crude Oil Dedication Agreement until the later of (a) 7:00 a.m. Wyoming time on Jan. 1, 1983, or (b) the date on which the cumulative volume of net interest oil made available to Pasco pursuant to the Crude Oil Dedication Agreement reaches a total of 75 million barrels (less the interim net production produced from 7:00 a.m. Wyoming time on Jan. 1, 1975, to 7:00 a.m. Wyoming time on the date of the Crude Oil Dedication Agreement). In accordance with and subject to the Crude Oil Dedication Agreement, Pasco shall be entitled to assign the Crude Oil Dedication Agreement to any credit-worthy future owner of the Sinclair Refinery, and any assignee of the Crude Oil Dedication Agreement shall have a like right of assignment.

II

It is further ordered, That upon the expiration of the dedication period referred to in Section I of this order, Amoco shall continue to make the Dedicated Oil available to Pasco or any assignee owner of the Sinclair Refinery so long as the owner continues to operate said refinery until the later of (a) 7:00 a.m. Wyoming time on Jan. 1, 1996, or (b) the date on which the cumulative volume of net interest oil produced and made available to the owner of the Sinclair Refinery reaches 100 million barrels (less the interim net production produced from 7:00 a.m. Wyoming time on Jan. 1, 1975, to 7:00 a.m. Wyoming time on the date of the Crude Oil Dedication Agreement). Amoco shall make the Dedicated Oil available during such additional dedication period in accordance with and subject to the Crude Oil Supply Agreement, which shall be entered into not less than thirty (30) days prior to the expiration of the initial dedication period, shall initially be for a period of five (5) years, and shall be subject to successive five-year renewals (not to exceed the additional dedication period), providing Amoco is given written notice of such renewal at least thirty (30) days prior to the expiration of the agreement. The price to be paid for the Dedicated Oil pursuant to the Crude Oil Supply Agreement shall be the highest of the prices posted by a Recognized Poster in effect at the time of delivery for Wyoming crude oil of like grade and gravity or, if the posting of prices in Wyoming is discontinued, the highest of the prices regularly offered for Wyoming crude oil of like grade and gravity by persons purchasing at least 3,000 barrels per day in Wyoming.

III

It is further ordered, That in the event of a termination of the Crude Oil Dedication Agreement or the Crude Oil Supply Agreement with Pasco or its assignees prior to the expiration of the dedication periods referred to in Sections I and II of this order, Amoco shall make the Dedicated Oil available to Independent Refiners until the later of (a) 7:00 a.m. Wyoming time on Jan. 1, 1996, or (b) the date on which the cumulative volume of net interest oil produced and saved reaches a total of 100 million barrels (less the interim net production produced from 7:00 a.m. Wyoming time on Jan. 1, 1975, to 7:00 a.m. Wyoming time on the date of the Crude Oil Dedication Agreement), in accordance with the following procedures:

(A) Amoco shall give public notice of the termination of its obligations to the owner of the Sinclair Refinery within ten (10) days after the termination becomes effective, advising all Independent Refiners of the opportunity to purchase the Dedicated Oil in accordance with the terms of this order. Amoco shall give such public notice by inserting a paid advertisement on at least three (3) consecutive days in the Oil Daily or another publication or publications having nationwide circulation in the petroleum industry and shall give all Independent Refiners in District IV written notice of the availability of the Dedicated Oil during the same period.

(B) An Independent Refiner wishing to purchase the Dedicated Oil shall submit a written offer to Amoco expressing the refiner's willingness to enter into the Crude Oil Supply Agreement for a period of five (5) years. As an alternative to submitting an individual offer, an Independent Refiner which is unable to refine all of the Dedicated Oil may submit a joint offer to purchase the Dedicated Oil with other Independent Refiners that are similarly situated. Any offer must be submitted within thirty (30) days after the date (hereafter the "Notice Date") on which the public notice by Amoco shall have been last published.

(C) In the event Amoco receives more than one timely offer for the Dedicated Oil from Independent Refiners at an equally high price, Amoco shall allow such refiners fifty (50) days after the notice date in which to make whatever allocation of the Dedicated Oil is agreeable to them. If the Independent Refiners are unable to do so, Amoco shall make the Dedicated Oil available to whichever Independent Refiner or group of such refiners offers, within seventy (70) days after the notice date, to pay the highest price for the Dedicated Oil.

(D) Within ninety (90) days after the notice date, Amoco shall enter into the Crude Oil Supply Agreement with the Independent Refiner or group of Independent Refiners offering the highest price. The Crude Oil Supply Agreement shall be subject to successive five-year renewals during the dedication period specified in this section, providing Amoco is given written notice of such renewal at least thirty (30) days prior to the expiration of the agreement. In the event the Crude Oil Supply Agreement is not renewed or is otherwise terminated prior to the expiration of the dedication period specified in this section, Amoco shall give notice of such termination in accordance with paragraph (A) of this section and shall again offer the Dedicated Oil to Independent Refiners in accordance with the procedures specified in this section.

(E) In the event Amoco shall receive a bona fide offer to purchase the Dedicated Oil at a price higher than that offered by an Independent Refiner or group of Independent Refiners, Amoco shall notify such refiner or refiners of the higher price offered and give such refiner or refiners ten (10) days within which to meet the higher price. If the Independent Refiner or group of Independent Refiners believes that the higher offer is not a bona fide offer, such refiner or refiners may request arbitration to determine the fair market value of the oil, provided that the Independent Refiner or group of Independent Refiners agrees to pay the fair market value when determined by the arbitrator and to pay the highest of the prices posted by a Recognized Poster in effect at the time of delivery for Wyoming crude oil of like grade and gravity pending such determination. The arbitrator shall be Arthur D. Little, Inc., unless it refuses or is unable to serve as arbitrator, in which event the arbitrator shall be appointed by the person who is at the time the Senior Judge (in point of service) of the 7th Judicial District of the State of Wyoming. The decision of the arbitrator shall be reached in accordance with the rules of the American Arbitration Association, shall be final and conclusive, and shall take effect immediately when announced. The fair market value to be determined by the arbitrator shall in no event be less than the highest of the prices posted by a Recognized Poster for Wyoming crude oil of like grade and gravity.

(F) In the event no Independent Refiner or group of Independent Refiners shall agree pursuant to Paragraph (E) of this order to meet the highest price offered or to pay the fair market value for the Dedicated Oil, Amoco may sell the Dedicated Oil to the person offering the highest price for Wyoming crude oil of like grade and gravity. In the event no Independent Refiner or group of Independent Refiners shall offer to purchase the Dedicated Oil at the highest of the prices posted by a Recognized Poster, Amoco may sell the oil to anyone (including an affiliate), providing such person offers a price higher than the price offered by an Independent Refiner or group of Independent Refiners. Amoco shall sell the Dedicated Oil pursuant to this Paragraph in accordance with and subject to the Crude Oil Supply Agreement, which agreement shall not be subject to automatic renewal at its expiration. Amoco shall give notice of such expiration or of any termination in accordance with Paragraph (A) of this Section and shall again offer the Dedicated Oil to Independent Refiners in accordance with the procedures specified in this Section.

IV

It is further ordered, That nothing in this order shall obligate Amoco to supply crude oil to any person in excess of Amoco's net interest oil and the royalty oil which is not taken in kind that are actually produced and saved from the properties described in Annex A to the Crude Oil Dedication Agreement. Nothing in this order shall affect Pasco's rights under the Crude Oil Dedication Agreement.

V

It is further ordered, That in the event Amoco enters into an agreement with an Independent Refiner or group of Independent Refiners to supply Dedicated Oil pursuant to Section III of this order, Standard shall not interfere with the delivery of such oil or equivalent oil to the refinery of such refiner or refiners. At the request of the Independent Refiner or group of Independent Refiners, Standard shall bargain in good faith over the transport of the Dedicated Oil through any then existing pipeline facilities owned by Standard and over an exchange of the Dedicated Oil for other crude oil owned by Amoco.

VI

It is further ordered, That except for the assets described in the Agreement of Sale and Purchase, Standard shall not purchase or attempt to purchase any of the assets owned by Pasco or which may be sold by Pasco to others, without the prior approval of the Commission.

VII

It is further ordered, That Standard shall not purchase or receive more than five (5) percent of the annual dollar value of the products which are refined from the Dedicated Oil by Pasco, its assignees, or any Independent Refiner or group of Independent Refiners; and Standard shall not control or attempt to control the sale of refined products by such persons to others. Nothing in this section shall preclude Standard from engaging in lawful competitive activity that may affect the sale of refined products by Pasco, any assignee, or any Independent Refiner.

VIII

It is further ordered, That Pasco will not sell any of the Pasco Downstream Assets without obtaining the prior approval of the Federal Trade Commission; *Provided, however*, That such prior approval need not be obtained by Pasco for (a) any sale or exchange of crude oil or refined petroleum products in the normal course of business, or (b) casual sales of Pasco Downstream Assets not to exceed $500,000 in total nor $50,000 in any one instance.

IX

It is further ordered, That if Studebaker acquires any of the Pasco Downstream Assets, it will not sell any such assets without obtaining the prior approval of the Federal Trade Commission; *Provided, however*, That such prior approval need not be obtained by Studebaker for (a) any sale or exchange of crude oil or refined petroleum products in the normal course of business, or (b) casual sales of Pasco Downstream Assets not to exceed $500,000 in total for a period of three years after the date Studebaker first acquires any of Pasco's Downstream Assets, nor to exceed $50,000 at any time in any one instance.

X

It is further ordered, That Pasco shall bargain in good faith over the transport of the Dedicated Oil through any pipeline facilities owned by Pasco in the event Amoco enters into an agreement with an Independent Refiner or group of Independent Refiners to supply Dedicated Oil pursuant to Section III of this order. If Pasco sells any such pipeline facilities, Pasco will obtain from the buyer of the Pasco facilities a written undertaking to bargain in good faith over the transport of the Dedicated Oil through such facilities in the event Amoco enters into an agreement with an Independent Refiner or group of Independent Refiners to supply Dedicated Oil pursuant to Section III of this order.

XI

It is further ordered, That if Studebaker purchases any of the Pasco Downstream Assets, it shall bargain in good faith over the transport of the Dedicated Oil through any of Pasco's present pipeline facilities then owned by Studebaker in the event that Amoco enters into an agreement with an Independent Refiner or group of Independent Refiners to supply Dedicated Oil pursuant to Section III of this order. If Studebaker sells any of Pasco's present pipeline facilities, it will obtain from the buyer of the pipeline facilities a written undertaking to bargain in good faith over the transport of the Dedicated Oil through such facilities in the event Amoco enters into an agreement with an Independent Refiner or group of Independent Refiners to supply Dedicated Oil pursuant to Section III of this order.

XII

It is further ordered, That each respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

XIII

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

XIV

It is further ordered, That the respondents Pasco and Studebaker shall, within sixty (60) days after service upon them of this order, and thereafter within five (5) days after the sale of any of Pasco's Downstream Assets, with the exception of sales in the normal course of business or casual sales as described in Sections VIII (a) and (b) and IX (a) and (b) of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order. In addition, the respondents Standard and Amoco shall, within sixty (60) days after service upon them of this order and thereafter annually and, in addition, within five (5) days after Amoco enters into any Crude Oil Supply Agreement pursuant to Sections II or III of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

DiLIDO SHOPS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-2771. Complaint, Dec. 22, 1975-Decision, Dec. 22, 1975

Consent order requiring two related Miami, Fla., manufacturers of men's sport shirts, among other things to cease misbranding and mislabeling their textile fiber products, furnishing false guaranties and failing to maintain proper records of the products manufactured by them.

Appearances

For the Commission: *Truett Honeycutt.*
For the respondents: *Monroe Gelb, Gelb & Spatz*, Miami, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that DiLido Shops, Inc., a corporation, and Go-Young, Inc., a corporation, doing business under their own names and as DiLido Fashions and Go-Young Fashions, and Solomon Jove and Bertha Jove, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Textile Fiber Products Identification Act, and it now appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent DiLido Shops, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its general offices and principal place of business located at 3050 N.W. 40th St., Miami, Fla. DiLido Shops, Inc., does business under its own name and as DiLido Fashions and Go-Young Fashions.

Respondent Go-Young, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its general offices and principal place of business located at 3050 N.W. 40th St., Miami, Fla. Go-Young, Inc., does business under its own name and as DiLido Fashions and Go-Young Fashions.

Respondents Solomon Jove and Bertha Jove are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including those hereinafter referred to. Their address is the same as that of the corporate respondents.

Respondents are engaged in the business of manufacturing men's sport shirts.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, offering for sale in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised or otherwise identified as to the name and amount of constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were men's sport shirts which contained substantially different amounts and types of fibers than as represented.

PAR. 4. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely men's shirts, with labels which failed:

1. To disclose the true generic names of the fibers present; and
2. To disclose the percentage of such fibers by weight.

PAR. 5. Certain of said textile fiber products were misbranded by respondents in that fiber trademarks were placed on labels without the generic names of fibers appearing on such labels in immediate conjunction therewith, in violation of Rule 17(a) of the rules and regulations promulgated under the Textile Fiber Products Identification Act.

PAR. 6. Respondents have furnished false guaranties that certain of their textile fiber products were not misbranded or falsely or deceptively invoiced or advertised, in violation of Section 10(b) of the Textile Fiber Products Identification Act and Rule 38(d) of the rules and regulations promulgated thereunder, by representing in writing that they have a continuing guaranty on file with the Federal Trade Commission, when such is not a fact.

PAR. 7. Respondents have failed to maintain and preserve proper records showing the fiber content of textile fiber products manufactured by them, in violation of Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the rules and regulations promulgated thereunder.

PAR. 8. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in or affecting commerce, within the intent and meaning of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to submit to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney and counsel for the Commission having thereafter executed an agreement containing the consent order, with an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint making the following jurisdictional findings, and enters the following order:

1. Respondent DiLido Shops, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its general offices and principal place of business located at 3050 N.W. 40th St., Miami, Fla. DiLido Shops, Inc., does business under its own name and as DiLido Fashions and Go-Young Fashions.

Respondent Go-Young, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its general offices and principal place of business located at 3050 N.W. 40th St., Miami, Fla. Go-Young, Inc., does business under its own name and as DiLido Fashions and Go-Young Fashions.

Respondents Solomon Jove and Bertha Jove are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents. Their address is the same as that of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents DiLido Shops, Inc., a corporation, and Go-Young, Inc., a corporation, doing business under their own names and as DiLido Fashions and Go-Young Fashions, their successors and assigns, and Solomon Jove and Bertha Jove, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or in the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce of any textile fiber product, whether in its original state or contained in any other textile fiber product, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

1. Misbranding textile fiber products by:

a. falsely or deceptively stamping, tagging, labeling, invoicing or otherwise identifying such products as to the name or amount of the constituent fibers contained therein;

b. failing to affix a stamp, tag, label or other means of identification to each such product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act;

c. using a fiber trademark on labels affixed to textile fiber products without the generic name of the fiber appearing in immediate conjunction therewith in type or lettering of equal size and conspicuousness.

2. Furnishing a false guaranty that any textile fiber product is not misbranded or falsely or deceptively invoiced or advertised under the provisions of the Textile Fiber Products Identification Act.

3. Failing to maintain and preserve proper records of fiber content of textile fiber products manufactured by respondents, as required by Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the rules and regulations promulgated thereunder.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, DiLido Shops, Inc., and Go-Young, Inc., such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged, as well as a description of their duties and responsibilities.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MAIN STREET FURNITURE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS.

Docket C-2772. Complaint, Dec. 23, 1975—Decision, Dec. 23, 1975

Consent order requiring a South Bend, Ind., furniture retailer, among other things to cease using bait and switch tactics; making price and/or savings misrepresentations; misrepresenting guarantees, furniture and service nature and quality, time limitations on offers to sell, and foreign origin; making false pictorial representations; failing to disclose additional charges and material facts and failing to make credit cost disclosures required by Regulation Z of the Truth in Lending Act.

Appearances

For the Commission: *Richard A. Palewicz.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Acts, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Main Street Furniture, Inc., a corporation and Samuel Goldstein, Raymond Goldstein and Chester E. Brost, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Main Street Furniture, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 50510 U.S. 31 No., South Bend, Ind.

Respondents Samuel Goldstein, Raymond Goldstein, and Chester E. Brost are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of household furniture and appliances, and services in connection therewith to the general public.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegation in Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated and caused the dissemination of certain advertisements concerning said products and services by various means in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of interstate circulation, and in radio and television broadcasts of interstate circulation, for the purpose of inducing, and which was likely to induce, directly or indirectly, the purchase of said products and services; additionally, respondents own, operate and control a total of three (3) retail furniture stores located in the States of Indiana and Ohio.

PAR. 4. In the course and conduct of respondents' business and for the purpose of inducing the sale of their household furniture, appliances and services in connection therewith, respondents have made numerous statements and representations in newspaper advertisements, radio and television commercials and oral statements by salesmen to prospective customers.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

TRUCK LOAD SALE!

SAVINGS FANTASTIC * * *
SPECTACULAR VALUES

SPECIAL LIVING ROOM SALE * * * HUNDREDS TO CHOOSE FROM-
ALL PRICES REDUCED!

HUNDREDS OF BEDROOM SUITES ON SALE NOW! * * * $96 to $388

SUPERB QUALITY

We guarantee everything and we SERVICE everything you buy from us

THESE FABULOUS OFFERS GOOD FOR ONE WEEK ONLY - - - -

SAVE UP TO $100 AND MORE * * *

ITALIAN!

FRENCH!

SPANISH!

WE NEVER SAY "NO!" TO CREDIT

EASY TERMS * * *

Walnut finished

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication that:

1. Respondents are making a bona fide offer to sell the advertised merchandise at the prices and on the terms and conditions stated in the advertisements.

2. By and through the use of the words, "SALE," "SAVINGS FANTASTIC," "SPECTACULAR VALUES," and other words of similar import and meaning not set out specifically herein, respondents' merchandise may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

3. By and through the use of the words, "HUNDREDS TO CHOOSE FROM," and other words of similar import and meaning not set out specifically herein, the advertised merchandise is available in 100 different sets from which the prospective purchaser may choose.

4. There are no charges in addition to the advertised purchase price of respondents' merchandise.

5. By and through the use of the words, "Superb Quality," and other words of similar import and meaning not specifically set out herein, the durability of the advertised merchandise exceeds reasonable requirements for normal everyday use for a reasonable period of time.

6. The advertised merchandise was guaranteed in every respect without conditions or limitations and would be continually serviced

without charge for an unlimited period of time after the delivery of the advertised merchandise to the homes of purchasers.

7. The advertised offer was being made only for a limited period of time.

8. Purchasers of the advertised merchandise are afforded savings of $100 and more off the prices at which such merchandise is usually and customarily sold at retail.

9. By and through the use of the words, "ITALIAN," "FRENCH," "SPANISH," and other words of similar import and meaning not set out specifically herein, furniture sold by respondents is of a foreign origin.

10. By and through the use of the words, "We Never Say 'No!' To Credit" and "Easy Terms," purchasers of respondents' merchandise are never refused credit and are granted easy credit terms without regard to their financial status or ability to pay.

11. By and through the use of the words, "Walnut finished," and other words of similar import and meaning not set out specifically herein, furniture sold by respondents is of solid wood construction.

PAR. 6. In truth and in fact:

1. The offers set out in respondents' advertisements are not bona fide offers to sell the advertised merchandise at the prices or on the terms or conditions stated but are made for the purpose of obtaining leads to prospective purchasers. Respondents' salesmen, thereafter, disparage respondents' advertised merchandise and otherwise discourage the purchase thereof and attempt to sell and frequently do sell different and more expensive merchandise.

2. Respondents' merchandise is not being offered for sale at special or reduced prices, and savings are not thereby afforded to their purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices, but the prices at which respondents' merchandise are sold vary from purchaser to purchaser.

3. The advertised merchandise is not available in 100 different sets from which the prospective purchaser may choose. To the contrary, respondents have available only a very limited number of selections of the advertised merchandise.

4. Respondents make extra charges as applicable, such as service, finance and life insurance charges over and above the regular advertised price of their merchandise.

5. The advertised merchandise is not of a high quality or durability that exceeds reasonable requirements for normal everyday use for a reasonable period of time. In many instances, respondents sell advertised merchandise only under the express condition that such merchandise is not warranted for any particular use.

6. The advertised merchandise is not guaranteed by respondents and is not continuously serviced without charge for an unlimited period of time.

7. Respondents' advertised offer is not made for a limited period of time. The advertised merchandise is regularly advertised for the represented price or at another so-called reduced price over a period of time greater than the represented limitations.

8. Purchasers of respondents' merchandise advertised in conjunction with the phrase "Save Up To $100 And More," or terms of similar comparable import or meaning, did not realize savings of the stated percentage amount from the actual prices at which the merchandise so advertised was sold or offered for sale in good faith for a reasonably substantial period of time in the recent regular course of respondents' business.

9. Merchandise advertised in conjunction with the words, "Italian," "French," or "Spanish," or terms of comparable import or meaning, is not of a foreign origin. The advertised merchandise is produced by domestic manufacturers.

10. Purchasers of respondents' merchandise are not granted easy credit terms by respondents, without regard to their financial status or ability to pay.

11. Merchandise advertised in conjunction with the use of the phrase, "walnut finished," or terms of similar comparable import or meaning, was not of solid wood construction. To the contrary, said phrase merely described the color of a stain finish applied to the exposed surfaces of the merchandise.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business and for the purpose of inducing the sale of their household furniture, respondents through the use of pictorial representations in various publications and T.V. commercials, represented directly or by implication that:

1. All of the furniture illustrated in the pictorial representation is being offered for sale at the advertised price.

2. All of the furniture illustrated in the pictorial representation is available for sale in unlimited quantities as a group.

3. Furniture illustrated in the pictorial representation may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

PAR. 8. In truth and in fact:

1. Respondents offer only part of the furniture in the pictorial

representation at the advertised price and make extra charges as applicable for remaining furniture items in the pictorial representation.

2. All of the furniture in the pictorial representation is not available for sale in unlimited quantities as a group. To the contrary, respondents have available only a very limited number of the advertised groups of furniture.

3. Furniture illustrated in the pictorial representation is not being offered for sale at special or reduced prices, and savings are not afforded to purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices, but the prices at which respondents' merchandise are sold vary from purchaser to purchaser.

Therefore, the representations set forth in Paragraph Seven hereinbefore, were, and are, false, misleading and deceptive.

PAR. 9. In the course and conduct of their business and for the purpose of inducing the sale of their furniture, respondents have maintained, and are now maintaining, in their salesrooms, floor models and displays of furniture being offered for sale, on the basis of which their customers select and order the furniture they purchase from respondents.

In this connection, respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will be sold and delivered, and the services that will be provided by respondents.

Moreover, subsequent to making sales and deliveries, respondents and their employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and manner in which respondents will perform various adjustments, replacements and/or repairs.

PAR. 10. By and through the use of the floor models and furniture displays, together with the aforesaid oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, and are now representing, directly or by implication, that:

1. Furniture sold by respondents will be delivered to the customer free from damages and defects.

2. Furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time.

3. Furniture which is delivered with damages and/or defects will be repaired or replaced to the satisfaction of the purchasers.

4. Furniture which is delivered to purchasers with damages and/or

defects will be repaired or replaced in accordance with promises made to the purchasers by respondents.

PAR. 11. In truth and in fact:

1. In many instances, furniture sold by respondents is delivered to purchasers with damages and/or defects.

2. In many instances, furniture which is delivered to purchasers with damages and/or defects is not repaired or replaced within a reasonable time.

3. In many instances, furniture which is delivered to purchasers with damages and/or defects is not repaired or replaced to the satisfaction of the purchasers.

4. In many instances, furniture which is delivered to purchasers with damages and/or defects is not repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

Therefore, the aforesaid acts, practices, statements and representations regarding respondents' merchandise and services as set forth in Paragraphs Nine and Ten were, and are, false, misleading and deceptive.

PAR. 12. In the further course and conduct of their aforesaid business, and in connection with the representations set forth in Paragraphs, Four, Five, Seven, Nine and Ten above, respondents in offering their furniture for sale have failed to disclose material facts relating to the veneered construction or to the use of plastics with simulated wood appearance in the manufacture of their merchandise.

The aforesaid failure to disclose such material facts to purchasers has the tendency and capacity to mislead or deceive such persons with respect to the utility, construction, composition, durability, design and grade of household furniture sold by respondents.

Therefore, respondents' failure to disclose such material facts was, and is, unfair, false, misleading and deceptive.

PAR. 13. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their furniture and appliances, respondents' salesmen or representatives have in many instances engaged in the following additional unfair, false, misleading and deceptive acts and practices:

1. They have obtained purchasers' signatures on blank retail installment contracts and other instruments by making false and misleading representations and deceptive statements, including false and deceptive representations with respect to the nature and effect thereof, to induce purchasers to sign such instruments.

2. Through the use of false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Twelve above, respondents or their representatives have been able to

induce their customers into signing a contract upon initial contact without giving the customers sufficient time to carefully consider the purchase and consequence thereof.

3. They have failed to disclose certain material facts to purchasers, including but not limited to the fact that, at respondents' option, conditional sales contracts, promissory notes or other instruments of indebtedness executed by such purchasers in connection with their credit purchase agreements may be discounted, negotiated or assigned to a finance company or other third party to whom the purchaser is thereafter indebted and against whom defenses may not be available.

Therefore, the acts and practices, as set forth in Paragraph Thirteen hereof, were, and are, false, misleading and deceptive.

PAR. 14. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 15. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, and acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 17. In the course and conduct of their business, as aforesaid, respondents are engaging, and for some time last past have engaged, in the collection of debts allegedly due and owing to Main Street Furniture, Inc. pursuant to contracts or other agreements relating to the purchase of respondents' merchandise.

PAR. 18. In attempting to induce payments of purportedly due or delinquent accounts, respondents and their representatives or agents have sent through the United States mail dunning letters, notices and similar instruments which contain false and misleading statements and representations.

Typical, but not all inclusive of such statements and representations are the following:

FINAL NOTICE TO RETAKE FURNITURE

You are hereby notified that unless you call Mr. —————— upon receipt of this notice, we will have no alternative but to start proceedings to RETAKE our furniture.

* * * * * * *

FINAL NOTICE OF COURT ACTION

48 HOUR NOTICE

Take notice that unless payment is made within 48 hours from the date hereof, our LEGAL DEPARTMENT will file proceedings against you without further notice, because you have failed or neglected to comply with the terms of your contract.

LEGAL DEPARTMENT

* * * * * * *

FINAL NOTICE BEFORE LEGAL ACTION YOU ARE HEREBY NOTIFIED THAT YOU HAVE 24 HOURS FROM THIS DATE TO CALL AT OUR STORE ANY PAY ON YOUR ACCOUNT. FAILURE TO DO SO WILL RESULT IN LEGAL ACTION AGAINST YOU.

LEGAL ACTION MEANS:

1. Court costs, attorney fees and other legal expenses will be charged to you, as provided by law, IN ADDITION to the complete amount of indebtedness to our store.

* * * * * * *

* * * This is definitely our FINAL NOTICE to you. Unless you pay your account WITHIN 24 HOURS YOU WILL HEAR FROM OUR ATTORNEY.

* * * * * * *

Notice of Impending Legal Proceedings

* * * A demand by proper authority is hereby made, and the debtor duly notified that he is about to be sued and his personal belongings attached by said Creditor in Court. And it is demanded that said debtor forthwith appear before the person of firm named below, and pay to said creditor either in money or duly accepted order, in such proportion of said earnings in accordance with the Statute in such made and provided.

Unless you comply with the above demand within 24 hours from date hereof, further proceedings will be had, and the above action prosecuted without further delay.

* * * * * * *

NOTICE OF INTENT TO FILE SUIT—OBTAIN JUDGMENT AND GARNISHEE WAGES

* * * You are hereby notified that unless you call at Main Street Furniture, 50510

U.S. 31N South Bend, Indiana, within 48 HOURS of this date and pay $64.00 suit will be immediately filed, judgment obtained, property sold subject to execution, and wages garnisheed.

* * * * * * *

SUMMONS

PAR. 19. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not specifically set forth herein, respondents have represented, directly or by implication, that:

1. Respondents have referred, are referring, or will refer delinquent accounts to attorneys.
2. Failure to pay the amount claimed as owing within a stated period of time will result in immediate legal action.
3. Failure to pay the amount claimed as owing within a period of time will result in attachment and garnishment proceedings against the property and wages of the debtor.
4. Failure to pay the amount claimed as owing after notice of intent to repossess will result in the repossession of the merchandise.
5. Once judgment is entered against a debtor, it is impossible for the debtor to avoid payment thereof.
6. Respondents' organization has or maintains a separate legal department with qualified employees serving in this department.
7. Some forms used by respondents imply in form and content they are official documents duly issued or approved by a court of law or other government agency.

PAR. 20. In truth and in fact:

1. Failure of an alleged debtor to remit money to respondents within time period(s) indicated does not in most instances result in the immediate reference of such matters to attorneys.
2. Failure of an alleged debtor to remit money to respondents within time period(s) indicated does not in most instances result in the immediate institution of legal action to effect payment.
3. Failure of an alleged debtor to remit money to respondents within time period(s) indicated does not in most instances result in the immediate institution of attachment or garnishment proceedings to effect payment.
4. Failure to pay the amount claimed as owing after notice of intent to repossess, will not result in the repossession of the merchandise.
5. It is possible to avoid payment of a judgment, once such is entered, in a matter involving a debt. For instance, resort to bankruptcy proceedings will often avoid the payment of at least part of a judgment. Also, the restrictions and exemptions placed on the

collection of judgments make it possible in some instances to avoid the payment of at least part of a judgment.

6. Respondents do not have a separate legal department with qualified employees serving in this department.

7. Forms used by respondents are not official documents issued or approved by a court of law or other government agency, but on the contrary are wholly private in origin.

Therefore, the statements and representations set forth in Paragraphs Nineteen and Twenty hereof were and are false, misleading and deceptive.

PAR. 21. In the ordinary course of their business as aforesaid, and in connection with the collection of debts arising from retail installment sales, respondents through their employees engage in fraudulent and unconscionable conduct in the repossession of furniture and appliances from delinquent accounts and in so doing, have represented directly or by implication, that:

1. The person making the repossession was a court constable who was acting in his official capacity and pursuant to lawful authority.

2. The repossession was being accomplished pursuant to a court order that was lawfully obtained from the local court in the area.

3. The document shown to the delinquent account at the time of the repossession was an official court order.

PAR. 22. In truth and in fact:

1. The person making the repossession was not a court constable that was acting in his official capacity and pursuant to lawful authority. To the contrary, the person making the repossession was merely a collection employee of respondents.

2. The repossession was not being accomplished pursuant to a court order that was lawfully obtained from the local court in the area.

3. The document shown to the delinquent account at the time of the repossession was not an official court order but was a simulated legal document that was made up by respondents for collection purposes.

Therefore, the statements and representations set forth in Paragraphs Twenty-One and Twenty-Two hereof were and are false, misleading and deceptive.

PAR. 23. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and to induce recipients thereof into the payment of alleged delinquent accounts by reason of the said erroneous and mistaken belief.

PAR. 24. The aforesaid acts and practices of respondents as herein alleged were, and are, all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT III

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 25. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend, and for some time last past have regularly extended consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 26. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, respondents have caused and are causing customers to execute a binding "Retail Installment Contract" hereinafter referred to as the "Installment Contract." Respondents do not provide these customers with any other credit cost disclosures.

By and through the use of the installment contracts, respondents:

1. Induced certain customers to sign installment contracts in blank form. Respondents have subsequently filled in the blank spaces and frequently failed to give those customers a completed copy, thereby failing to furnish those customers any cost or credit disclosures prior to the consummation of the contract as required by Section 226.8(a) of Regulation Z in the manner and form prescribed by Section 226.8(b) and (c) of Regulation Z.

2. Failed to meet the requirements of Section 226.8(b)(7) of Regulation Z as the contract provides for the right of payment of the full amount due and "under certain conditions" to obtain a partial refund of the finance charge, without further disclosing the "certain conditions" under which prepayment could be made and a partial refund of the finance charge be obtained.

3. Failed to accurately disclose the date on which the finance charge begins to accrue as prescribed by Section 226.8(b)(1) of Regulation Z.

4. Failed to accurately state the "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

5. Failed to disclose the total of payments as prescribed by Section 226.8(b)(3) of Regulation Z.

6. Failed to accurately disclose the number, amount and due dates, or periods of payments, scheduled to repay the indebtedness, as prescribed by Section 226.8(b)(3) of Regulation Z.

7. Failed to state the "unpaid balance of cash price," as prescribed by Section 226.8(c)(3) of Regulation Z.

8. Failed to disclose the amount financed, as required by Section 226.8(c)(7) of Regulation Z.

9. Failed to disclose the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

10. Failed to include in the finance charge, charges or premiums for fire risk of loss insurance, written in connection with credit transactions when the customer was not given a clear, conspicuous, and specific written statement setting forth the cost of the insurance if obtained from or through respondents and stating that the customer may choose the person through which the insurance is to be obtained as prescribed by Section 226.4(a)(6) of Regulation Z.

11. Failed to include in the finance charge, charges or premiums for credit life, accident, health or loss of income insurance, written in connection with credit transactions when the customer has not given a specific dated and separately signed affirmative written indication of his desire for such coverage as prescribed by Section 226.4(a)(5)(ii) of Regulation Z.

PAR. 27. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constituted violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Truth in Lending Act and the implementing regulation promulgated thereunder; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted and executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Main Street Furniture, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 50510 U.S. 31 No., South Bend, Ind.

Respondents Samuel Goldstein, Raymond Goldstein and Chester E. Brost are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER I

It is ordered, That respondents Main Street Furniture, Inc., a corporation, its successors and assigns, and its officers, and Samuel Goldstein, Raymond Goldstein and Chester E. Brost, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division or any other device in connection with the purchasing, advertising, offering for sale, sale and distribution of furniture and appliances, or any other products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise.

2. Making representations, directly or indirectly, orally or in writing, purporting to offer merchandise or services for sale when the purpose of the representation is not to sell the offered merchandise or

services but to obtain leads or prospects for the sale of other merchandise or services at higher prices.

3. Discouraging in any manner the purchase of any merchandise or services which are advertised or offered for sale.

4. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

5. Using the words "Sale," "Savings Fantastic," "Spectacular Values," or any other words of similar import or meaning not set forth specifically herein, unless the immediately preceding price at which bona fide sales have been made of the merchandise being offered for sale is disclosed or can be readily ascertained by disclosure of the stated dollar or percentage price and the price of said merchandise constitutes a recent reduction, in an amount not so insignificant as to be meaningless, from the immediately preceding price or unless a disclosure is made that such merchandise was offered for sale at the immediately preceding price in the recent regular course of respondents' business, and that no sales were made at that price or at any other price in the recent past.

6. (a) Representing, directly or indirectly, orally or in writing, that by purchasing any of respondents' merchandise, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless the former price is respondents' immediately preceding price for the advertised merchandise and bona fide sales have been made by respondents at that price in the recent past or unless a disclosure is made that said merchandise was offered for sale at the former price for a reasonably substantial period of time in the recent regular course of respondents' business and that no sales were made at that price or at any other price in the recent past.

(b) Representing, directly or indirectly, orally or in writing that by purchasing any of respondents' merchandise, customers are afforded savings between respondents' stated price and a compared price for said merchandise in respondents' trade area unless respondents' merchandise and the nature of the compared price are explicitly identified in advertising and at the point of sale through the use of shelf tags or similar means and a substantial number of the principal retail outlets in the trade area regularly sell such merchandise at the compared price or some higher price in the regular course of their business.

(c) Representing, directly or indirectly, orally or in writing, that by purchasing any of respondents' merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise unless the compared value price is explicitly identified in advertising and at the point of sale through the use of shelf tags or similar means and respondents have in good faith conducted a market survey or obtained a similar representative sample of prices for comparable merchandise of like grade and quality in their trade area to establish that a substantial number of the principal retail outlets in the trade area regularly sell comparable merchandise of like grade and quality at the compared value price in the regular course of their business.

7. Failing to maintain and produce for inspection or copying, for a period of three years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraphs Five and Six of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

8. Representing, directly or indirectly, orally or in writing, that respondents have "HUNDREDS" or any other given number of furniture suites in stock unless respondents have the stated number of furniture suites available for immediate sale and delivery; or misrepresenting in any manner the colors, style, kind or quantity of furniture in stock and available for sale or delivery.

9. Failing to make full disclosure either in its advertising or at the time of sale and prior to consummation of the sale that in addition to the price quoted in respondents' advertising, certain other charges, as applicable, are made, such as, delivery, set up or assembly, service, and warranty charges.

10. Failing to disclose clearly and conspicuously within each advertisement for an advertised product each reservation, if any, as to suitability or durability of such advertised product for normal usage by the customers who may buy such product or service.

11. Representing, directly or indirectly, that any of respondents' products are guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and unless respondents promptly and fully perform all of their obligations

and requirements, directly or impliedly represented, under the terms of each such guarantee.

12. Representing, directly or by implication, that any of respondents' offers to sell merchandise are limited as to time or restricted or limited in any other manner, unless such represented limitations or restrictions are actually in force and in good faith adhered to.

13. Using the terms "Italian," "French" or "Spanish," or any other unqualified terms of similar import or meaning not set forth specifically herein, orally or in writing, to describe respondents' furniture when such furniture is of domestic origin, unless a clear and conspicuous disclosure is made in advertising and on the furniture that such furniture was manufactured in the United States by means of such statements as "Made in U.S.A." or "manufactured by" followed by the name and address of the domestic manufacturer.

14. Representing, directly or indirectly, orally or in writing, that purchasers of respondents' merchandise are granted easy or assured credit terms, by respondents; or misrepresenting in any manner, the amount, type, extent of any other facet of the credit terms respondents arrange or may arrange for their purchasers.

15. Representing, directly or indirectly, orally or in writing, that respondents' merchandise is "walnut finished," or using any other terms of comparable import or meaning not set forth specifically herein, to describe respondents' furniture, unless a clear and conspicuous disclosure is made in advertising and on the furniture that such terms are merely descriptive of the color and/or grain design or other simulated finish that is applied to the exposed surfaces of such furniture.

16. Using any wood names or any names that suggest wood, orally or in writing, to describe any materials simulating wood in respondents' furniture, unless a clear and conspicuous disclosure is made in advertising and on the furniture that such wood names are merely descriptive of the color and/or grain design or other simulated finish that is applied to the exposed surfaces of such furniture.

17. Using pictorial representations of two or more items of furniture in conjunction with a stated price when all of the furniture in the pictorial representations is not being offered at the stated price, unless a disclosure is made in immediate conjunction and with equal prominence that all of the illustrated furniture is not being offered at the stated price and that an additional charge is made for certain items that are clearly identified in the illustrations.

18. Offering merchandise for sale by means of any form of pictorial advertisement when such merchandise is not in stock and available in quantities sufficient to meet reasonably anticipated demands for sale to

the public at or below the advertised price for the period in which the prices are advertised to be effective.

19. Failing to inform, orally, all customers at the time of sale and provide in writing on the face of all order forms, sales contracts and invoices executed by customers, with such conspicuousness and clarity as is likely to be read and understood, that the customer has the right and option to cancel the contract and obtain a refund of all monies, by notifying respondents, in writing, within ten (10) days from the date of actual delivery of the merchandise, where furniture and/or appliances are delivered in a defective or damaged condition; *Provided, however*, That the provisions of Paragraphs 19 and 20 of the order shall not apply to merchandise sold "as is," conspicuously designated as such on order forms, sales contracts and invoices executed by the customers who have knowledge of damage to, or defects in, particular merchandise and have given written consent to purchasing same in its stated condition.

20. Failing to refund immediately all monies to customers who have requested contract cancellation in writing within ten (10) days from the date of actual delivery of defective or damaged merchandise; *Provided, however*, That, in lieu of making such a refund, respondents may, with the written consent of, and with no additional cost to the customer replace or repair defective or damaged merchandise, such replacement or repair to be fully, satisfactorily and promptly performed, in accordance with Paragraph 21 of this order I. In such a case, the customer who consents to accept replacement or repair in lieu of a refund, may cancel the contract with a refund of all monies by notification to respondents in writing within ten (10) days from the date of actual delivery or redelivery of any replacement or repaired merchandise that is itself defective or damaged.

21. Failing to make all refunds or to obtain the voluntary written consent of the customer for replacement or repair, as provided for in this order, within one (1) week of the receipt of the customer's request for cancellation; or to complete all repairs, pursuant to a written consent for repairs, within two (2) weeks from the date of such written consent, or to make full replacements, pursuant to a written consent for replacement, within thirty (30) days from the date of such written consent. In all other instances, where a customer has requested repairs or replacements, orally or in writing, within ten days following the delivery of defective, damaged or nonconforming merchandise, respondents shall investigate such complaints forthwith and complete repairs within three (3) weeks and replacements within forty (40) days of the receipt of such request.

22. Failing to notify the customer, orally and in writing, and at least five (5) business days prior to the scheduled completion date, that

respondents are unable to complete repairs or replacement within the time specified by this order and to cancel the contract with a full refund of all monies to the customer within one week, or in lieu thereof and at the option of the customer, to obtain the customer's voluntary written consent for an extension of the date set for completion, setting forth a date certain for completion, which shall be a date by which respondents actually expect to complete performance.

23. Failing to maintain and produce for inspection or copying, for a period of two (2) years, adequate records which disclose the facts pertaining to the receipt, handling and disposition of each and every communication from a customer, oral or written, requesting contract cancellation, refund, replacement or repair.

24. Failing to make a clear and conspicuous disclosure on furniture, or on a tag or label prominently attached thereto, that veneers, plastics or other materials having the appearance of wood, leather, slate or marble have been used in the manufacture of such merchandise; or failing to make a clear and conspicuous disclosure of any material facts relating to the true composition of furniture where materials or products that simulate other materials or products are used in the manufacture of such furniture.

25. Inducing or causing purchasers or prospective purchasers of respondents' products, installations or services to sign blank or partially filled in completion certificates or other legal instruments or documents; or misrepresenting, in any manner, the true nature or effect of such legal instruments or documents.

26. Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

27. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of ten (10) points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

28. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form, in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point boldface type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

(Enter date of transaction)

____________ ____________

(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE: OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO ______ (*NAME OF SELLER*) , AT ______ ______ (ADDRESS OF SELLER'S PLACE OF BUSINESS) ,

NOT LATER THAN MIDNIGHT OF ______ (*DATE*).

I HEREBY CANCEL THIS TRANSACTION.

____

(DATE)

____

(BUYER'S SIGNATURE)

29. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction,

and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

30. Including in any sales contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

31. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

32. Failing or refusing to honor any valid notice of cancellation by a buyer and within ten (10) business days after the receipt of such notice, to (a) refund all payments made under the contract of sale; (b) return any goods or property traded in, in substantially as good condition as when received by the seller; (c) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

33. Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

34. Failing, within ten (10) business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

35. Assigning, selling or otherwise transferring respondents' notes, contracts or other documents evidencing a purchaser's indebtedness, unless any rights or defenses which the purchaser has and may assert against respondents are preserved and may be asserted against any assignee or subsequent holder of such note, contract or other document evidencing the indebtedness.

36. Failing to include the following statement clearly and conspicuously on the face of any note, contract or other instrument of indebtedness executed by or on behalf of respondents' customers:

NOTICE

> Any holder takes this instrument subject to the terms and conditions of the contract which gave rise to the debt evidenced hereby, any contractual provision or other agreement to the contrary notwithstanding.

ORDER II

It is further ordered, That respondents Main Street Furniture, Inc., a corporation, its successors and assigns, and its officers, and Samuel Goldstein, Raymond Goldstein and Chester E. Brost, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the collection of, or attempt to collect, accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing or causing to be represented by any means, directly or indirectly, that respondents have instructed, are instructing, or will instruct an attorney to file suit against an alleged debtor unless the alleged debt is immediately paid in full or a specified amount is paid thereon unless the respondents have already instituted the aforesaid suit.

2. Representing by any means, directly or indirectly, that:

(a) legal action has been taken against the debtor; or

(b) legal action is being taken against the debtor; or

(c) legal action will be taken against the debtor unless the respondents have already instituted said legal action.

3. Representing by any means, directly or indirectly, that the post judgment rights of a creditor to attach property or garnish wages of a debtor are as specifically represented unless such is the fact in the jurisdiction in which collection is sought.

4. Informing a debtor of a creditor's right after judgment without disclosing at the same time that no judgment may be entered against the debtor unless the debtor has first been given notice and an opportunity to appear and defend himself in a court of law.

5. Representing, directly or indirectly, by any means to a debtor that it is impossible to escape a judgment.

6. Using fictitious job titles or organizational designations or descriptions by any means in connection with respondents' business or misrepresenting in any manner any departmentalization of respondents' business.

7. Using fictitious official titles or designations or descriptions by any means in connection with the repossession of furniture and/or appliances from delinquent accounts.

8. Representing by any means, directly or indirectly, that the repossession of furniture and/or appliances is being accomplished pursuant to a court order, unless a court order was lawfully obtained from the local court in the area and the delinquent account had first been given notice and an opportunity to appear and defend himself prior to the issuance of such court order; or misrepresenting, in any manner, respondents' repossession procedures.

9. Using any unofficial or unauthorized document which simulates or is represented by any means to be a document authorized, issued, or approved by a court of law or any other official or legally constituted or

authorized authority, or misrepresenting, in any manner, the source, authorization, or approval of any document.

10. Failing to give notification of the commencement of legal action by respondents against a customer by mailing a summons and complaint to such customer's last known address, and failing to obtain from the post office a certificate of such mailing. Such notice shall be in addition to any other notification or service required by law, practice or custom. Such summons and complaint to be sent by first class mail by respondents or their attorney with instructions on the face of the envelope "Do not forward. Address Correction Requested." In the event that such mail is returned as undeliverable by the post office or if the residence address of the defendant is unknown, the summons is to be mailed to the customer, care of the employer or place of employment of the customer if known, in a sealed envelope not indicating on the outside thereof, directly or indirectly by the return address or otherwise, that the communication is from an attorney or concerns an alleged debt.

ORDER III

It is further ordered, That respondents Main Street Furniture, Inc., a corporation, its successors and assigns, and its officers, and Samuel Goldstein, Raymond Goldstein and Chester E. Brost, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit, or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, or any advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. Law 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to furnish to the customer, before the transaction is consummated, a duplicate of the instrument or other statement containing the disclosures required by Section 226.8 of Regulation Z, as required by Section 226.8(a) of Regulation Z.

2. Failing to disclose the conditions entitling a customer to a partial refund of the finance charge as required by Section 226.8(b)(7) of Regulation Z.

3. Failing to accurately disclose the date on which the finance charge begins to accrue, as prescribed by Section 226.8(b)(1) of Regulation Z.

4. Failing to accurately state the "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

5. Failing to disclose the "total of payments," as prescribed by Section 226.8(b)(3) of Regulation Z.

6. Failing to accurately disclose the number, amount, and due dates, or periods of payment, scheduled to repay the indebtedness, as prescribed by Section 226.8(b)(3) of Regulation Z.

7. Failing to state the "unpaid balance of cash price," as prescribed by Section 226.8(c)(3) of Regulation Z.

8. Failing to disclose the "amount financed," as prescribed by Section 226.8(c)(7) of Regulation Z.

9. Failing to disclose the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

10. Failing to itemize and include in the finance charge, for purposes of disclosure of the finance charge and computation of the annual percentage rate, any and all charges for risk of loss insurance unless the customer was given a clear, conspicuous and specific written indication of the cost of such insurance coverage from respondents and stating that the customer may choose the source through which the insurance is to be obtained as prescribed by Section 226.4(a)(6) of Regulation Z.

11. Failing to itemize and include in the finance charge, for purposes of disclosure of the finance charge and computation of the annual percentage rate, any and all charges or premiums for credit life, accident, or health insurance unless respondents have obtained a specific dated and separately signed affirmative written indication of the customer's desire for such insurance coverage as prescribed by Section 226.4(a)(5)(ii) of Regulation Z.

12. Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That for a period of one year respondents post in a prominent place in each salesroom or other area wherein respondents sell furniture or other products and services a copy of this cease and desist order with a notice that any customer or prospective customer may receive a copy on demand.

It is further ordered, That respondents forthwith distribute a copy of this order to each of their operating divisions or departments.

It is further ordered, That respondents prominently display the following notice in two or more locations in that portion of respondents' business premises most frequented by prospective customers, and in each location where customers normally sign consumer credit documents or other binding instruments. Such notice shall be considered prominently displayed only if so positioned as to be easily observed and read by the intended individuals:

NOTICE TO CREDIT CUSTOMERS

IF THE DEALER IS FINANCING OR ARRANGING THE FINANCING OF YOUR PURCHASE, YOU ARE ENTITLED TO CONSUMER CREDIT COST DISCLOSURES AS REQUIRED BY THE FEDERAL TRUTH IN LENDING ACT. THESE MUST BE PROVIDED TO YOU IN WRITING BEFORE YOU ARE ASKED TO SIGN ANY DOCUMENT OR OTHER PAPERS WHICH WOULD BIND YOU TO SUCH A PURCHASE.

This notice required by order of the Federal Trade Commission.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any consumer credit transaction or in any aspect of preparation, creation or placing of advertising, and to all personnel of respondents responsible for the sale or offering for sale of all products covered by this order, and that respondents secure a signed statement acknowledging receipt of said order from each person.

It is further ordered, That respondents, for a period of one year from the effective date of this order, shall furnish each newspaper or other advertising medium which is utilized by the respondents to obtain leads for the sale of merchandise, or to advertise, promote, or sell merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That in the event that the corporate respondent merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation or to any other person, said respondents shall require such successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; *Provided*, That if said respondents wish to present to the Commission any reasons why said order should not apply in its present form to said successor or transferee, they shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

ADVISORY OPINIONS WITH REQUESTS THEREFOR

Interpretation of language contained in an order to file special report regarding purchases of used bakery equipment. (Docket 7880, released July 18, 1975)

Opinion Letter

July 2, 1975

Gordon A. Thomas, Esquire,
Vice President and General Counsel,
ITT Continental Baking Company, Inc.,
P.O. Box 731,
Rye, New York. 10580

Re:ITT Continental Baking Company,
Docket No. 7880.

Dear Mr. Thomas:

In your letter of May 15, 1975, you requested the Commission's opinion as to whether the order entered on November 26, 1974 [84 F.T.C. 1349], requires ITT Continental Baking Company to file a special report informing the Commission of any purchase of used bakery equipment from any concern currently engaged in the production and sale of bread and bread type rolls.

After careful consideration of your request and the purpose of the order, the Commission is of the opinion that acquisition of used bakery equipment of whatever kind from another bakery is the acquisition of an "interest in any concern" engaged in the production and sale of bread and bread type rolls requiring ITT Continental Baking Company to file a special report.

By direction of the Commission.

Letter of Request

May 15, 1975

Mr. Charles A. Tobin
Secretary
Federal Trade Commission
Washington, D.C.

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* For case before the Commission, see 60 F.T.C. 1183, 84 F.T.C. 1349.

Re: Docket No. 7880

Dear Mr. Tobin:

On November 26, 1974 the Federal Trade Commission issued an order in connection with the above docket number which required this company to file with the Commission a special report in the event it intends to make "any acquisitions of any interest in any concern engaged in the production and sale of bread and bread-type rolls." The words of special import in this order are "interest in any concern." It is our interpretation of that language that it is not intended to cover the purchase by Continental of items of used bakery equipment from another baking company currently engaged in the production and sale of bread.

Inasmuch as this company from time to time will be interested in making used bakery equipment purchases, we would appreciate an acknowledgment from you that our interpretation of the order is correct and that the filing of a special report is not required in that type of a transaction.

We will look forward to hearing from your office in the near future.

Very truly yours,

Gordon A. Thomas
Vice President and
General Counsel

No. 147. Granting of "back-haul" allowances to customers picking up their own orders. (72 F.T.C. 1050)

No. 483. "Backhaul" allowances advisory opinion affirmed. (File No. 683 7026, released December 26, 1973, 83 F.T.C. 1843) Statement of Clarification. (85 F.T.C.1174)

Letter of Reply

October 8, 1975

Honorable Albert Rees
Director
Council on Wage and Price Stability
Executive Office of the President
Washington, D.C. 20506

Dear Director Rees:

This is in reply to your letter of April 1, 1975 relating to the Commission's recent clarification, in a letter to Consumers Union of March 19, 1975, of the legality under Section 2(a) of the Robinson-Patman Act of backhaul allowances.

Your letter suggests that the Commission's clarification will discourage backhaul practices. It was the Commission's intention in the March 19 statement to eliminate confusion over the options available to the delivered price seller. It emphasized that the seller who uses a uniform delivered price can, in addition to the delivered price, offer his customers the option of purchasing f.o.b. his shipping point as long as the optional f.o.b. price is uniform and available to all customers on a nondiscriminatory basis. The Commission sees no reason why this clarification of the available options should discourage backhaul practices.

You further recommend that the Commission should adopt a policy of allowing backhaul allowances equal to the actual cost of transportation to each customer. Such a policy, your letter urges, can be based on the premise that the Robinson-Patman Act does not mandate uniformity as to f.o.b. prices, because that Act permits a seller to offer different prices where justified by different costs.

However, those differences in cost under the Robinson-Patman Act that justify price differentials are limited "* * * strictly to those actual differences traceable to the particular buyer for and against whom the discrimination is granted, to the different methods of serving them, and to the different quantities in which they buy." *House Committee Report No. 2287*, March 31, 1936. The cost justification provision, accordingly, was designed "* * * to leave the test of a permissible differential upon the question: If the more favored customer were sold in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much more per unit would it actually cost the seller to do so, his other business remaining the same?" *Senate Committee Report No. 1502*, February 3, 1936. "There can be no doubt," the Supreme Court has stated, "that the § 2(a) proviso as amended by the Robinson-Patman Act contemplates, both in express wording and legislative history, a showing of actual cost differences resulting from the differing methods or quantities in which the commodities in question are sold or delivered." United States v. Borden Co., 370 U.S. 460, 467 (1962).

It follows, therefore, as the Commission understands these requirements, that the Robinson-Patman Act's Section 2(a) cost proviso cannot be interpreted so as to cost justify price differentials between backhaul customers purchasing f.o.b. at the seller's shipping point, if those price differentials represent only the *absence* of delivery cost differentials that *would have been incurred* had the commodities in question in fact been transported to different delivery destinations and, in that contingency, would have occasioned differing cost obligations upon the seller.

To state the matter in another way, if different backhaul customers purchase identical goods in identical quantities and according to exactly the same method of sale and delivery (*i.e.* by pick-up in their own trucks at the seller's shipping point) then, as the Commission see it, no cost differences to the seller, as contemplated under the cost justification provision of Section 2(a) of the Robinson-Patman Act, obtain. In particular, in such transactions, because no transportation of goods by the seller to affect delivery occurs, no delivery cost differentials arise such as would justify differences with respect to the f.o.b. price. Accordingly, f.o.b. price differences, in these circumstances, would not be cost justified under Section 2(a) of the Robinson-Patman Act in the Commission's view.

As the Commission heretofore has indicated, questions would not arise under the laws it administers if sellers using valid uniform zone delivered pricing systems offer to all customers, in lieu of a uniform delivered price, the option of purchasing f.o.b. the seller's shipping point, if that optional f.o.b. price is uniform and available to all customers on a nondiscriminatory basis.

The Commission does not understand that economies would not consistently be realized, through backhauling, by customers with empty trucks returning via their suppliers' factory and/or warehouse shipping points, if those suppliers make uniformly available a nondiscriminatory shipping-point price option. You suggest, in this regard, that geographically distant customers would not be able to afford to make use of such an option if the f.o.b. price is no lower than the seller's uniform zone-delivered price minus his average transportation cost for that zone. However, it appears to us that the only significant costs to the customers of backhauling in this situation are the additional wages, if any, required to be paid to the driver of the backhauling truck for the added time required to accomplish the pickup and the additional fuel cost incurred in traveling full rather than empty. Insofar as these costs were less than the difference between the supplier's delivered price and his f.o.b. price, the customer would be realizing a saving. This would be apart from any general or public economies such as a reduction in overall fuel requirements.

The Commission has carefully considered the views that you have expressed and sincerely appreciates your concern in this matter. As indicated, however, the Commission is unable to construe the cost justification proviso of Section 2(a) of the Robinson-Patman Act as justifying differing backhaul allowances on the basis of hypothetical, and not actual, delivery cost differences. While the Commission would be happy to take action which would result in the additional reduction of fuel and other costs, it is not empowered to do so except as such may be incident to the proper exercise of its statutory responsibilities and consequently it can encourage backhauling only so far as it is consistent with the Commission's interpretation of the Robinson-Patman Act.

By direction of the Commission.

Correspondence from Council on Wage and Price Stability

April 2, 1975

Charles A. Tobin
Secretary
Room 172
Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Tobin:

I have enclosed copies of letters sent today to the members of the Commission by the Director of the Council on Wage and Price Stability. These letters are in response to the Commission's March 19, 1975 letter, about "backhaul" allowances, to the Consumers Union.

Please include these letters in the appropriate public docket at the Commission.

Sincerely,

/S/ Vaughn C. Williams
General Counsel

April 1, 1975

Dear Commissioner ————:

I am writing to express my concern about the Federal Trade Commission's clarification, in a letter to the Consumers' Union issued on March 19, 1975, and publicly released on March 28, of the legality under Section 2(a) of the Robinson-Patman Act of backhaul allowances offered by a seller, who otherwise offers a uniform zone-delivered price, to customers who provide their own transportation for goods purchased at the seller's warehouse. In my view, it is important that the Commission develop a clear policy to encourage backhaul practices, in order to alleviate the fuel waste and other costs that result from unused backhaul capacity. However, the Commission's March 19 clarification is not such a policy, and may indeed further discourage backhaul.

The March 19 letter requires that the f.o.b. price offered to all backhauling customers be "uniform"—that is, be the same dollar amount in each case. It does not permit a seller to offer backhaul allowances that vary in accordance with the cost of transportation to each customer. This requirement of uniformity places a substantial restraint upon the development of backhauling—a restraint not mandated by the Robinson-Patman Act, which permits a seller to offer different prices where justified by different costs.

Under the Commission's March 19 letter, the uniform f.o.b. price offered to customers who backhaul is not likely to be lower than the seller's uniform zone-delivered price minus his average transportation cost for that zone. Sellers, at least those with substantial dominance in their product markets, cannot be expected to offer a uniform allowance in excess of their average costs. This allowance, however, will only permit backhauling by customers who can provide their own transportation at less than or equal to the seller's average cost. Customers far away enough to incur greater transportation costs will not be able to afford to make use of their empty backhaul capacity. In my view, this status will persist over time.

Backhauling by a seller's more distant customers can most simply be encouraged by a seller's offer of an allowance that is equal to his actual cost of transportation to any particular customer. With such an allowance, any customer who can ship as efficiently as the seller would be encouraged to use his empty truck capacity to do so. While different customers would be paying different prices for the same goods, the difference would only reflect differences in the seller's actual transportation costs to those customers.

While Section 2(a) of the Robinson-Patman Act generally prohibits price differentials for a single product, it expressly permits "differentials which make only due allowance for differences in the cost of manufacture, sale, or *delivery* * * *." This language can certainly be interpreted to refer to such price differentials as would result from a backhaul allowance measured by actual transportation costs. Additional discriminations may be inherent in the uniform zone-delivered price from which such a backhaul allowance would be deducted. However, that fact makes it no less true that the price differentials resulting from an actual cost allowance would be justified by the differences in the seller's transportation costs to different customers.

Uncertainty about the legality of actual-cost backhaul allowances has significantly impeded the negotiation of backhaul agreements. The Commission's disapproval of actual cost allowances in its March 19 letter will of course further discourage backhaul practices by customers far enough away from a supplier to exceed his average transportation costs. The encouragement of backhaul, on the other hand, would not only save fuel and other costs as noted above, but would also increase competition among suppliers and customers with respect to the transportation of purchased goods. I therefore recommend that the Commission issue a statement that Section 2(a) of the Robinson-Patman Act permits actual cost backhaul allowances.

Sincerely,

/S/ Albert Rees
/S/ Director

Joint venture for the production and marketing of cresols, cresol derivatives and certain other related products. (File No. 753 7007, released November 3, 1975)

Opinion Letter

October 9, 1975

John Bodner, Jr., Esquire
Howrey, Simon, Baker & Murchison
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Advisory Opinion Request of Hercules Incorporated and Koppers Company, Incorporated, File No. 753 7007

Dear Mr. Bodner:

This is in response to your letter of February 11, 1975 requesting an advisory opinion concerning a proposed joint venture between Hercules, Incorporated and Koppers Company, Inc. for the production and marketing of cresols, cresol derivatives and certain other related products. You have requested that the Commission approve the venture as consonant with the laws it administers.

The Commission has given careful consideration to your request and the supplemental data provided. On the basis of the information presently available to it, the Commission has concluded that it is unable to approve the joint venture.

Based upon information presently available, the Commission is seriously concerned that a consequence of the joint venture, if consummated, may be substantially to lessen competition in particular, already concentrated, product markets. In the Commission's opinion, substantial anticompetitive effects in such markets may result because the venture, on the one hand, would appear to position an existing major factor in such markets, Koppers, to gain significant further market shares, entrench and solidify its market position and to obtain monopolistic market control, while on the other, the venture would appear to operate substantially to lessen potential competition by eliminating an apparent strong potential competitor, Hercules, from independent entry, or from entry in conjunction with a partner not already significantly present in any of the affected markets.

Acquisitions are proscribed where their effect may be substantially to lessen competition in any line of commerce in any section of the country, 15 U.S.C. §18; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). The elimination of a potential entrant may substantially lessen competition in violation of the Act. *United States* v. *Penn-Olin Chemical Co., Supra.*

A number of facts lead us tentatively to conclude, based on the information presently available to us, that Hercules is a potential entrant into cresol production generally, and BHT and meta-para cresol production in particular, two markets in which Koppers already has substantial market shares. Not only was Hercules present in the BHT and paracresol markets during the period 1958 to 1972, but the firm appears to possess the technical expertise required for cresol production. Its technical know-how has, from time to time, been offered under license to others. Furthermore, it is clear from your submission that Hercules possesses a new and apparently commercially valuable production process for cresols. The firm has a continuing internal need for one of the venture products, BHT, and has available an idle plant which can be readily converted to cresol production. The firm's financial resources; interest in investment; investment history; and the market opportunity in cresols, apparent from supply and anticipated demand profiles, are also factors indicating that Hercules stands as a viable independent potential entrant. Hercules, additionally, does not appear to us to be foreclosed from entry because of a lack of any necessary capabilities or skills.

At the same time, Hercules' venture partner, Koppers, is a substantial producer of meta-para cresol in a domestic market of only five producers and the leading domestic producer of BHT with approximately a 33 percent market share in a four producer market. In both of these markets, Hercules appears as a likely potential entrant. The venture accordingly presents serious issues under Section 7 of the Clayton Act.

You have stated that initially the venture will not market any meta-para cresol other than that presently produced by Koppers. However, regardless of whether the venture chooses initially to market such meta-para cresol, the venture would appear to have the effect of increasing Kopper's market power as to meta-para cresol, and would appear to provide Koppers, already a substantial producer, with an opportunity substantially to increase its share of that market any time the venture chooses to do so.

Koppers is the sole domestic producer of MBMC. Joining with Hercules in continued MBMC production and in the production of raw materials for MBMC will be likely to solidfy Koppers' position in this market. Because Koppers has a monopoly in MBMC, the proposed venture would appear to raise questions under Section 5 of the Federal Trade Commission Act and Section 2 of the Sherman Act.

A joint venture or merger may substantially lessen competition both in eliminating a potential entrant and by entrenching the position of a firm in an oligopolistic market. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967); *General Foods Corp.* v. *Federal Trade Commission*, 386 F.2d 936 (3rd Cir. 1967), cert. denied, 391 U.S. 919 (1968). The substitution of a larger more powerful competitor for a smaller already dominant firm may reduce a competitive structure by raising entry barriers and by dissuading smaller firms from aggressively competing. *Federal Trade Commission* v. *Procter & Gamble Co.*, supra.

The presence of Hercules-Koppers in the relevant markets, substituted for Koppers alone, may entrench the position of Koppers, rigidifying present oligopolistic structures and raising barriers, both actual and psychological, to entry by others. Koppers' position in the already concentrated BHT and MBMC markets would solidified by vertical integration into raw materials. Firms considering entry would face the combined strength and resources of two major firms instead of Koppers alone. Accordingly, competition could be substantially lessened within the meaning of Section 7 of the Clayton Act not only by the elimination of Hercules as a potential entrant, but also by the entrenchment of Koppers in the BHT, meta-para cresol and MBMC markets.

The competitive consequences outlined in this letter are not conclusive. Nonetheless, based upon the information presently available to the Commission, we are unable to approve the proposed joint venture; accordingly the Commission advises that it will undertake a formal investigation if Hercules, Incorporated and Koppers Company, Inc. enter into said joint venture.

By the direction of the Commission.

*Letter of Request**

February 11, 1975

Dear Mr. Tobin:

Re: Hercules Incorporated-Koppers Company, Inc.'s Proposed Jointly-Owned Company To Produce Cresols and Cresol Derivatives

This is a request by Hercules Incorporated and Koppers Company, Inc. to the Commission for an Advisory Opinion under Section 1.1 *et seq.* of the Commission's Rules that the creation and operation of a proposed jointly-owned company by the requesting parties to produce and market cresols and cresol derivatives is permissible under the antitrust laws of the United States.

In support of this request, Hercules and Koppers submit the enclosed memorandum showing that the proposed joint venture for the specialty chemicals involved will benefit both competition and the public interest. The memorandum describes the parties and the chemical products involved, sets forth the nature and basic terms of the joint venture, and then discusses the probable effects on competition of the joint venture.

As further pointed out in the memorandum, Hercules and Koppers must decide very soon whether they will consummate the proposed joint venture, and for commercial reasons they wish to make that decision without giving advance notice. Accordingly, we ask that this request be handled with all possible dispatch and that all the information submitted to the Commission by the parties be accorded confidential treatment. If the Commission decides to release any of the submitted information, we request that we receive reasonable notice before the release date.

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* For reasons of economy, the large volume of supporting materials is not reproduced in this volume. It is available for public inspection in the Division of Legal and Public Records, Room 130, Federal Trade Commission Building, Washington, D.C. 20580.

In order to expedite this matter, Hercules and Koppers on their part stand ready to discuss the memorandum with the staff of the Commission and, if necessary, to provide supplemental information.

We further wish to advise the Commission that the proposed course of action is not currently being followed by the requesting parties and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

Sincerely yours,

/S/ John Bodner, Jr.

Warranties—Interpretation of obligation under a full warranty to provide installment or replacement materials in event of a defect in an "installed product." (File No. 763 7001, released December 1, 1975)

Opinion Letter

November 7, 1975

L. A. Pulkrabek, Esquire
Legal Department
Armstrong Cork Company
Lancaster, Pennsylvania 17604
Dear Sir:

This is in response to your letters to the commissioners dated May 29, 1975 concerning the Magnuson-Moss Warranty Act, Public Law 93-637. You request the Commission's opinion whether a "full (statement of duration) warranty" for what you term an "installed product" must include an obligation to provide installation of replacement materials in the event of a defect.

The Commission has carefully considered the matters set forth in your letter pertaining to the obligations required under a full warranty. The Commission has treated your letter as a request for an advisory opinion under §§ 1.1-1.4 of the Commission's rules, 16 C.F.R. §§ 1.1-1.4. Section 104 of the Act, 15 U.S.C. 2304, provides that a full warranty must, at a minimum, affirm or promise to "remedy" such product "without charge". Section 101(10), 15 U.S.C. 2301(10) defines the term remedy to include, at the warrantor's option, repair or replacement. Replacement is defined in § 101(11), 15 U.S.C. 2301(11), as "furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product." Applying this definition to the case of flooring or other products having utility only when installed, the Commission is of the opinion that installation of substitute materials is within the Act's definition of replacement. Uninstalled materials cannot be deemed "identical or reasonably equivalent" to the installed product. Therefore, the consumer could not be charged for such installation.

It should be noted that a full warrantor could impose on the consumer a duty to remove, return, and reinstall a consumer product, if such duty met the test of reasonableness under § 104(b)(1), 15 U.S.C. 2304(b)(1). The duty would be on the warrantor to show that the cost and inconvenience to consumers of such a duty were outweighed by corresponding benefits to individuals or to the public. *See* "Implementation and Enforcement Policy" for the Magnuson-Moss Warranty Act, 40 Fed. Reg. 25721, 25722 (June 18, 1975).

By direction of the Commission.

Letter of Request

May 29, 1975

Dear ——————:

Re: Title I-P. L. 93-637 Consumer Product Warranties

Representatives of Armstrong Cork Company met with Christian S. White of the Commission's staff in mid-April for the purpose of discussing interpretative views of the warranty provisions of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. For the most part, Armstrong agrees with Mr. White's interpretation of those provisions of the Act which were discussed. However, there was disagreement in interpretation in an area we consider significant in view of the nature of our business. Mr. White suggested our addressing that issue direct to the Commissioners through appropriate expression of our views. That issue is, whether the new legislation *requires* warrantors of consumer products which are intended to be installed in the home by an independent third party installer, to provide for removal of defective goods and the installation of replacement goods in order to extend a full warranty on the product.

Armstrong Cork Company, a Pennsylvania corporation, is engaged primarily in the manufacture of resilient flooring, carpeting, and residential and architectural ceilings. Most of the products Armstrong manufactures are intended to be installed in the home, and in public and commercial buildings. The installation of these products is performed by independent flooring, carpeting, and ceiling retailers, contractors, and in some instances, on a do-it-yourself basis. These "installers" are generally several steps removed from the manufacturing process. Most of the products sold by Armstrong, with the notable exception of ceiling systems, are complete in themselves, that is, they have no component parts. Before the consumer has what might be called an "installed product," ready for use, there are two undertakings: one for the product, the other for the installation of that product. In addition to labor, the installation of the product may include use of sundries, underlayment, etc. which may or may not be of Armstrong manufacture.

There are essentially four different situations involving defects in products installed in the home:

(1) A product has been improperly installed; for example, flooring material is ripped or gouged during installation—clearly, in this instance, the dealer whose mechanic was performing the installation must provide the necessary remedy.

(2) The dealer installs defective goods and the defect was apparent at the time of installation; for example, there is an apparent bubble or discoloration, and instead of properly procuring replacement material prior to installation, the mechanic installs the defective material. In those situations, clearly the dealer should provide the remedy to the consumer.

(3) A product defect may not be readily perceived, or is not discovered until after installation. When such a defect becomes apparent, it is Armstrong's policy to undertake either repair of those areas found defective or provide replacement goods. This undertaking is performed without any charge being assessed by Armstrong to the consumer. Currently, in the case of carpet and ceiling materials, and after a specified period in the instance of flooring materials, we do not provide compensation for the labor charges incidental to the removal of the

defective goods or installation of the replacement goods. In regard to our carpet and ceiling materials, we follow general industry practice. In the case of our flooring materials, we currently provide a consumer warranty which we believe does more for the consumer than industry practice. Neither our carpet nor our ceiling materials currently carry a written consumer warranty.

(4) The consumer undertakes to perform the installation of a do-it-yourself product and save the costs incident to a professional installation. Product defect claims may arise from the consumer's failure to follow installation instructions, from non-recommended use, or from defective goods. If the manufacturer who fully warrants his product is required to professionally install replacement goods for the do-it-yourselfer, the consumer receives a better bargain than he initially paid for.

The underlying thread of the Act, as well as the legislative history, is to advise consumers, clearly and conspicuously, of written warranty terms, so that educated decisions can be made in the marketplace. The legislative intent is borne out by the statutory language in Section 102: "* * * to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." House Report No. 93-1107 clearly indicates that "The purpose of the legislation is (1) to make warranties on consumer products more readily understood * * *." The legislators were attempting to avoid a situation where "the bold print giveth and the fine print taketh away." We do not read the Act as requiring the manufacturer to assume the costs of installation of replacement goods if he fully warrants only his product and makes it clear that the remedy is to provide replacement goods. The opposite reading would, we believe, result in an unintended substantive change in warranty law and practice for it would preclude a manufacturer from fully warranting its product with the remedy being product replacement and requires the manufacturer either to offer its product with a limited warranty or not provide any written warranty. Considering that installation and installation costs are not within the manufacturer's control and that such costs may approach or even exceed the product costs, it is likely that few manufacturers of installed products will, as a practical matter, be able to offer full warranties after July 3, 1975, at least to the degree theretofore.

Should the Commission not ultimately concur with our interpretation of the Act as expressed above, we believe that the Commission should consider establishing under Section 103(c) or perhaps Section 104(b)(3) a special category of warranty entitled "FULL (Statement of Duration) WARRANTY - INSTALLATION NOT INCLUDED." Such a category would permit exclusion by the manufacturer of the responsibility for removing the defective product and installing replacement material. Appropriately the consumer would then look to the local dealer—his seller and installer—for a warranty of installation attendant to a product defect. This is clearly the most efficient and least expensive way of handling the problem and properly places upon the installer not only the responsibility to carefully select from whom he purchases, but also avoids the too recurrent theme of the installer avoiding responsibilities by simply passing them along to a remote manufacturer.

The clear legislative purpose and intent under the Act's warranty provisions is to clearly and conspicuously advise the consumer of the terms of written warranties. If the consumer is so advised that purpose is fulfilled.

We would welcome the opportunity to further address ourselves to this matter should you or any of your associates so desire.

Very truly yours,

/S/ L. A. Pulkrabek
Assistant Secretary and
General Manager
Legal Department
Secretary's Office

Compliance advisory opinion as to whether a proposed quantity discount, if implemented, would constitute compliance with the amended Clayton Act Subsection 2(a) Order (72 F.T.C. 412). (Docket No. 8599, released December 5, 1975)

Opinion Letter

November 19, 1975

Thomas E. Quay, Esquire
Secretary and Counsel
William H. Rorer, Inc.
Fort Washington, Pennsylvania 19034
Re: William H. Rorer, Inc., Docket No. 8599

Dear Mr. Quay:

This is in response to your request on behalf of William H. Rorer, Inc., for an advisory opinion concerning whether a proposed quantity discount, if implemented, would constitute compliance with the amended Clayton Act Subsection 2(a) Order in the above-captioned matter. According to your letter of March 13, 1975, and attachments thereto, Rorer proposes granting to all direct-buying retail customers a 3.5 percent discount from the list price of Maalox products with any purchase of $250 or more of Maalox products at net prices. Rorer bases the proposed discount on a showing of savings in its costs of delivery and sale.

According to your letter, Rorer currently employs a nationally uniform delivered pricing system in the sales of its products. The net price to direct-buying retail customers, according to the letter, is the suggested price from wholesaler to retailer less 15 percent. To maintain the direct account status, however, the retail customer must purchase in terms of net prices at least $125 of any Rorer products in each order and a total of $500 for an entire year. The letter adds that Rorer products are delivered to direct-buying retail customers by common carrier from warehouses in Fort Washington, Pennsylvania; Tucker, Georgia; Hammond, Indiana; and San Leandro, California.

The Commission understands that the proposed discount would amount to a 4.12 percent reduction in the net price of Maalox products to participating direct-buying retail customers. According to your letter, the discount would not be applicable to non-Maalox products. Finally, it is understood that the discount would be offered to all direct-buying retail customers.

To determine the savings in the cost of delivery, Rorer focuses on savings in the cost of shipping its products to customers located closest to its points of distribution. Sufficient savings to justify the discount to these customers would arise, according to Rorer, by shipping a typical order containing $250 worth of Maalox products instead of shipping two or more typical minimum $125 orders. Rorer reasons, relying on facts previously submitted, that if the discount is qualified to the near-by customers then it would be uniformly cost justified to all customers.

To determine the savings in the cost of sale, Rorer divides its total 1974 operating cost for processing orders by the total number of invoices written to find the average cost of processing an individual order. Rorer contends that by processing an order containing $250 worth of Maalox products rather than two more minimum $125 orders it would save the cost of processing at least one invoice.

The Commission after reviewing the materials submitted in support of the proposed discount hereby advises that, based on the cost justification submitted, the discount would not be uniformly cost justified and would therefore be violative of the above-captioned order. Several erroneous assumptions made in the cost study concerning the costs of delivery and sale require that the justification be rejected.

The cost justification is improperly based on a cost comparison which relies on the cost of handling a minimum $125 purchase without having established that this size order would be substantially representative of the class of all purchases not earning the discount. A cost justification must reflect the true cost of transacting business and the actual pattern of sales experienced.

The cost justification is in further error because it attempts to qualify the discount in part by savings in the cost of handling the order's undiscounted non-Maalox products. Since these non-Maalox products would not benefit from the proposed discount it is unacceptable to justify the discount with savings attributable to their cost of delivery or processing in the order. The only savings which can be properly considered in supporting a discount on Maalox products are those which would reflect due allowances for differences in the costs of shipping and processing orders for Maalox products in differing quantities.

Additionally, the cost justification erroneously assumes that the entire cost incurred in order processing can be the basis for establishing cost savings. Only that portion of the operating cost which varies with the size of orders processed is suitable for consideration in the cost justification. That portion of the cost which depends on the total volume of business transacted without regard to the size of orders on which that business is divided would not be relevant to a cost justification * * *.

By direction of the Commission.

Letter of Request

March 13, 1975

Re: New Request for Advisory Opinion Pursuant to FTC Rule 3.61(d); Ref. Docket No. 8599

Dear Sir:

1. As general counsel, I hereby request, on behalf of William H. Rorer, Inc., an advisory opinion pursuant to FTC rule 3.61(d) as to whether the proposed quantity discount, if implemented, would be in compliance with the Commission's Order, as modified, August 21, 1967,

32 *Federal Register* 12844, Docket No. 8599. As modified, the Order's application was limited to competing retail customers.

2. We also understand that the Order, as modified, does not *require* us to seek this advisory opinion from the Commission prior to instituting a quantity discount compatible with the terms of the Order. Nevertheless, Rorer voluntarily elects to seek the Commission's opinion in advance.

3. Rorer proposes to offer only to its retail customers a quantity discount of three and one-half percent (3-1/2%) from the list price on each single order of $250 (net) or more of its leading antacid product, Maalox (suspension or tablets). There is adequate transportation cost justification for this discount as set forth in the attached schedules (see Index of Schedules). Rorer makes prepaid shipments from four locations: Fort Washington, Pennsylvania; Tucker, Georgia; Hammond, Indiana; and San Leandro, California.

4. Rorer's "list price" is our suggested price from wholesaler to retailer. (see General Price List, Schedule F.) Our price to wholesalers reflects a 20% discount from that "list price;" to retailers who buy on a direct basis, our price reflects a 15% discount. Our proposed 3-1/2% quantity discount to retailers only, on Maalox products only, would provide a direct retail discount of 18-1/2% from the list price. The non-Maalox portion of the order will continue to bear a 15% discount. Rorer additionally offers retailers a 2% discount for prompt payment.

5. Effective January 1, 1975, a retailer, in order to maintain his direct account status, must purchase $500 (net) worth of Rorer products annually. Each order must be for $125 (net) or more of our products.

6. Previous studies of transportation savings made and discussed with a representative of the Bureau of Competition of the FTC have revealed that there are three examples that show a *minimum* savings: from our Tucker, Georgia, branch warehouse to Atlanta, Georgia; from our San Leandro branch warehouse to Oakland, California; and from the San Leandro location to Los Angeles, California. Therefore, we have computed transportation savings on the basis of typical orders shipped from our Tucker and San Leandro branches to those locations.

7. Although transportation savings more than justify the proposed 3-1/2% quantity discount, we also assert a cost justification based upon administrative savings to be gained (Schedule E(a) and (b)). It is our contention that the proposed 3-1/2% discount is also justified entirely by this analysis alone.

8. Based upon experience during the last six months of 1974, we know that more than 50% of orders shipped to direct buying retailers contained $200 (net) or more worth of Maalox products. It is our firm conviction that under our new terms and prices in effect since January 1, 1975, the 50% figure will be valid for orders containing $250 (net) or more worth of Maalox products.

9. Enclosed in Schedule G are copies of four sets of published tariff schedules applicable to all four of our shipping points, although the examples cited refer only to our Tucker, Georgia and San Leandro, California branches. The tariff schedules are provided in order to facilitate the evaluation of our submission.

10. Schedules A through E, inclusive, contain calculations and data based on a "typical" order which is a competitive trade secret within the meaning of FTC Rule §4.10(a)(2). Therefore, Rorer expressly asserts a claim of confidentiality to Schedules A through E, inclusive. If the Commission renders a favorable advisory opinion, Rorer's implementation of the proposal would, of course, be in strict compliance with all the terms of the Order including prompt notification to the Commission and adequate and regular notice to all retail customers together with reasons and details of the discount.

Very truly yours,

/S/ Thomas E. Quay

Advertising and selling as "new," cars used for emission control tests (85 F.T.C. 1171). (File No. 753 7005, released January 7, 1976)

Opinion Letter

December 4, 1975

Mr. Richard H. Johnson
Acting Assistant Administrator for Enforcement
United States Environmental Protection Agency
Uashington, D.C. 20460

Re: Sale of Vehicles Used to Perform Emission Control Tests Required by the State of California

Dear Mr. Johnson:

This is in reply to your letter of May 12, 1975 requesting the Commission's opinion regarding the status "of those vehicles sold in the

State of California which have been tested in accordance with the provisions of the California Air Resources Board (CARB) Assembly Line testing requirements." Your letter indicates that for the 1974 model year, CARB required automobile manufacturers to subject about 20,000 vehicles to an emission control test identical to the "standard Federal testing procedure." It is the Commission's understanding that this standard procedure is the same as that described in your prior letter of September 16, 1974. Your May 12th request further indicates that auto manufacturers also have the option under California law to accumulate any desired mileage on test vehicles prior to testing in order to stabilize emission performance. The question posed is whether vehicles used to accomplish the CARB tests may be advertised and sold as "new."

On March 7, 1975, the Commission responded to your prior request for advice dated September 16, 1974 by advising you that each manufacturer's emission testing could raise unique questions and that the Commission would therefore prefer to respond to individual requests from manufacturers on a case-by-case basis. Your letter of May 12th, including its references to CARB test vehicles, fails to include individualized testing data, and in any event is not from an individual manufacturer. The Commission requires an affected party to make its own advisory opinion request, 16 C.F.R. §1.1, and without the benefit of comprehensive submissions by the real parties in interest the Commission is unable to issue a definitive opinion in elaboration of the March 7th reply.

It has come to the Commission's attention, however, that the March 7th letter has been interpreted in some quarters to constitute a Commission determination that emission test vehicles cannot legally be sold as "new" under any circumstances. Such an interpretation is incorrect, and the Commission wishes to emphasize that its previous reply did not involve any determination that emission test vehicles may or must be sold as either "new" or "used".

By direction of the Commission. Commissioner Hanford dissented, believing that the issuance of an advisory opinion was appropriate under the circumstances.

Letter of Request

May 12, 1975

Dear Mr. Tobin:

On March 7, 1975, the Commission provided an opinion, in response to our request of September 16, 1974, on the right of automobile manufacturers to advertise and sell as "new" those test automobiles used to demonstrate compliance with air pollution control standards.

The opinion responded to the issue as to "whether manufacturers would have the right to advertise and sell any of these test vehicles as 'new' " by stating that the "Commission * * * cannot conclude, as a matter of law, that automobile manufacturers have the right to sell such test vehicles as 'new.' Each manufacturer's testing may raise unique questions. Therefore, the Commission would prefer to defer a more definitive opinion until it receives a request from an auto manufacturer."

In order for us to relate the general opinion to our pending rulemaking, we request your definitive opinion regarding the status of those vehicles sold in the State of California which have been tested in accordance with the provisions of the California Air Resources Board (CARB) Assembly Line testing requirements. In model year 1974, the CARB required that a statistical sample of approximately 20,000 production vehicles (2% of one million vehicles sold in California) be selected and tested by American and foreign manufacturers using the standard Federal testing procedure. The test itself results in the accumulation of approximately 15 miles per vehicle. The CARB procedures permit manufacturers, at their option, to accumulate any desired mileage on vehicles prior to testing to accommodate those particular manufacturers who claim that a new vehicle exhibits erratic emission performance during the first few miles of use until the engine and emission control system settle into more predictable modes. Manufacturers claim that new vehicles of some model lines require mileage accumulation prior to testing. Accordingly, based on CARB information, 20-40 miles are accumulated prior to testing which could result in a total accumulation of 55 miles or 70 miles in the event of a retest. The totals would be 58.2 and 76.4 for 1975 and later models because the FTP is extended for 3.2 miles. One foreign manufacturer accumulates 200 miles on a selected vehicle prior to testing for a total accumulation of 218.2 miles. We are requesting that you provide the Commission's opinion on the status as "new" or "used" of these test automobiles used to demonstrate compliance with air pollution control standards in California.

We would appreciate your response as soon as possible.

Sincerely yours,

/S/ Richard H. Johnson
Acting Assistant Administrator
for Enforcement (EG-329)

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